

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of San Diego Gas & Electric Company (U902E) For Authority To Implement Optional Pilot Program To Increase Customer Access To Solar Generated Electricity.

A.12-01-008
(Filed January 17, 2012)

**OPENING BRIEF OF DIVISION OF RATEPAYER ADVOCATES
ON LEGAL ISSUES**

The Division of Ratepayer Advocates (DRA) hereby responds to Administrative Law Judge (ALJ) Angela Minkin's Ruling of March 13, 2013 asking for legal briefing on whether San Diego Gas & Electric Company's (SDG&E) proposed community solar programs comply with the Renewable Portfolio Standard (RPS) and Direct Access (DA) rules. Because several of the questions raise issues that are not central to DRA's position on the case, DRA does not answer all questions but may file a reply brief responding to others' comments.

Question 1. Explain how transferring megawatts (MW) procured under the Connected to the Sun (CTTS) program and then subsequently used to meet SDG&E's [RPS] program requirements can be done in a manner legally consistent with the requirements of the RPS program? Specifically, with respect to the MWs from contracts already signed by SDG&E, explain how MWs procured under the CTTS program can be transferred consistent with RPS program requirements if the Renewable Energy Credits (REC) associated with the MW have been or will be used by SDG&E to meet its RPS program requirements?

Answer 1. DRA will await others' briefs and, if necessary, provide a response in its reply brief.

Question 2. Explain how SDG&E’s decision to structure CTTS so that SDG&E will potentially be voluntarily exceeding the 33% RPS target in 2020 is consistent with the RPS statute. Identify the specific provisions of the statute and explain how the CTTS program is aligned with the RPS statute. For example: (a) how would SDG&E address issues related to renewable energy credits as defined in §399.12.(h)?; (b) in the event of over-procurement of RPS generation by SDG&E as a result of the CTTS, how would the *de minimis* increase in rates standard be upheld in §399.15(f)?; and (c) how would the CTTS procurement be deemed consistent with the least-cost best-fit requirements of § 399.13(a)(4)(A)?

Answer 2. The statute appears to allow voluntary programs that exceed the RPS requirements. Public Utilities (P.U.) Code § 399.15(b)(3) states: “A retail seller may voluntarily increase its procurement of eligible renewable resources beyond the renewables portfolio standard procurement requirements.” By the same token, the Commission engages in Resource Adequacy (RA) efforts and Long-Term Procurement Planning (LTPP) to ensure that the State does not have – and ratepayers do not fund – more generation than is necessary to serve forecasted load. Thus, any voluntary programs that impact non-participating customers’ rates must comply with the Commission’s limits on future procurement set forth in decisions in the RA and LTPP proceedings, and may not propose to procure resources in greater amounts than allowed there. Alternatively, to the extent that CTTS capital costs and expenses are collected exclusively from CTTS customers and excluded from ratemaking (*i.e.*, not incorporated in the utility’s base revenue requirement and rates), SDG&E can exceed the 33% RPS target without issue.

On (a), regarding § 399.12(h), DRA will await others’ briefs and, if necessary, provide a response in its reply brief.

(b) The *de minimis* reference in P.U. Code § 399.15(f) refers to a different situation – that where a utility may be excused from meeting the RPS requirement because the cost of such procurement is too high to comport with the statute’s “cost

limitation” requirement – unless such cost is *de minimis*.¹ Here, by contrast, the Commission faces the opposite situation, where the utility is not seeking leave to procure *less* than its RPS requirements – *i.e.*, “refrain from entering into new contracts or constructing facilities” that would allow it to “meet[] the [RPS] requirements” – but instead is seeking leave to procure potentially *more* than the RPS statute would require by implementing a voluntary program in which ratepayers can choose to participate. However, the *de minimis* principle in § 399.15(f) must be interpreted to apply consistently to situations where the IOU seeks permission to procure either less or more than the required 33 percent. Otherwise, the IOU could get around the *de minimis* principle in § 399.15(f) simply by calling expensive procurement a “voluntary” program. Moreover, protecting non-participating ratepayers from bearing the costs of a voluntary renewable program is consistent with § 399.15(f)’s principle of protecting ratepayers from excessive costs of the mandatory RPS.

Thus, DRA agrees with the implication of the question that procurement that causes more than *de minimis* cost impact for ratepayers is potentially barred by P.U. Code § 399.15(f). At a minimum, as noted earlier in this response, the IOUs may not pass on to ratepayers the costs for more resources than the relevant RA and LTPP decisions allow. To ensure that the *de minimis* principle is upheld, the Commission could require that non-participating ratepayers bear no cost or risk related to the CTTS, and that all cost and risk be borne by the CTTS participants. Specifically, CTTS capital costs and expenses should be collected exclusively from CTTS participants and excluded from ratemaking.

It is too early to determine whether CTTS will cause over-procurement of resources that cannot be banked under the RPS rules in P.U. Code § 399.13(a)(4)(B), and

¹ The full provision reads as follows:

(f) If the cost limitation for an electrical corporation is insufficient to support the projected costs of meeting the renewables portfolio standard procurement requirements, the electrical corporation may refrain from entering into new contracts or constructing facilities beyond the quantity that can be procured within the limitation, unless eligible renewable energy resources can be procured without exceeding a *de minimis* increase in rates, consistent with the long-term procurement plan established for the electrical corporation pursuant to Section 454.5.

whether, even if they can be banked, the over-procured resources would be more expensive than resources procured in the RPS procurement period for which they are due. If such over-procurement could be banked, and were not more expensive than resources procured later, the over-procured resources might meet the *de minimis* rule by costing less than or the same as resources procured in the RPS compliance period, and thus in compliance with the statute. If, on the other hand, the over-procured resources are more expensive than resources procured in the relevant compliance period – *i.e.*, because the cost of renewables procurement continues to decrease – such over-procurement may violate the *de minimis* rule. The most straightforward way to ensure that over-procurement does not impact non-participating customers’ rates would be to have complete separation of CTTS procurement and SDG&E’s RPS procurement.

Finally, it does not make sense to define what is *de minimis* under the RPS statute on a one-off basis in this case except to say that the term implies a very small cost. As the Oxford English Dictionary definition establishes, the term derives from the Latin phrase *de minimis non curat lex* and means the amount is “too trivial or minor to merit consideration, especially in law.”²

(c) DRA understands that the Commission is examining the least-cost best-fit parameters, including potential revisions to the investor owned utilities’ least-cost best-fit methodologies, in the RPS proceeding, Rulemaking (R.) 11-05-005. The RPS proceeding is the better place to make determinations about whether and how voluntary programs can meet the least-cost best-fit parameters. Two principles should guide that determination, as noted above: 1) CTTS must meet the *de minimis* rule, and 2) SDG&E may not procure more in a voluntary program than allowed in the Commission’s RA and LTTP decisions.

Question 3. What entity or agency will be responsible for tracking ownership of RECs in each aspect of the program? What safeguards will SDG&E put in place to avoid duplicative “green”?

² <http://oxforddictionaries.com/definition/english/de%2Bminimis>.

Answer 3. DRA understands SDG&E intends to use the Western Renewable Energy Generation Information System (WREGIS). The application specifies that SDG&E will retire the RECs associated with CTTS participants' Sun Rate and Share the Sun subscriptions in a WREGIS subaccount that will not count toward SDG&E's RPS requirement. DRA may respond in its reply brief to others' comments about safeguards.

Question 4. If SDG&E will purchase the energy directly from the generator under the CTTS program, explain what federal and state laws apply to the pricing of the transaction.

Answer 4. DRA will await others' briefs and, if necessary, provide a response in its reply brief.

Question 5. Explain whether the generation associated with the CTTS program will meet the requirements of the Feed-In Tariff A.12-01-008 (FiT) program under §399.20? If not, explain why the FiT price is nevertheless a reasonable proxy for the CTTS program.

Answer 5. DRA will await others' briefs and, if necessary, provide a response in its reply brief.

Question 6. The FiT price is based on an avoided cost analysis under federal law. Is avoided cost a consideration in setting the price for the CTTS program?

Answer 6. DRA will await others' briefs and, if necessary, provide a response in its reply brief.

Question 7. If the CTTS program is not legally consistent with the Commission's RPS program and statutory law, what changes to CTTS should be made to make the CTTS program consistent with RPS requirements? How, if at all, could the CTTS program be structured to have no impact and interaction with the RPS? If that case leads to SDG&E's over-procurement of RPS-eligible generation (or any kind of generation), how would non-participant ratepayer indifference be maintained?

Answer 7. The simplest way to ensure the CTTS program is consistent with RPS requirements may be to restructure CTTS so that there is complete separation of CTTS

procurement and SDG&E's RPS procurement. The Commission should also require that all cost and risk of CTTS be borne by the CTTS participants.

Question 8. Explain whether the CTTS program should be incorporated into SDG&E's annual RPS procurement plan, and if so how? If the CTTS program should not be incorporated into SDG&E's annual RPS procurement plan, explain how consistency between CTTS and RPS procurement requirements could be maintained.

Answer 8. SDG&E should incorporate CTTS into its annual RPS procurement plan, because SDG&E proposes that it purchase for its RPS portfolio, with ratepayer funds, any resources procured for CTTS and not subscribed to by participants in the CTTS program.³ This proposal puts ratepayer funds at risk if CTTS participants do not subscribe to all procurement that is allocated to the CTTS program.

More generally, SDG&E proposes to use both existing RPS contracts and RPS procurement mechanisms for CTTS, and SDG&E's application suggests the possibility of expanding the initial CTTS pilot programs into larger programs. SDG&E's failure to account for this procurement in its broader RPS procurement plan may result in over-procurement of RPS resources that violate the *de minimis* requirement in P.U. Code § 399.15(f), as discussed above.

Question 9. As set forth in the Scoping Memo and Ruling, explain whether or not the proposed CTTS programs comport with current policy and legal restrictions on direct access and discuss whether the programs raise any anti-competitive issues.

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³ See illustration of over-procurement risk in slide 4 of SDG&E's Workshop Day 3 presentation: <http://www.sdge.com/sites/default/files/regulatory/SDG%26E%20Presentation%20-%20ctts%20Workshop%203.pdf>

Answer 9. DRA will await others' briefs and, if necessary, provide a response in its reply brief.

Respectfully submitted,

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