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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RADIANT BMT, LLC, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY (U338-E), Defendant.	Case (C.) 17-08-007 (Filed August 8, 2017)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) REVISED RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF RADIANT BMT, LLC

JANET S. COMBS
VIVIAN A. LE

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-1524
E-mail: Janet.Combs@sce.com

ELLEN A. BERMAN
EB Energy Law, Inc.

Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY
50 W. Hillcrest Drive
Suite 218
Thousand Oaks, California 91360
Telephone: (626) 623-3938
E-mail: ellen@ebenergylaw.com

Dated: October 27, 2017

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Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission ("CPUC" or "Commission") and Administrative Law Judge DeAngelis' order via electronic mail sent to the parties on October 26, 2017, Southern California Edison Company ("SCE") respectfully submits this Revised Response ("Response") to the Motion for Summary Judgment of Radiant BMT, LLC ("Radiant" or "Complainant").[1] The revisions to SCE's original Response ("Original Response"), filed on October 24, 2017, were made to address two concerns raised by the Complainant in its e-mail Request for Leave to Reply to SCE's Original Response.[2] Specifically, the revisions in this Response (1) correct references and related statements indicating that the Complaint included all five Projects (as defined herein), rather than four Projects; and (2) remove Attachment 1 and all references to that attachment from the Original Response and the evidentiary record. Other than a few related clarifying edits and

[1] Motion for Summary Judgment of Radiant BMT, LLC, dated October 9, 2017 ("Motion").
[2] E-Mail from T. Lindl to ALJ DeAngelis and Parties of Record, dated October 26, 2017.

minor typographical corrections, no other substantive revisions have been made to the Original Response. SCE has provided, as Attachment A hereto, a redline between the Original Response and this Response to assist the Commission's and parties' review of the specific revisions.

The Motion for Summary Judgment asks the Commission to order SCE to accept Complainant's Program Participation Requests ("PPRs") for four solar photovoltaic ("PV") projects ("Projects") within the As-Available Non-Peaking ("AANP") Product Type category in SCE's Renewable Market Adjusting Tariff ("ReMAT" or "Tariff"),[3] even though the Projects do not qualify as AANP projects. For the reasons stated herein, and in SCE's Answer to Complaint and Motion to Dismiss filed concurrently on September 22, 2017, the Commission should deny the relief requested by Complainant and grant SCE's request to dismiss the Complaint with prejudice.

I.

SUMMARY OF RESPONSE

The parties agree that the issue before the Commission is whether the Projects qualify as AANP projects. SCE's position, which is consistent with the position of Pacific Gas and Electric Company ("PG&E"), is that the Tariff and Commission-filed ReMAT Power Purchase Agreement ("PPA") do not permit a developer to convert a standard solar PV project from an as-available peaking ("AAP") facility to an AANP facility by using storage to shift energy deliveries from the time the renewable resource is generated to a different time. While Complainant accuses SCE of "labor[ing] to stretch the plain language of the Tariff,"[4] it is Complainant's interpretation that is a stretch. It is Complainant – not SCE – that is seeking a

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[3] Complainant filed PPRs for five distinct Projects in SCE's ReMAT AANP queue. Only Projects 1-4 were included in the Complaint, because at the time of the Complaint filing, SCE had not yet rejected the PPR for Project 5. Specifically, the Complaint states that "Radiant reserves its right to amend this Complaint if and when SCE rejects the Project 5 PPR or any additional PPRs Radiant might submit for projects with similar generation profiles." Complaint, p. 3. SCE rejected Project 5 on September 6, 2017.

[4] *Id.*, p. 11.

novel interpretation of the Tariff ***four years*** after the inception of ReMAT.[5] Prior to Complainant, no developer submitted a storage project into the ReMAT program, and no other party has challenged the investor-owned utilities' ("IOUs'")[6] determination that storage may not be used to convert an AAP project into an AANP project or vice versa. It is Complainant that is requesting the Commission to interpret the Tariff in a manner that would (1) alter the tariff's implementation four years after the ReMAT program began; (2) permit Complainant to reap the benefits of the higher AANP price without providing SCE's customers any additional benefits; and (3) circumvent the AAP project queue in a manner that is unjust and unreasonable to other renewable project developers.

The Tariff language is not ambiguous in any material way; rather, Complainant is reading the Tariff incorrectly. The fundamental flaws in Complainant's arguments are twofold. First, the Complainant incorrectly equates generation with delivery in the context of the ReMAT program. While it is true that, by definition, renewable "as-available" facilities deliver energy at the same time they generate energy, projects with storage can bifurcate the generation and delivery of the renewable resource to deliver energy at a different time than when the energy is generated. Because of this bifurcation, the production -- or generation -- of the energy is different from the delivery for the portions of energy that are firmed and shaped by the storage feature. Complainant ignores this bifurcation and attempts to equate "generation" and "delivery," even though doing so would render the use of both terms in the Tariff superfluous.

Second, Complainant relies on the incorrect assertion that its purported generation profiles are enforceable under the pro forma PPA, but SCE cannot and does not specifically enforce any generation profile for an intermittent renewable generator because the seller is not

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5 *See* SCE's Advice 2916-E, effective July 24, 2013 (establishing SCE's Schedule ReMAT, or the Tariff, and ReMAT PPA). SCE began accepting PPRs on October 1, 2013, and the first bi-monthly ReMAT program period began on November 1, 2013.

6 As noted in SCE's Answer, San Diego Gas & Electric Company's ("SDG&E's") ReMAT program has concluded, and this issue was not raised in its program. SDG&E Re-MAT webpage at https://www.sdge.com/regulatory-filing/654/feed-tariffs-small-renewable-generation. No party submitted a project with storage in the SDG&E ReMAT program. *See* SCE's Answer, pp. 17-18.

able to control the actual time of the generation of the product. The fact that Complainant asserts that it is subject to an enforceable obligation to firm and shape energy to deliver it at a particular time of day demonstrates that, *when the storage capability of the project is considered,* the Projects are not "as-available" Projects delivering at least five percent of intermittent energy between 10 p.m. and 6 a.m.

While neither party believes that the Tariff language is ambiguous,[7] if the Commission finds an ambiguity, it should interpret it in favor of SCE's customers. The Commission generally construes a tariff ambiguity in favor of the customer, and the Commission will not interpret the tariff in a way that leads to an unreasonable result. SCE's customers are wholly responsible for paying the costs of the ReMAT contracts, and allowing the Projects into the AANP queue would lead to an unreasonable result for SCE's customers. Contrary to Complainant's assertions, public policy and customer protections favor rejection of the Projects. As SCE previously explained, the Projects, if accepted into the AANP queue, would be well above market value due to the difference in pricing for AAP versus AANP resources and would cost SCE's customers tens of millions[8] more than solar PV projects (awarded at the current AAP price) over the life of the contracts, with no additional quantifiable or contractually enforceable benefit to SCE's customers.

SCE also reiterates its concern about Complainant's proposed remedy if the Commission determines that its Projects qualify as AANP projects. Complainant rejects the notion that it might be gaming the ReMAT program,[9] and yet Complainant knowingly submitted the first Project with the understanding that it would not qualify as an AANP project. Then, ***after*** SCE predictably rejected that PPR, Complainant submitted ***four*** additional projects into the AANP project queue. Thus, Complainant continued to invest in and develop projects that it knew were not eligible AANP projects, according to both California utilities still administering the ReMAT

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7 *See* Motion, p. 8.
8 *See infra.,* Section IV.D., fn. 57.
9 *Id.*, p. 22.

program. The Commission should not interpret the Tariff in a way that would result in a windfall to Complainant at SCE's customers' expense.

II.

PROCEDURAL HISTORY

SCE's PPR form includes the following language: "Projects utilizing storage should select the Product Type typically associated with the underlying technology. For example, a solar project utilizing storage should select As-available Peaking."[10] Complainant filed the application for Project 1 on March 31, 2017, even though its cover letter to the PPR indicates that it understood that the Project would not qualify as an AANP project according to the PPR.[11] SCE rejected the PPR for Project 1 after providing Complainant an opportunity to correct all identified deficiencies. ***After*** SCE rejected Project 1, and having confirmed that SCE would not accept the projects as AANP projects, Complainant continued to develop four additional projects and submitted PPRs for them prior to the resolution of the dispute.[12] Those PPRs were submitted on April 26, May 31, June 13, and July 20, 2017. Thus, Complainant continued to attempt to stack the AANP queue with projects, even though it knew that SCE would reject the PPRs.

Only after SCE rejected Projects 1-4, Complainant filed the Complaint against SCE on August 8, 2017. SCE filed both an Answer to the Complaint and a Motion to Dismiss the Complaint on September 22, 2017. Radiant filed a Response to SCE's Motion to Dismiss concurrently with its Motion for Summary Judgment on October 9, 2017.

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[10] *See, e.g.,* Complaint, Exhibit 1, p. 4.

[11] *See* Complaint, Ex. 2 ("Radiant and our counsel, Keyes & Fox LLP, have carefully reviewed SCE's ReMAT contract and tariff and believe the [NAME REDACTED] project meets all the AANP requirements and can perform within the requirements of the AANP ReMAT contract."). In its cover letter to the Project 1 PPR, Complainant drafted a legal justification, with extensive endnotes and citations, urging SCE to accept Project 1 into the AANP queue, thus indicating that it understood at the time of filing that the PPR did not permit a solar PV project, with or without storage, to be submitted into the AANP queue.

[12] *See* Motion, pp. 24-25.

III.

LEGAL STANDARD

SCE agrees with Complainant regarding the legal standard governing a Motion for Summary Judgment.[13] If the Commission grants SCE's Motion to Dismiss, it should dismiss the Complaint with prejudice. If the Commission grants the Complainant's Motion for Summary Judgment, it should stay the complaint proceeding and address implementation issues as detailed in SCE's Motion to Dismiss.[14] In this section, SCE provides the Commission with the relevant legal standards for interpreting the Tariff, including how the Commission should resolve any potential ambiguities.

In order to determine the meaning of contract or tariff provisions, the "whole of the contract is to be taken together, so as to give effect to every part . . ."[15] and "several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together."[16] Based on these rules of contract interpretation, the Commission should look at the entire ReMAT program, including the ReMAT PPA, and harmonize the provisions between the Tariff and the contract where possible.[17] Additionally, the Commission has held that, "Under generally recognized rules of tariff interpretation the tariff should be given a fair and reasonable construction and not a strained or unnatural one; all the pertinent provisions of the tariff should be considered together, and if those provisions may be

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13 *See id.*, Section II.

14 *See* SCE's Motion to Dismiss, pp. 2 and 10-11 (requesting that if the Commission resolves the legal issue in favor of the Complainant, it should "stay the complaint proceeding, and address these issues in the underlying rulemaking proceeding to allow the investor-owned electric utilities ('IOUs') to seek necessary changes to the PPA to effectively dispatch and manage a storage project, and allow all developers an opportunity to submit solar plus storage projects into the IOUs' AANP queues").

15 Cal. Civil Code Section 1641.

16 Cal. Civil Code Section 1642.

17 *See* Decision (D.)12-04-051, p. 7 (stating that the Commission should construe words of a tariff "in context, and different provisions relating to the same subject must be harmonized to the extent possible").

said to express the intention of the framers under a fair and reasonable construction, that intention should be given effect."[18]

If the Commission determines that the Tariff or PPA is ambiguous, Complainant argues that "the Commission must interpret such ambiguities in favor of Radiant."[19] In the context of this proceeding, Complainant is incorrect. While tariff ambiguities are generally "resolved in favor of a customer and against a utility," the Commission should not do so if the interpretation is "strained" or "produces an absurd or unreasonable result."[20] Thus, "[w]here more than one statutory construction is arguably possible, [the Commission's] policy has long been to favor the construction that leads to the more reasonable result."[21] As discussed herein, Complainant's interpretation of the Tariff and requested relief would lead to an unreasonable result.[22] More importantly, tariff ambiguities are construed in favor of utility ***customers*** to protect consumers of electricity. The Complainant is not an SCE customer, but rather a sophisticated developer with independent counsel. The Commission has a "mandate to protect the interests of ratepayers"[23] and to "protect the public interest in its oversight of utility actions,"[24] and in this case, considerations of the public interest strongly favor the Commission construing any ambiguity in favor of SCE's customers.[25]

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[18] D.92-08-028, p. 12 (internal quotation marks and citations omitted); *see also* D.03-04-058, p. 6 ("The Commission must interpret the words of a tariff in context and in a reasonable, common-sense way.").

[19] Motion, pp. 11-12.

[20] D.92-08-028, pp. 12, 18 (Conclusion of Law 7); *see also* D.12-03-056, p. 7 (stating that the Commission will avoid an interpretation that "defies common sense, or leads to mischief or absurdity . . .") and D.12-04-051, p. 7 ("We recognize that tariffs should not be interpreted to produce an unintended result, or so as to frustrate the manifest purpose of the provisions.").

[21] D.13-01-041, Attachment A, p. 14. The law is also clear that "[t]ariffs are interpreted using traditional statutory construction principles." D.16-01-049, p. 4.

[22] *See* D.16-01-049, pp. 5-8 (rejecting Complainant's assertion that tariff ambiguities must always be construed against the drafter and construing ambiguity in favor of utility).

[23] *PG&E Corp. v. Public Utilities Com'n*, 118 Cal. App. 4th 1174, 13 Cal. Rptr. 3d 630, 647 (1st Dist. 2004).

[24] *Id.*, fn. 21.

[25] SCE does not profit from its procurement activities, but rather the ReMAT PPA costs are a direct pass-through to SCE's customers. Thus, in this context, SCE is acting on behalf of customers, and

IV.

RESPONSE

In its Answer and Motion to Dismiss, SCE explained why the plain language of the Tariff mandates that solar PV projects, with or without a battery, fall within the AAP Product Type category of the ReMAT.[26] SCE also detailed how both Commission precedent and the ReMAT PPA support SCE's interpretation of the Tariff, which is consistent with the interpretation of the other electric IOUs for their ReMAT programs.[27] Finally, SCE expressed some fundamental policy concerns with permitting the Complainant to circumvent the AAP queue and receive a higher contract price for renewable power.

Complainant's arguments, set forth in the Motion and its Response to SCE's Motion to Dismiss, demonstrate Complainant's fundamental misunderstanding of the ReMAT program and SCE's position. In this Response, SCE will not repeat all of the arguments it has already made, and SCE hereby incorporates its Answer and Motion to Dismiss into this response.

A. The Projects Are Only "As-Available" When Considered Without Utilizing the Battery Feature of the Project.

Many of the Complainant's arguments rely on a mischaracterization of SCE's interpretation of the Tariff as it relates to whether the Projects are "as-available." According to Complainant, the fact that SCE permits solar projects with storage to apply to the AAP queue is an acknowledgement by SCE that the Projects are "as-available."[28] SCE clarifies again that in evaluating a renewable project with storage, SCE ***disregards*** the storage component of the project and looks only at the underlying technology.[29] Because the use of storage was never

SCE is seeking to protect its customers from paying patently unreasonable rates for the contracts at issue.

26 SCE's Motion to Dismiss, pp. 4-6; *see also* SCE's Answer, Section II.A.

27 *See* SCE's Answer, pp. 7-9.

28 Motion, p. 3.

29 *See* Complaint, Exhibit 1, p. 4 ("Projects utilizing storage must select the Product Type associated with the underlying technology. For example, a solar project utilizing storage must select As-available Peaking.").

contemplated by the parties in the ReMAT proceeding, SCE was required to determine whether and how to accommodate storage given the Tariff language and the pro forma PPA. SCE concluded that there were two possible accommodations. Based on the program structure and related documents, SCE could determine that a project with a storage component is not permissible at all in the ReMAT program, consistent with PG&E's implementation of its ReMAT program.[30]

Alternatively, SCE could – and did – determine to permit a renewable project with a storage component to submit a PPR, ***but only if the storage feature allowing the renewable energy produced to be delivered at another time was not considered for the purpose of determining Product Type.*** The ability to change the Product Type of the underlying resource by shifting delivery was not intended for the ReMAT program. SCE determined that, in order to be more inclusive of different technologies, while still complying with the Tariff and the PPA, it could permit projects with a storage feature to submit PPRs based on the underlying renewable resource, as intended.[31] As SCE explained in detail in its prior filings, considering the effect of the storage component would render the energy delivered (not generated) between the hours of 10 p.m. and 6 a.m. non-intermittent, or firm, because by definition the storage is utilized to shape and firm the delivery. By continuing to focus on the generation profile of the underlying intermittent resource ***only***, SCE determined that it could accept solar projects with a storage component as an AAP Product Type and still comply with the Tariff.

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[30] PG&E FAQs at https://pge.accionpower.com/ReMAT/faqs.asp ("PG&E is unable to accept projects with storage, particularly those intended to shift energy from one Product Type to another at this time. The PPA, in its current form, does not have adequate language for PG&E to account for storage operations, nor to properly enforce and/or manage this type of energy delivery profile shift."). As noted in SCE's Answer, SDG&E also did not accept any storage projects into the ReMAT program.

[31] See SCE's Answer, p. 7 (citing D.12-03-035, p. 81). In its Motion, Complainant argues extensively that its contracts should be accepted in the AANP category because the ReMAT program is "technology neutral." Motion, pp. 13-14. While SCE agrees that the ReMAT program is technology neutral, SCE does not agree that fact resolves any disputed issue in this proceeding. That the ReMAT program is technology neutral has no bearing on whether the Projects meet the definition of AANP.

Thus, while SCE and PG&E implemented the Tariff in a slightly different manner, both IOUs interpret the Tariff to prohibit a developer from adding storage for the purpose of shifting energy delivery to convert a solar PV project into an AANP project. While the Commission could find that, consistent with PG&E's implementation, storage projects are not permitted to participate in ReMAT at all, SCE does not believe that is necessary to resolve this dispute.

B. The Generation Profile Is Not Enforceable Under the PPA.

Complainant's argument relies on its contention that the generation profiles it provided to SCE are decisive, enforceable, and demonstrate that its Projects will deliver over five percent of their output during the hours of 10 p.m. and 6 a.m.[32] Complainant is incorrect. By definition, a generation profile of an intermittent, "as-available" generation project cannot be specifically enforced. A key feature of "as-available" intermittent generation is that its generation profile provides only an estimate of generation based on expected climatological conditions, but delivery must occur when the power is generated based on the actual conditions at the time. For example, a typical PV solar project's actual generation may vary from its generation profile if a day is unexpectedly cloudy. For this reason, the ReMAT PPA contains no enforceable obligation for the counterparty to deliver according to its generation profile. In fact, the IOUs could not reasonably include such a provision in the pro forma PPA for as-available, renewable projects because those sellers would not be able to comply with such a provision.

The Complainant is therefore correct that, "To the extent that a generation profile is enforceable for any AANP Re-MAT project (be it wind or otherwise), it is enforceable for Radiant's Project",[33] because the generation profile is not enforceable for either. Rather, the generation profile is utilized to determine initial eligibility for the ReMAT program. As noted in SCE's Answer, if storage were permitted to convert the project into an AANP project, the PPA would necessarily include additional provisions to account for dispatch rights and other

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[32] *See* Motion, pp. 21-23.
[33] Motion, p. 23.

management issues, similar to provisions included in SCE's other storage contracts.[34] But the pro forma ReMAT PPA does not include these provisions.

Despite agreement by the implementing IOUs that there are no enforceable provisions in the ReMAT PPA that require a developer to comply with its estimated generation profile[35] – and that any such provision would be infeasible for projects without the ability to firm generation and deliver it on demand – Complainant argues incorrectly that Section 6.4(c) does require a Seller to comply with its purported generation profiles. Section 6.4(c) requires the counterparty to "generate, schedule and perform transmission services in compliance with all applicable operating policies, criteria, rules, guidelines and tariffs."[36] The generation profiles provided by a counterparty are not "operating policies, criteria, rules, guidelines or tariffs." For the reasons set forth above, there are no rules or guidelines requiring a project to generate or deliver during specific time periods; rather, the time periods set forth in the ReMAT Tariff are only utilized to determine whether the project is eligible for the AANP or AAP category.

The mere fact that Complainant alleges that it can ***guarantee*** that five percent of its energy will be delivered at night demonstrates that the portion of the energy it is delivering at that time is not "as-available" or intermittent, but rather firm and shaped energy. While SCE agrees with Complainant the Projects as a whole generate intermittent energy, the energy delivered at night is "firmed and shaped" energy; thus, the very feature that Complainant alleges converts the Projects into AANP projects requires the Complainant to firm and shape the energy being delivered at that time. But the lack of enforceable obligations in the ReMAT PPA actually permits Complainant to operate the Projects exactly as a solar PV project without storage, or in any manner that maximizes profits (e.g., delivering power during on-peak hours). Complainant

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[34] *See* SCE's Answer, pp. 7-8.

[35] *See* PG&E FAQs at https://pge.accionpower.com/ReMAT/faqs.asp.

[36] ReMAT PPA, Section 6.4(c). Complainant also cites to Section 6.1 of the PPA, which requires compliance generally with distribution owner's tariffs. There is nothing in the distribution tariff that would require the Projects to dispatch energy during the hours of 10 p.m. and 6 a.m. The other provisions cited by the Complainant only apply to the remedies available if the counterparty breaches the PPA, and thus those provisions are not relevant here, where delivering energy inconsistent with generation profiles is not a breach of the ReMAT PPA.

is asking the Commission to interpret the Tariff in a way that would require SCE to "just trust" Complainant to comply with its generation profile, and that interpretation is unreasonable.

C. The Projects Do Not Qualify As AANP Projects Under the Plain Language of the Tariff.

In compliance with the Commission's decisions, SCE developed its ReMAT Tariff, in which it defines the two product types at issue[37] as follows:

> As-Available Peaking: For the purposes of this Schedule, As-Available Peaking shall have the same meaning as the defined term "As-Available Facility" in Appendix A of the Re-MAT PPA and have a generation profile demonstrating **intermittent energy delivery** with 95% or more of the expected output **generated** between the hours of 6:00 a.m. and 10:00 p.m. SCE reserves the right to request a generation profile and supporting information for the Project to confirm the generation profile.[38]
>
> As-Available Non-Peaking: For the purposes of this Schedule, As-Available Non-Peaking shall have the same meaning as the defined term "As-Available Facility" in Appendix A of the Re- MAT PPA and have a generation profile demonstrating **intermittent energy delivery** with less than 95% of the expected output **generated** between the hours of 6:00 a.m. and 10:00 p.m. SCE reserves the right to request a generation profile and any supporting information for the Project to confirm the generation profile.[39]

In its Answer and Motion to Dismiss, SCE explains that the Projects fail to meet the Tariff definition of the AANP Product Type category for at least two separate reasons. First, more than 95 percent of the expected output would be generated between the hours of 6:00 a.m. and 10:00 p.m., rather than less than 95 percent, which is required to be eligible for AANP. Second, storage does not produce intermittent energy delivery, therefore the projects do not meet the intermittent energy delivery aspect required under the AANP Product Type category.

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[37] SCE and Complainant agree that the Projects do not fall within the "Baseload" product type. *See* Complaint, pp. 2, 11.

[38] ReMAT Tariff, Section N.3, Definitions (emphasis added).

[39] *Id.*, Section N.4, Definitions (emphasis added).

Complainant responds by stating that "generation" and "delivery" have the exact same meaning, and therefore SCE's interpretation "contravenes the plain meaning of when a facility generates electricity."[40] Complainant also argues that the **Projects** are intermittent "since the output from the facilities still relies on natural forces."[41] As discussed below, neither of these responses have merit.

1. Generation and Delivery are Not Equivalent In the ReMAT Tariff.

Complainant claims that "delivery" and "generation" mean the same thing even though both terms are used separately in the Tariff.[42] SCE contends that in the context of the ReMAT program it is clear that "generation" means actual production by the renewable resource of the energy, not storage and delivery of the energy at a later time. While it is true that, by necessity, renewable "as-available" facilities deliver energy at the same time they generate such energy, projects with storage bifurcate the production – or generation – of the energy from the delivery of the energy; thus, generation and delivery may not occur at the same time. In fact, the entire purpose of the storage component of the Projects is to de-link the time of generation and the time of delivery in an attempt to qualify for the AANP Product Type by shifting delivery to a different time than the production, or generation, of the solar energy.

A de-linking of generation and delivery was never contemplated for ReMAT; however, that does not mean the words have identical meanings. A cardinal rule of contract interpretation is that terms of a contract should not be interpreted so as to render any term superfluous or meaningless.[43] The Tariff separately uses the terms "generated" and "delivered." Complainant's favored interpretation of the Tariff would require the Commission to remove the term

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40 Motion, p. 15.
41 *Id.*, p. 10.
42 *Id.*, pp. 17-18.
43 *See, e.g.,* D.12-05-036, p. 6 (finding persuasive parties' arguments that the Commission should interpret a statute in a way that "avoids making any clause, sentence or word superfluous, void, or insignificant") (internal quotation marks omitted).

"generated" and replace it with "delivered" even though the Tariff could have stated that an AANP project had to demonstrate "less than 95% of the expected output **delivered** between the hours of 6:00 a.m. and 10:00 p.m." But that is not what the Tariff says. Rather, it says that less than 95% of the expected output must be **generated** during the relevant hours.[44]

To sow doubt in the plain meaning of the Tariff, Complainant makes various arguments, all of which are unavailing. Complainant first tries to compare other tariffs, including SCE's net energy metering ("NEM") tariff and the California Independent System Operator ("CAISO") Tariff, to the ReMAT. Complainant does not provide any citation for the proposition that these tariffs are applicable to the ReMAT program, or even acknowledge that the terms in the other tariffs are used differently. More importantly, Complainant's analysis of the terms is superficial, and a deeper look at the tariffs it cites actually supports SCE's position.

The NEM tariff contains extensive provisions concerning the treatment of storage facilities. Specifically, the NEM cites at least two different Commission decisions that specify how storage will be treated and managed under the NEM program,[45] and the NEM Tariff includes the word "storage" over 50 times.[46] Similarly, the CAISO and its stakeholders have been engaged in a stakeholder process spanning more than two years and currently in its third phase to establish the rules governing storage facilities and distributed resources on the CAISO grid. According to the CAISO's website, more than a dozen parties have filed comments on the various proposals, the CAISO has held numerous stakeholder meetings, issued draft proposals, and made filings at the Federal Energy Regulatory Commission ("FERC") in order to ensure the proper management of storage facilities on the CAISO grid.

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[44] *See* D.16-01-049, p. 4 (noting that the "starting point" of tariff interpretation is to look at the plain language of the tariff).

[45] SCE's Net Energy Metering (NEM) Tariff, Special Condition 6 ("Pursuant to D.16-04-020 and D.14-05-033, where a Customer utilizes a NEM-Paired Storage System (as defined in Special Condition 7.l), the applicable provisions of this Special Condition 6 shall apply.").

[46] *See id.*, at https://www.sce.com/NR/sc3/tm2/pdf/ce158-12.pdf.

The extensive discussion of storage in the NEM tariff and the CAISO stakeholder process demonstrates that the Commission and various California stakeholders have carefully considered the treatment of storage in those contexts and have included, or are seeking to include, the necessary provisions to address its unique characteristics.[47] They also clearly demonstrate that adding storage to a regulatory regime ***requires careful consideration and modification of terms and conditions under which service is provided.*** As SCE noted in its Answer, the ReMAT decisions, tariff, and PPA do not mention storage even once, and there is nothing in the ReMAT Tariff or PPA that would allow SCE to dispatch or manage the storage feature of a ReMAT project. For this reason, unlike with the NEM Tariff, for example, the Commission cannot harmonize the PPA with a Tariff interpretation that would permit a seller to shift energy delivery to another time period to qualify as a different Product Type under the ReMAT program.[48]

Additionally, while the NEM tariff is not controlling, it also supports SCE's argument that "generation" and "delivery" are two separate functions, even though they often overlap. Under the NEM tariff, a NEM generator can be paid both generation and/or delivery service charges, but the two services are distinct.[49] In fact, in areas with a community choice aggregator ("CCA"), the CCA is responsible for paying the generation component of the bundled rate and SCE is responsible for paying the delivery component of the bundled rate.[50] This bifurcation of the charges demonstrates that generation and delivery are two separate processes. Complainant

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47 Although not controlling in this case, SCE notes that the Self-Generation Incentive Program ("SGIP") also includes detailed rules about how storage is managed pursuant to that program. The SGIP Handbook mentions the term "storage" almost 150 times, and it contains detailed provisions regarding the use of storage, in contrast to the ReMAT program, which does not address storage at all. *See* file:///C:/Users/Owner/Downloads/2017%20Handbook%2008-29-2017_V3%20(2).pdf.

48 *See* D.12-04-051, p. 7 (stating that the Commission should construe words of a tariff "in context, and different provisions relating to the same subject must be harmonized to the extent possible").

49 *See* NEM Tariff, Section 4.b.1 (describing how NEM energy credits may include "Delivery Service plus Generation", but will not include "any portion of the Delivery Service energy rate components" unless the correct metering is installed).

50 *Id.*, Section 3.g ("For DA and CCA Service Customers, SCE will provide the applicable Delivery Service and CRS charges or credits, and the Customer's ESP or Community Choice Aggregator is responsible for providing the applicable generation charges or credits.").

also omits the fact that the term "generation" in the CAISO Tariff is used differently than the ReMAT's use of that term. The CAISO is concerned with the management of the entire interstate transmission grid and, as Complainant notes, "would only see the output of the combined generating facility;"[51] whereas, for purposes of qualifying a facility as a peaking or non-peaking project in ReMAT, the IOUs must look at the time the renewable energy is actually produced, or generated, not when it is delivered.

Complainant spends a significant amount of time arguing that the Projects are one generating facility, and thus the storage component should not be considered a different generating facility.[52] SCE agrees that the Projects are each a single generating facility, but SCE posits that fact is not relevant to the legal issue presented. As SCE has extensively explained, because the ReMAT Tariff and PPA are not structured to permit storage to shifting energy deliveries for the purpose of converting a project from category to another, SCE disregards the purported future and unenforceable use of storage to firm and shape the energy for qualification purposes; otherwise, SCE would not be able to permit storage at all and still comply with the Tariff or properly administer the PPA.[53]

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51 Motion, p. 17 (citing CAISO, Technical Bulletin of Hybrid Energy Storage Generating Facilities, p. 24 (October 19, 2016)).

52 *See, e.g.*, Motion, p. 13.

53 *See supra*, Section VI.A. Complainant also argues that the enabling statute for ReMAT doesn't provide support for SCE's position because the statute aimed to "encourage electrical generation from eligible renewable energy resources [ERER]" and its Projects qualify as ERER. Motion, p. 12, fn. 13. Whether this is true or not has no bearing on whether the Projects meet the definition of AANP or AAP. In fact, the Complainant itself notes that "Section 399.20 makes no further mention of 'peaking' or 'non peaking'" and "does not explain what those terms mean." *Id.*, p. 12. It is the Commission, in compliance with the statute, that separated the category types into peaking and non-peaking, and it is the Tariff definition that is decisive concerning which projects qualify for each category. Thus, the ERER status of the Projects is not relevant to the question presented.

2. The Energy Delivered Between the Hours of 10 p.m. and 6 a.m. Is Not "As-Available" Intermittent Energy; Rather, It is Shaped and Firmed.

Complainant's assertion that the Commission should simply replace the term "generated" with "delivered" also faces another challenge: if the utility considers the time of day that the resource is delivered, not generated, then the resource no longer meets the intermittency requirement because solar coupled with storage involves shaped energy delivery, not "intermittent energy delivery." At a minimum, energy deliveries from the storage device, which are shaped and, therefore, not intermittent, must be excluded from the generation profile.

Complainant attempts to use SCE's "admission" that the Projects qualify as AAP projects to prove that the Project remains intermittent.[54] This is a clear mischaracterization of SCE's position: SCE has always stated that the Projects qualify as AAP projects only if the storage component of the Project is disregarded. That is, SCE qualifies the Project under ReMAT by considering the generating profile of the underlying renewable resource only. SCE may not consider the storage component which purports to shift delivery because, among several other reasons, that shift (or firming and shaping the energy) does not comport with the intermittency requirement.

Complainant's citation of the FERC's definition of generation helps to illustrate SCE's point. FERC defines generation, in relevant part as "[t]he act of **producing** electrical energy from other forms of energy (such as thermal, mechanical, chemical or nuclear) . . . ."[55] Complainant argues that the term "chemical" includes batteries, and therefore the batteries are "producing" or generating the energy. The logical conclusion of this argument is that Complainant is producing, or generating, the energy from a chemical source of energy – one that is not intermittent. Thus, at the very least, the energy being "produced" by the battery, or chemical form of energy, does not meet the Tariff's intermittency requirement.

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[54] Motion, p. 19.

[55] Motion, p. 17, fn. 66 (citing FERC Glossary, *at* https://www.ferc.gov/resources/glossary.asp#G) (emphasis added).

D. Granting Complainant's Requested Relief Would Lead to an Unreasonable Result.

The Commission avoids interpreting a tariff in a way "that produces an absurd or unreasonable result . . . ."[56] An unreasonable result would occur if the Commission grants Complainant's requested relief. Doing so would require SCE, on behalf of its customers, to enter into several significantly above-market value contracts, costing up to $60 million more[57] over their terms than the same solar PV projects processed as AAP projects, for energy that SCE does not need to meet its Renewable Portfolio Standards ("RPS") goals[58] and which does not provide any other enforceable incremental intrinsic or extrinsic value for SCE's customers. This result would be especially unreasonable given that the price itself is based on market interest, and there is no market for this "product" in ReMAT because ***none of the IOUs*** permit a developer to use storage to shift energy delivery in order to qualify as a different product type. The Complainant is not entitled to this windfall at customers' expense.[59]

Granting Complainant's requested relief would also unreasonably result in giving Complainants unfair market advantages over similarly-situated developers. As the Complaint noted, the AAP queue, as of July 3, 2017, had available only 7.5 MW with over four times the

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[56] D.92-08-028, p. 12.

[57] The $60 million figure assumes that Complainant would seek leave to amend its Complaint to include Project 5, as it requested, but even if Radiant never seeks to include Project 5 in the AANP queue (despite having submitted a PPR for it), the incremental cost to SCE's customers would still be close to $48 million. Specifically, at current prices, the notional costs of the five projects for which PPRs were submitted would be as follows: (1) an estimated $43,505,236 for contracts under the AAP Product Type category, and (2) an estimated $104,270,004 for contracts under the AANP Product Type category, resulting in an estimated additional cost to SCE's customers of $60,764,767. If Project 5 is not included in the calculation, the cost to SCE's customers for the Project 1-4 PPAs would be approximately $47.7 million more over their lifetime when compared with solar PV projects in the AAP queue.

[58] *See, e.g.,* SCE's 2017 Renewables Portfolio Standard Procurement Plan, Vol. 1, filed July 21, 2017, p. 9 ("SCE does not forecast a net short in its RPS compliance position until 2027 without the use of bank and after 2030 with the use of bank. Therefore, SCE does not intend to hold a RPS Solicitation in 2017 and, instead, will look to sell RECs consistent with its proposal in this 2017 RPS Plan."), *available at* http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/56BDFA13E002DADC88258164007B8DEC/$FILE/R1502020-SCE%202017%20RPS%20Procurement%20Plan%20Volume%201%20PUBLIC.pdf.

[59] *See* D.12-05-035, pp. 49-50 (adopting incremental release of capacity "to minimize ratepayer exposure to a large number of non-competitively priced contracts . . ..").

number of megawatts of solar projects already in the queue.[60] The result of granting Complainant's requested relief would be to allow it to circumvent the solar PV queue simply by adding a battery that it is not required to use. This is unfair to other solar PV developers who are unlikely to obtain ReMAT contracts in the over-subscribed AAP queue. Stated another way, even though Complainant may legally operate its projects exactly as an AAP project and never deliver any energy between 10 p.m. and 6 a.m., it would surpass waiting solar PV projects in the AAP queue **and** receive almost $48 million more in payments over the life of the four contracts at issue in the Complaint.[61] That is a patently unreasonable result, and the Commission should resolve any ambiguity in the Tariff in favor of protecting SCE's customers from entering into unreasonable contracts.

Complainant counters that it is SCE that caused the damage because SCE was remiss in interpreting its own Tariff, "without Commission input."[62] Complainant spends considerable space in its brief maligning SCE for failing to unilaterally change the interpretation of its own Tariff after having interpreted the Tariff the same way for several years and after having conveyed that interpretation to any developers who inquired or viewed the PPR form.[63] There is nothing irregular about SCE interpreting the ReMAT without the input of the Commission, as SCE and the other IOUs are responsible for administering their own tariffs. In fact, it would have been highly irregular and discriminatory for SCE to unilaterally ***change*** its interpretation of the ReMAT after four years at the request of one developer, particularly where that new interpretation would conflict with the other IOUs' administration of the same statewide

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60 Complaint, p. 7.

61 This amount would increase to approximately $60 million if Project 5 is considered. Complainant filed leave to amend its Complaint to include Project 5 if SCE rejects the PPR for Project 5, and SCE has rejected the PPR for Project 5.

62 Motion, p. 25.

63 *Id.*, pp. 23-25 (stating, among other things, that it filed the PPR for Project 1 "hoping that SCE would change its mind" and that SCE's interpretation of its own tariff was "belated, unilateral and obstructive . . .")

program[64] and would be detrimental to SCE's customers. The Commission has chided IOUs in the past for unilaterally changing a tariff interpretation, specifically where the new interpretation conflicted with the other IOUs' interpretations.[65]

It is Complainant that should have sought Commission input ***prior to*** expending significant resources to develop five projects without assurance that the Commission would agree with its interpretation. Complainant claims that it is not gaming the system, and yet it developed and submitted to SCE ***five*** project PPRs prior to filing a complaint, with the knowledge that SCE was going to reject each of the PPRs. Given that none of the IOUs have permitted solar plus storage developers to enter the AANP queue, the requested remedy would be unjust and unreasonable to both SCE's customers and other project developers.[66] Rather, if the Commission does not dismiss the Complaint based on the merits, it should consider the issue in Rulemaking 11-05-005[67] or encourage Complainant to file a petition to modify the underlying decisions in the Rulemaking, to allow all interested parties to participate, to give other developers an opportunity to submit a storage project into the AANP Product Type queue on an equal basis, and to allow the IOUs to seek necessary PPA modifications to implement a solar plus storage project as an AANP Product Type.

The Commission should deny Complainant's Motion for Summary Judgment and grant SCE's Motion to Dismiss for the reasons set forth in this Response and in SCE's Motion to

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64 *See, e.g.*, D.01-11-066, p. 8 ("Statewide programs must be uniform, with consistent terms and requirements throughout all the utilities' service territories.").

65 In *Madera,* the Commission reversed PG&E's decision to unilaterally change its interpretation of tariff language after PG&E and the other California gas utilities had previously interpreted the phrase in the same manner. The Commission there stated that, the "law is clear that tariffs must be uniformly enforced to prevent discrimination." D.84-04-006, p. 19 ("We conclude that PG&E has unilaterally deviated from its filed tariff and should be required to adhere to it for all its customers.").

66 *See* D.12-04-051, p. 9 (stating that any change in the tariff that might be warranted by a change in policy should be made in a rulemaking and not in a complaint case); *see also* D.91-11-053, p. 7 ("The only parties to the complaint are [Complainant] and PG&E. If we addressed the issues tendered by [Complainant] in this proceeding, [other affected parties] would be denied notice and an opportunity to be heard prior to modification of Commission decisions that affect their [] interests.").

67 *See Order Instituting Rulemaking Regarding Implementation and Administration of the Renewables Portfolio Standard Program*, issued May 10, 2011 ("Rulemaking").

Dismiss and Answer. If the Commission agrees that the Projects meet the AANP definition of the Tariff, it should assess the appropriate remedy in the Rulemaking proceeding, not in the individual complaint case.

WHEREFORE, SCE prays:

1. That the Complaint and relief requested are denied; and
2. For such other relief as the Commission may deem just and equitable.

Respectfully submitted,

JANET S. COMBS
ELLEN A. BERMAN
VIVIAN A. LE

/s/ *Ellen A. Berman*
By: Ellen A. Berman

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

October 27, 2017

Attachment A

Redline Comparison of Original Response And Revised Response

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

RADIANT BMT, LLC, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY (U338-E), Defendant.	Case (C.) 17-08-007 (Filed August 8, 2017)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) REVISED RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF RADIANT BMT, LLC

JANET S. COMBS
VIVIAN A. LE

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-1524
E-mail: Janet.Combs@sce.com

ELLEN A. BERMAN
EB Energy Law, Inc.

Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY
50 W. Hillcrest Drive
Suite 218
Thousand Oaks, California 91360
Telephone: (626) 623-3938
E-mail: ellen@ebenergylaw.com

Dated: October ~~24~~27, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RADIANT BMT, LLC, Complainant, vs. SOUTHERN CALIFORNIA EDISON COMPANY (U338-E), Defendant.	Case (C.) 17-08-007 (Filed August 8, 2017)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) REVISED RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF RADIANT BMT, LLC

Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission ("CPUC" or "Commission~~"), Southern California Edison Company ("SCE") respectfully submits this Response to the Motion for Summary Judgment of Radiant BMT, LLC ("Radiant" or "Complainant").[1]~~ ") and Administrative Law Judge DeAngelis' order via electronic mail sent to the parties on October 26, 2017, Southern California Edison Company ("SCE") respectfully submits this Revised Response ("Response") to the Motion for Summary Judgment of Radiant BMT, LLC ("Radiant" or "Complainant").[2] The revisions to SCE's original Response ("Original Response"), filed on October 24, 2017, were made to address two concerns raised by the Complainant in its e-mail Request for Leave to Reply to SCE's Original Response.[3] Specifically, the revisions in this Response (1) correct references and related statements indicating that the Complaint included all five Projects (as defined herein), rather than

~~[1] Motion for Summary Judgment of Radiant BMT, LLC, dated October 9, 2017 ("Motion").~~
[2] Motion for Summary Judgment of Radiant BMT, LLC, dated October 9, 2017 ("Motion").
[3] E-Mail from T. Lindl to ALJ DeAngelis and Parties of Record, dated October 26, 2017.

four Projects; and (2) remove Attachment 1 and all references to that attachment from the Original Response and the evidentiary record. Other than a few related clarifying edits and minor typographical corrections, no other substantive revisions have been made to the Original Response. SCE has provided, as Attachment A hereto, a redline between the Original Response and this Response to assist the Commission's and parties' review of the specific revisions.

The Motion for Summary Judgment asks the Commission to order SCE to accept Complainant's Program Participation Requests ("PPRs") for ~~five~~four solar photovoltaic ("PV") projects ("Projects") within the As-Available Non-Peaking ("AANP") Product Type category in SCE's Renewable Market Adjusting Tariff ("ReMAT" or "Tariff"),[4] even though the Projects do not qualify as AANP projects. For the reasons stated herein, and in SCE's Answer to Complaint and Motion to Dismiss filed concurrently on September 22, 2017, the Commission should deny the relief requested by Complainant and grant SCE's request to dismiss the Complaint with prejudice.

I.

SUMMARY OF RESPONSE

The parties agree that the issue before the Commission is whether the Projects qualify as AANP projects. SCE's position, which is consistent with the position of Pacific Gas and Electric Company ("PG&E"), is that the Tariff and Commission-filed ReMAT Power Purchase Agreement ("PPA") do not permit a developer to convert a standard solar PV project from an as-available peaking ("AAP") facility to an AANP facility by using storage to shift energy deliveries from the time the renewable resource is generated to a different time. While

[4] Complainant filed PPRs for five distinct Projects in SCE's ReMAT AANP queue. Only Projects 1-4 were included in the Complaint, because at the time of the Complaint filing, SCE had not yet rejected the PPR for Project 5. Specifically, the Complaint states that "Radiant reserves its right to amend this Complaint if and when SCE rejects the Project 5 PPR or any additional PPRs Radiant might submit for projects with similar generation profiles." Complaint, p. 3. SCE rejected Project 5 on September 6, 2017.

Complainant accuses SCE of "labor[ing] to stretch the plain language of the Tariff,"[5] it is Complainant's interpretation that is a stretch. It is Complainant – not SCE – that is seeking a novel interpretation of the Tariff ***four years*** after the inception of ReMAT.[6] Prior to Complainant, no developer submitted a storage project into the ReMAT program, and no other party has challenged the investor-owned utilities' ("IOUs'")[7] determination that storage may not be used to convert an AAP project into an AANP project or vice versa. It is Complainant that is requesting the Commission to interpret the Tariff in a manner that would (1) alter the tariff's implementation four years after the ReMAT program began; (2) permit Complainant to reap the benefits of the higher AANP price without providing SCE's customers any additional benefits; and (3) circumvent the AAP project queue in a manner that is unjust and unreasonable to other renewable project developers.

The Tariff language is not ambiguous in any material way; rather, Complainant is reading the Tariff incorrectly. The fundamental flaws in Complainant's arguments are twofold. First, the Complainant incorrectly equates generation with delivery in the context of the ReMAT program. While it is true that, by definition, renewable "as-available" facilities deliver energy at the same time they generate energy, projects with storage can bifurcate the generation and delivery of the renewable resource to deliver energy at a different time than when the energy is generated. Because of this bifurcation, the production -- or generation -- of the energy is different from the delivery for the portions of energy that are firmed and shaped by the storage feature. Complainant ignores this bifurcation and attempts to equate "generation" and "delivery," even though doing so would render the use of both terms in the Tariff superfluous.

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5 *Id.*, p. 11.

6 *See* SCE's Advice 2916-E, effective July 24, 2013 (establishing SCE's Schedule ReMAT, or the Tariff, and ReMAT PPA). SCE began accepting PPRs on October 1, 2013, and the first bi-monthly ReMAT program period began on November 1, 2013.

7 As noted in SCE's Answer, San Diego Gas & Electric Company's ("SDG&E's") ReMAT program has concluded, and this issue was not raised in its program. SDG&E Re-MAT webpage at https://www.sdge.com/regulatory-filing/654/feed-tariffs-small-renewable-generation. No party submitted a project with storage in the SDG&E ReMAT program. *See* SCE's Answer, pp. 17-18.

Second, Complainant relies on the incorrect assertion that its purported generation profiles are enforceable under the pro forma PPA, but SCE cannot and does not specifically enforce any generation profile for an intermittent renewable generator because the seller is not able to control the actual time of the generation of the product. The fact that Complainant asserts that it is subject to an enforceable obligation to firm and shape energy to deliver it at a particular time of day demonstrates that, *when the storage capability of the project is considered,* the Projects are not "as-available" Projects delivering at least five percent of intermittent energy between 10 p.m. and 6 a.m.

While neither party believes that the Tariff language is ambiguous,[8] if the Commission finds an ambiguity, it should interpret it in favor of SCE's customers. The Commission generally construes a tariff ambiguity in favor of the customer, and the Commission will not interpret the tariff in a way that leads to an unreasonable result. SCE's customers are wholly responsible for paying the costs of the ReMAT contracts, and allowing the Projects into the AANP queue would lead to an unreasonable result for SCE's customers. Contrary to Complainant's assertions, public policy and customer protections favor rejection of the Projects. As SCE previously explained, ~~these five~~the Projects, if accepted into the AANP queue, would be well above market value due to the difference in pricing for AAP versus AANP resources and would cost SCE's customers ~~over $60 million~~tens of millions[9] more than solar PV projects (awarded at the current AAP price) over the life of the contracts, with no additional quantifiable or contractually enforceable benefit to SCE's customers.

SCE also reiterates its concern about Complainant's proposed remedy if the Commission determines that its Projects qualify as AANP projects. Complainant rejects the notion that it might be gaming the ReMAT program,[10] and yet Complainant knowingly submitted the first Project with the understanding that it would not qualify as an AANP project. Then, ***after*** SCE

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[8] *See* Motion, p. 8.
[9] *See infra.,* Section IV.D., fn. 57.
[10] *Id.*, p. 22.

predictably rejected that PPR, Complainant submitted ***four*** additional projects into the AANP project queue. Thus, Complainant continued to invest in and develop projects that it knew were not eligible AANP projects, according to both California utilities still administering the ReMAT program. The Commission should not interpret the Tariff in a way that would result in a windfall to Complainant at SCE's customers' expense.

II.

PROCEDURAL HISTORY

~~Since or before May 31, 2014,~~ SCE's PPR form ~~has included~~includes the following language: "Projects utilizing storage should select the Product Type typically associated with the underlying technology. For example, a solar project utilizing storage should select As-available Peaking."[11] Complainant filed the application for Project 1 on March 31, 2017, even though its cover letter to the PPR indicates that it understood that the Project would not qualify as an AANP project according to the PPR.[12] SCE rejected the PPR for Project 1 after providing Complainant an opportunity to correct all identified deficiencies. ***After*** SCE rejected Project 1, and having confirmed that SCE would not accept the projects as AANP projects, Complainant continued to develop four additional projects and submitted PPRs for them prior to the resolution of the dispute.[13] Those PPRs were submitted on April 26, May 31, June 13, and July 20, 2017.

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[11] ~~While SCE added to its website a "Frequently Asked Question" in December 2016 related to storage, the form PPR in effect at the time Complainant was developing its projects, conducting due diligence, and analyzing the relevant documents already included the requirement that solar projects with a storage component must select the AAP category. SCE has provided, as Attachment 1 hereto, a redacted PPR time stamped on May 31, 2014 – well over three years ago – that includes the clarifying language (highlights added).~~ *See, e.g.*, Complaint, Exhibit 1, p. 4.

[12] *See* Complaint, Ex. 2 ("Radiant and our counsel, Keyes & Fox LLP, have carefully reviewed SCE's ReMAT contract and tariff and believe the [NAME REDACTED] project meets all the AANP requirements and can perform within the requirements of the AANP ReMAT contract."). In its cover letter to the Project 1 PPR, Complainant drafted a legal justification, with extensive endnotes and citations, urging SCE to accept Project 1 into the AANP queue, thus indicating that it understood at the time of filing that the PPR did not permit a solar PV project, with or without storage, to be submitted into the AANP queue.

[13] *See* Motion, pp. 24-25.

Thus, Complainant continued to attempt to stack the AANP queue with projects, even though it knew that SCE would reject the PPRs.

Only after SCE rejected Projects 1-4, Complainant filed the Complaint against SCE on August 8, 2017. SCE filed both an Answer to the Complaint and a Motion to Dismiss the Complaint on September 22, 2017. Radiant filed a Response to SCE's Motion to Dismiss concurrently with its Motion for Summary Judgment on October 9, 2017.

III.

LEGAL STANDARD

SCE agrees with Complainant regarding the legal standard governing a Motion for Summary Judgment.[14] If the Commission grants SCE's Motion to Dismiss, it should dismiss the Complaint with prejudice. If the Commission grants the Complainant's Motion for Summary Judgment, it should stay the complaint proceeding and address implementation issues as detailed in SCE's Motion to Dismiss.[15] In this section, SCE provides the Commission with the relevant legal standards for interpreting the Tariff, including how the Commission should resolve any potential ambiguities.

In order to determine the meaning of contract or tariff provisions, the "whole of the contract is to be taken together, so as to give effect to every part . . ."[16] and "several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together."[17] Based on these rules of contract interpretation, the Commission should look at the entire ReMAT program, including the ReMAT PPA, and

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[14] *See id.*, Section II.

[15] *See* SCE's Motion to Dismiss, pp. 2 and 10-11 (requesting that if the Commission resolves the legal issue in favor of the Complainant, it should "stay the complaint proceeding, and address these issues in the underlying rulemaking proceeding to allow the investor-owned electric utilities ('IOUs') to seek necessary changes to the PPA to effectively dispatch and manage a storage project, and allow all developers an opportunity to submit solar plus storage projects into the IOUs' AANP queues").

[16] Cal. Civil Code Section 1641.

[17] Cal. Civil Code Section 1642.

harmonize the provisions between the Tariff and the contract where possible.[18] Additionally, the Commission has held that, "Under generally recognized rules of tariff interpretation the tariff should be given a fair and reasonable construction and not a strained or unnatural one; all the pertinent provisions of the tariff should be considered together, and if those provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention should be given effect."[19]

If the Commission determines that the Tariff or PPA is ambiguous, Complainant argues that "the Commission must interpret such ambiguities in favor of Radiant."[20] In the context of this proceeding, Complainant is incorrect. While tariff ambiguities are generally "resolved in favor of a customer and against a utility," the Commission should not do so if the interpretation is "strained" or "produces ~~and~~an absurd or unreasonable result."[21] Thus, "[w]here more than one statutory construction is arguably possible, [the Commission's] policy has long been to favor the construction that leads to the more reasonable result."[22] As discussed herein, Complainant's interpretation of the Tariff and requested relief would lead to an unreasonable result.[23] More importantly, tariff ambiguities are construed in favor of utility ***customers*** to protect consumers of electricity. The Complainant is not an SCE customer, but rather a sophisticated developer with

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[18] *See* Decision (D.)12-04-051, p. 7 (stating that the Commission should construe words of a tariff "in context, and different provisions relating to the same subject must be harmonized to the extent possible").

[19] D.92-08-028, p. 12 (internal quotation marks and citations omitted); *see also* D.03-04-058, p. 6 ("The Commission must interpret the words of a tariff in context and in a reasonable, common-sense way.").

[20] Motion, pp. 11-12.

[21] D.92-08-028, pp. 12, 18 (Conclusion of Law 7); *see also* D.12-03-056, p. 7 (stating that the Commission will avoid an interpretation that "defies common sense, or leads to mischief or absurdity . . .") and D.12-04-051, p. 7 ("We recognize that tariffs should not be interpreted to produce an unintended result, or so as to frustrate the manifest purpose of the provisions.").

[22] D.13-01-041, Attachment A, p. 14. The law is also clear that "[t]ariffs are interpreted using traditional statutory construction principles." D.16-01-049, p. 4.

[23] *See* D.16-01-049, pp. 5-8 (rejecting Complainant's assertion that tariff ambiguities must always be construed against the drafter and construing ambiguity in favor of utility).

independent counsel. The Commission has a "mandate to protect the interests of ratepayers"[24] and to "protect the public interest in its ~~oversight of utility actions~~ oversight of utility actions,"[25] and in this case, considerations of the public interest strongly favor the Commission construing any ambiguity in favor of SCE's customers.[26]

IV.

RESPONSE

In its Answer and Motion to Dismiss, SCE explained why the plain language of the Tariff mandates that solar PV projects, with or without a battery, fall within the AAP Product Type category of the ReMAT.[27] SCE also detailed how both Commission precedent and the ReMAT PPA support SCE's interpretation of the Tariff, which is consistent with the interpretation of the other electric IOUs for their ReMAT programs.[28] Finally, SCE expressed some fundamental policy concerns with permitting the Complainant to circumvent the AAP queue and receive a higher contract price for renewable power.

Complainant's arguments, set forth in the Motion and its Response to SCE's Motion to Dismiss, demonstrate Complainant's fundamental misunderstanding of the ReMAT program and SCE's position. In this Response, SCE will not repeat all of the arguments it has already made, and SCE hereby incorporates its Answer and Motion to Dismiss into this response.

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[24] *PG&E Corp. v. Public Utilities Com'n*, 118 Cal. App. 4th 1174, 13 Cal. Rptr. 3d 630, 647 (1st Dist. 2004).

[25] *Id.*, fn. 21.

[26] SCE does not profit from its procurement activities, but rather the ReMAT PPA costs are a direct pass-through to SCE's customers. Thus, in this context, SCE is acting on behalf of customers, and SCE is seeking to protect its customers from paying patently unreasonable rates for the contracts at issue.

[27] SCE's Motion to Dismiss, pp. 4-6; *see also* SCE's Answer, Section II.A.

[28] *See* SCE's Answer, pp. 7-9.

A. The Projects Are Only "As-Available" When Considered Without Utilizing the Battery Feature of the Project.

Many of the Complainant's arguments rely on a mischaracterization of SCE's interpretation of the Tariff as it relates to whether the Projects are "as-available." According to Complainant, the fact that SCE permits solar projects with storage to apply to the AAP queue is an acknowledgement by SCE that the Projects are "as-available."[29] SCE clarifies again that in evaluating a renewable project with storage, SCE ***disregards*** the storage component of the project and looks only at the underlying technology.[30] Because the use of storage was never contemplated by the parties in the ReMAT proceeding, SCE was required to determine whether and how to accommodate storage given the Tariff language and the pro forma PPA. SCE concluded that there were two possible accommodations. Based on the program structure and related documents, SCE could determine that a project with a storage component is not permissible at all in the ReMAT program, consistent with PG&E's implementation of its ReMAT program.[31]

Alternatively, SCE could – and did – determine to permit a renewable project with a storage component to submit a PPR, ***but only if the storage feature allowing the renewable energy produced to be delivered at another time was not considered for the purpose of determining Product Type.*** The ability to change the Product Type of the underlying resource by shifting delivery was not intended for the ReMAT program. SCE determined that, in order to be more inclusive of different technologies, while still complying with the Tariff and the PPA, it

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29 Motion, p. 3.

30 *See* ~~Attachment~~Complaint, Exhibit 1, ~~ReMAT PPR Form~~p. 4 ("Projects utilizing storage must select the Product Type associated with the underlying technology. For example, a solar project utilizing storage must select As-available Peaking.").

31 PG&E FAQs at https://pge.accionpower.com/ReMAT/faqs.asp ("PG&E is unable to accept projects with storage, particularly those intended to shift energy from one Product Type to another at this time. The PPA, in its current form, does not have adequate language for PG&E to account for storage operations, nor to properly enforce and/or manage this type of energy delivery profile shift."). As noted in SCE's Answer, SDG&E also did not accept any storage projects into the ReMAT program.

could permit projects with a storage feature to submit PPRs based on the underlying renewable resource, as intended.[32] As SCE explained in detail in its prior filings, considering the effect of the storage component would render the energy delivered (not generated) between the hours of 10 p.m. and 6 a.m. non-intermittent, or firm, because by definition the storage is utilized to shape and firm the delivery. By continuing to focus on the generation profile of the underlying intermittent resource ***only***, SCE determined that it could accept solar projects with a storage component as an AAP Product Type and still comply with the Tariff.

Thus, while SCE and PG&E implemented the Tariff in a slightly different manner, both IOUs interpret the Tariff to prohibit a developer from adding storage for the purpose of shifting energy delivery to convert a solar PV project into an AANP project. While the Commission could find that, consistent with PG&E's implementation, storage projects are not permitted to participate in ReMAT at all, SCE does not believe that is necessary to resolve this dispute.

B. The Generation Profile Is Not Enforceable Under the PPA.

Complainant's argument relies on its contention that the generation profiles it provided to SCE are decisive, enforceable, and demonstrate that its Projects will deliver over five percent of their output during the hours of 10 p.m. and 6 a.m.[33] Complainant is incorrect. By definition, a generation profile of an intermittent, "as-available" generation project cannot be specifically enforced. A key feature of "as-available" intermittent generation is that its generation profile provides only an estimate of generation based on expected climatological conditions, but delivery must occur when the power is generated based on the actual conditions at the time. For example, a typical PV solar project's actual generation may vary from its generation profile if a day is unexpectedly cloudy. For this reason, the ReMAT PPA contains no enforceable

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[32] See SCE's Answer, p. 7 (citing D.12-03-035, p. 81). In its Motion, Complainant argues extensively that its contracts should be accepted in the AANP category because the ReMAT program is "technology neutral." Motion, pp. 13-14. While SCE agrees that the ReMAT program is technology neutral, SCE does not agree that fact resolves any disputed issue in this proceeding. That the ReMAT program is technology neutral has no bearing on whether the Projects meet the definition of AANP.

[33] *See* Motion, pp. 21-23.

obligation for the counterparty to deliver according to its generation profile. In fact, the IOUs could not reasonably include such a provision in the pro forma PPA for as-available, renewable projects because those sellers would not be able to comply with such a provision.

The Complainant is therefore correct that, "To the extent that a generation profile is enforceable for any AANP Re-MAT project (be it wind or otherwise), it is enforceable for Radiant's Project",[34] because the generation profile is not enforceable for either. Rather, the generation profile is utilized to determine initial eligibility for the ReMAT program. As noted in SCE's Answer, if storage were permitted to convert the project into an AANP project, the PPA would necessarily include additional provisions to account for dispatch rights and other management issues, similar to provisions included in SCE's other storage contracts.[35] But the pro forma ReMAT PPA does not include these provisions.

Despite agreement by the implementing IOUs that there are no enforceable provisions in the ReMAT PPA that require a developer to comply with its estimated generation profile[36] – and that any such provision would be infeasible for projects without the ability to firm generation and deliver it on demand – Complainant argues incorrectly that Section 6.4(c) does require a Seller to comply with its purported generation profiles. Section 6.4(c) requires the counterparty to "generate, schedule and perform transmission services in compliance with all applicable operating policies, criteria, rules, guidelines and tariffs."[37] The generation profiles provided by a counterparty are not "operating policies, criteria, rules, guidelines or tariffs." For the reasons set forth above, there are no rules or guidelines requiring a project to generate or deliver during

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[34] Motion, p. 23.
[35] *See* SCE's Answer, pp. 7-8.
[36] *See* PG&E FAQs at https://pge.accionpower.com/ReMAT/faqs.asp.
[37] ReMAT PPA, Section 6.4(c). Complainant also cites to Section 6.1 of the PPA, which requires compliance generally with distribution owner's tariffs. There is nothing in the distribution tariff that would require the Projects to dispatch energy during the hours of 10 p.m. and 6 a.m. The other provisions cited by the Complainant only apply to the remedies available if the counterparty breaches the PPA, and thus those provisions are not relevant here, where delivering energy inconsistent with generation profiles is not a breach of the ReMAT PPA.

specific time periods; rather, the time periods set forth in the ReMAT Tariff are only utilized to determine whether the project is eligible for the AANP or AAP category.

The mere fact that Complainant alleges that it can ***guarantee*** that five percent of its energy will be delivered at night demonstrates that the portion of the energy it is delivering at that time is not "as-available" or intermittent, but rather firm and shaped energy. While SCE agrees with Complainant the Projects as a whole generate intermittent energy, the energy delivered at night is "firmed and shaped" energy; thus, the very feature that Complainant alleges converts the Projects into AANP projects requires the Complainant to firm and shape the energy being delivered at that time. But the lack of enforceable obligations in the ReMAT PPA actually permits Complainant to operate the Projects exactly as a solar PV project without storage, or in any manner that maximizes profits (e.g., delivering power during on-peak hours). Complainant is asking the Commission to interpret the Tariff in a way that would require SCE to "just trust" Complainant to comply with its generation profile, and that interpretation is unreasonable.

C. The Projects Do Not Qualify As AANP Projects Under the Plain Language of the Tariff.

In compliance with the Commission's decisions, SCE developed its ReMAT Tariff, in which it defines the two product types at issue[38] as follows:

> As-Available Peaking: For the purposes of this Schedule, As-Available Peaking shall have the same meaning as the defined term "As-Available Facility" in Appendix A of the Re-MAT PPA and have a generation profile demonstrating **intermittent energy delivery** with 95% or more of the expected output **generated** between the hours of 6:00 a.m. and 10:00 p.m. SCE reserves the right to request a generation profile and supporting information for the Project to confirm the generation profile.[39]
>
> As-Available Non-Peaking: For the purposes of this Schedule, As-Available Non-Peaking shall have the same meaning as the defined

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[38] SCE and Complainant agree that the Projects do not fall within the "Baseload" product type. *See* Complaint, pp. 2, 11.

[39] ReMAT Tariff, Section N.3, Definitions (emphasis added).

> term "As-Available Facility" in Appendix A of the Re- MAT PPA and have a generation profile demonstrating **intermittent energy delivery** with less than 95% of the expected output **generated** between the hours of 6:00 a.m. and 10:00 p.m. SCE reserves the right to request a generation profile and any supporting information for the Project to confirm the generation profile.[40]

In its Answer and Motion to Dismiss, SCE explains that the Projects fail to meet the Tariff definition of the AANP Product Type category for at least two separate reasons. First, more than 95 percent of the expected output would be generated between the hours of 6:00 a.m. and 10:00 p.m., rather than less than 95 percent, which is required to be eligible for AANP. Second, storage does not produce intermittent energy delivery, therefore the projects do not meet the intermittent energy delivery aspect required under the AANP Product Type category.

Complainant responds by stating that "generation" and "delivery" have the exact same meaning, and therefore SCE's interpretation "contravenes the plain meaning of when a facility generates electricity."[41] Complainant also argues that the **Projects** are intermittent "since the output from the facilities still relies on natural forces."[42] As discussed below, neither of these responses have merit.

1. Generation and Delivery are Not Equivalent In the ReMAT Tariff.

Complainant claims that "delivery" and "generation" mean the same thing even though both terms are used separately in the Tariff.[43] SCE contends that in the context of the ReMAT program it is clear that "generation" means actual production by the renewable resource of the energy, not storage and delivery of the energy at a later time. While it is true that, by necessity, renewable "as-available" facilities deliver energy at the same time they generate such energy, projects with storage bifurcate the production – or generation – of the energy from the delivery of the energy; thus, generation and delivery may not occur at the same time. In fact, the entire

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[40] *Id.*, Section N.4, Definitions (emphasis added).
[41] Motion, p. 15.
[42] *Id.*, p. 10.
[43] *Id.*, pp. 17-18.

purpose of the storage component of the Projects is to de-link the time of generation and the time of delivery in an attempt to qualify for the AANP Product Type by shifting delivery to a different time than the production, or generation, of the solar energy.

A de-linking of generation and delivery was never contemplated for ReMAT; however, that does not mean the words have identical meanings. A cardinal rule of contract interpretation is that terms of a contract should not be interpreted so as to render any term superfluous or meaningless.[44] The Tariff separately uses the terms "generated" and "delivered." Complainant's favored interpretation of the Tariff would require the Commission to remove the term "generated" and replace it with "delivered" even though the Tariff could have stated that an AANP project had to demonstrate "less than 95% of the expected output **delivered** between the hours of 6:00 a.m. and 10:00 p.m." But that is not what the Tariff says. Rather, it says that less than 95% of the expected output must be **generated** during the relevant hours.[45]

To sow doubt in the plain meaning of the Tariff, Complainant makes various arguments, all of which are unavailing. Complainant first tries to compare other tariffs, including SCE's net energy metering ("NEM") tariff and the California Independent System Operator ("CAISO") Tariff, to the ReMAT. Complainant does not provide any citation for the proposition that these tariffs are applicable to the ReMAT program, or even acknowledge that the terms in the other tariffs are used differently. More importantly, Complainant's analysis of the terms is superficial, and a deeper look at the tariffs it cites actually supports SCE's position.

The NEM tariff contains extensive provisions concerning the treatment of storage facilities. Specifically, the NEM cites at least two different Commission decisions that specify

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[44] *See, e.g.,* D.12-05-036, p. 6 (finding persuasive parties' arguments that the Commission should interpret a statute in a way that "avoids making any clause, sentence or word superfluous, void, or insignificant") (internal quotation marks omitted).

[45] *See* D.16-01-049, p. 4 (noting that the "starting point" of tariff interpretation is to look at the plain language of the tariff).

how storage will be treated and managed under the NEM program,[46] and the NEM Tariff includes the word "storage" over 50 times.[47] Similarly, the CAISO and its stakeholders have been engaged in a stakeholder process spanning more than two years and currently in its third phase to establish the rules governing storage facilities and distributed resources on the CAISO grid. According to the CAISO's website, more than a dozen parties have filed comments on the various proposals, the CAISO has held numerous stakeholder meetings, issued draft proposals, and made filings at the Federal Energy Regulatory Commission ("FERC") in order to ensure the proper management of storage facilities on the CAISO grid.

The extensive discussion of storage in the NEM tariff and the CAISO stakeholder process demonstrates that the Commission and various California stakeholders have carefully considered the treatment of storage in those contexts and have included, or are seeking to include, the necessary provisions to address its unique characteristics.[48] They also clearly demonstrate that adding storage to a regulatory regime ***requires careful consideration and modification of terms and conditions under which service is provided.*** As SCE noted in its Answer, the ReMAT decisions, tariff, and PPA do not mention storage even once, and there is nothing in the ReMAT Tariff or PPA that would allow SCE to dispatch or manage the storage feature of a ReMAT project. For this reason, unlike with the NEM Tariff, for example, the Commission cannot harmonize the PPA with a Tariff interpretation that would permit a seller to shift energy delivery to another time period to qualify as a different Product Type under the ReMAT program.[49]

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[46] SCE's Net Energy Metering (NEM) Tariff, Special Condition 6 ("Pursuant to D.16-04-020 and D.14-05-033, where a Customer utilizes a NEM-Paired Storage System (as defined in Special Condition 7.l), the applicable provisions of this Special Condition 6 shall apply.").

[47] *See id.*, at https://www.sce.com/NR/sc3/tm2/pdf/ce158-12.pdf.

[48] Although not controlling in this case, SCE notes that the Self-Generation Incentive Program ("SGIP") also includes detailed rules about how storage is managed pursuant to that program. The SGIP Handbook mentions the term "storage" almost 150 times, and it contains detailed provisions regarding the use of storage, in contrast to the ReMAT program, which does not address storage at all. *See* file:///C:/Users/Owner/Downloads/2017%20Handbook%2008-29-2017_V3%20(2).pdf.

[49] *See* D.12-04-051, p. 7 (stating that the Commission should construe words of a tariff "in context, and different provisions relating to the same subject must be harmonized to the extent possible").

Additionally, while the NEM tariff is not controlling, it also supports SCE's argument that "generation" and "delivery" are two separate functions, even though ~~the~~they often overlap. Under the NEM tariff, a NEM generator can be paid both generation and/or delivery service charges, but the two services are distinct.[50] In fact, in areas with a community choice aggregator ("CCA"), the CCA is responsible for paying the generation component of the bundled rate and SCE is responsible for paying the delivery component of the bundled rate.[51] This bifurcation of the charges demonstrates that generation and delivery are two separate processes. Complainant also omits the fact that the term "generation" in the CAISO Tariff is used differently than the ReMAT's use of that term. The CAISO is concerned with the management of the entire interstate transmission grid and, as Complainant notes, "would only see the output of the combined generating facility;"[52] whereas, for purposes of qualifying a facility as a peaking or non-peaking project in ReMAT, the IOUs must look at the time the renewable energy is actually produced, or generated, not when it is delivered.

Complainant spends a significant amount of time arguing that the Projects are one generating facility, and thus the storage component should not be considered a different generating facility.[53] SCE agrees that the Projects are each a single generating facility, but SCE posits that fact is not relevant to the legal issue presented. As SCE has extensively explained, because the ReMAT Tariff and PPA are not structured to permit storage to shifting energy deliveries for the purpose of converting a project from category to another, SCE disregards the purported future and unenforceable use of storage to firm and shape the energy for qualification

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50 *See* NEM Tariff, Section 4.b.1 (describing how NEM energy credits may include "Delivery Service plus Generation", but will not include "any portion of the Delivery Service energy rate components" unless the correct metering is installed).

51 *Id.*, Section 3.g ("For DA and CCA Service Customers, SCE will provide the applicable Delivery Service and CRS charges or credits, and the Customer's ESP or Community Choice Aggregator is responsible for providing the applicable generation charges or credits.").

52 Motion, p. 17 (citing CAISO, Technical Bulletin of Hybrid Energy Storage Generating Facilities, p. 24 (October 19, 2016)).

53 *See, e.g.*, Motion, p. 13.

purposes; otherwise, SCE would not be able to permit storage at all and still comply with the Tariff or properly administer the PPA.[54]

2. The Energy Delivered Between the Hours of 10 p.m. and 6 a.m. Is Not "As-Available" Intermittent Energy; Rather, It is Shaped and Firmed.

Complainant's assertion that the Commission should simply replace the term "generated" with "delivered" also faces another challenge: if the utility considers the time of day that the resource is delivered, not generated, then the resource no longer meets the intermittency requirement because solar coupled with storage involves shaped energy delivery, not "intermittent energy delivery." At a minimum, energy deliveries from the storage device, which are shaped and, therefore, not intermittent, must be excluded from the generation profile.

Complainant attempts to use SCE's "admission" that the Projects qualify as AAP projects to prove that the Project remains intermittent.[55] This is a clear mischaracterization of SCE's position: SCE has always stated that the Projects qualify as AAP projects only if the storage component of the Project is disregarded. That is, SCE qualifies the Project under ReMAT by considering the generating profile of the underlying renewable resource only. SCE may not consider the storage component which purports to shift delivery because, among several other reasons, that shift (or firming and shaping the energy) does not comport with the intermittency requirement.

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[54] *See supra*, Section VI.A. Complainant also argues that the enabling statute for ReMAT doesn't provide support for SCE's position because the statute aimed to "encourage electrical generation from eligible renewable energy resources [ERER]" and its Projects qualify as ERER. Motion, p. 12, fn. 13. Whether this is true or not has no bearing on whether the Projects meet the definition of AANP or AAP. In fact, the Complainant itself notes that "Section 399.20 makes no further mention of 'peaking' or 'non peaking'" and "does not explain what those terms mean." *Id.*, p. 12. It is the Commission, in compliance with the statute, that separated the category types into peaking and non-peaking, and it is the Tariff definition that is decisive concerning which projects qualify for each category. Thus, the ERER status of the Projects is not relevant to the question presented.

[55] Motion, p. 19.

Complainant's citation of the FERC's definition of generation helps to illustrate SCE's point. FERC defines generation, in relevant part as "[t]he act of **producing** electrical energy from other forms of energy (such as thermal, mechanical, chemical or nuclear) . . . ."[56] Complainant argues that the term "chemical" includes batteries, and therefore the batteries are "producing" or generating the energy. The logical conclusion of this argument is that Complainant is producing, or generating, the energy from a chemical source of energy – one that is not intermittent. Thus, at the very least, the energy being "produced" by the battery, or chemical form of energy, does not meet the Tariff's intermittency requirement.

D. Granting Complainant's Requested Relief Would Lead to an Unreasonable Result.

The Commission avoids interpreting a tariff in a way "that produces an absurd or unreasonable result . . . ."[57] An unreasonable result would occur if the Commission grants Complainant's requested relief. Doing so would require SCE, on behalf of its customers, to enter into ~~five~~several significantly above-market value contracts, costing ~~approximately~~up to $60 million more[58] over their terms than the same solar PV projects processed as AAP projects, for energy that SCE does not need to meet its Renewable Portfolio Standards ("RPS") goals[59] and

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56 Motion, p. 17, fn. 66 (citing FERC Glossary, *at* https://www.ferc.gov/resources/glossary.asp#G) (emphasis added).

57 D.92-08-028, p. 12.

58 ~~At~~The $60 million figure assumes that Complainant would seek leave to amend its Complaint to include Project 5, as it requested, but even if Radiant never seeks to include Project 5 in the AANP queue (despite having submitted a PPR for it), the incremental cost to SCE's customers would still be close to $48 million. Specifically, at current prices, the notional costs of ~~these~~the five projects ~~as AAP projects is~~ for which PPRs were submitted would be as follows: (1) an estimated ~~to be~~ $43,505,236~~, while the notional costs of these five projects as AANP projects is~~ for contracts under the AAP Product Type category, and (2) an estimated ~~to be~~ $104,270,004 for contracts under the AANP Product Type category, resulting in an estimated additional cost to SCE's customers of $60,764,767. If Project 5 is not included in the calculation, the cost to SCE's customers for the Project 1-4 PPAs would be approximately $47.7 million more over their lifetime when compared with solar PV projects in the AAP queue.

59 *See, e.g.,* SCE's 2017 Renewables Portfolio Standard Procurement Plan, Vol. 1, filed July 21, 2017, p. 9 ("SCE does not forecast a net short in its RPS compliance position until 2027 without the use of bank and after 2030 with the use of bank. Therefore, SCE does not intend to hold a RPS Solicitation in 2017 and, instead, will look to sell RECs consistent with its proposal in this 2017 RPS Plan."), *available at*

which does not provide any other enforceable incremental intrinsic or extrinsic value for SCE's customers. This result would be especially unreasonable given that the price itself is based on market interest, and there is no market for this "product" in ReMAT because ***none of the IOUs*** permit a developer to use storage to shift energy delivery in order to qualify as a different product type. The Complainant is not entitled to this windfall at customers' expense.[60]

Granting Complainant's requested relief would also unreasonably result in giving Complainants unfair market advantages over similarly-situated developers. As the Complaint noted, the AAP queue, as of July 3, 2017, had available only 7.5 MW with over four times the number of megawatts of solar projects already in the queue.[61] The result of granting Complainant's requested relief would be to allow it to circumvent the solar PV queue simply by adding a battery that it is not required to use. This is unfair to other solar PV developers who are unlikely to obtain ReMAT contracts in the over-subscribed AAP queue. Stated another way, even though Complainant may legally operate its projects exactly as an AAP project and never deliver any energy between 10 p.m. and 6 a.m., it would surpass waiting solar PV projects in the AAP queue **and** receive ~~approximately $60~~almost $48 million more in payments over the life of the ~~five~~four contracts~~.~~ at issue in the Complaint.[62] That is a patently unreasonable result, and the Commission should resolve any ambiguity in the Tariff in favor of protecting SCE's customers from entering into unreasonable contracts.

Complainant counters that it is SCE that caused the damage because SCE was remiss in interpreting its own Tariff, "without Commission input."[63] Complainant spends considerable space in its brief maligning SCE for failing to unilaterally change the interpretation of its own

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http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/56BDFA13E002DADC88258164007B8DEC/$FILE/R1502020-SCE%202017%20RPS%20Procurement%20Plan%20Volume%201%20PUBLIC.pdf.

60 *See* D.12-05-035, pp. 49-50 (adopting incremental release of capacity "to minimize ratepayer exposure to a large number of non-competitively priced contracts . . ..").

61 Complaint, p. 7.

62 This amount would increase to approximately $60 million if Project 5 is considered. Complainant filed leave to amend its Complaint to include Project 5 if SCE rejects the PPR for Project 5, and SCE has rejected the PPR for Project 5.

63 Motion, p. 25.

Tariff after having ~~conveyed to~~interpreted the ~~market~~Tariff the ~~correct~~same way for several years and after having conveyed that interpretation ~~for almost four years~~to any developers who inquired or viewed the PPR form.[64] There is nothing irregular about SCE interpreting the ReMAT without the input of the Commission, as SCE and the other IOUs are responsible for administering their own tariffs. In fact, it would have been highly irregular and discriminatory for SCE to unilaterally ***change*** its interpretation of the ReMAT after four years at the request of one developer, particularly where that new interpretation would conflict with the other IOUs' administration of the same statewide program[65] and would be detrimental to SCE's customers. The Commission has chided IOUs in the past for unilaterally changing a tariff interpretation, specifically where the new interpretation conflicted with the other IOUs' interpretations.[66]

It is Complainant that should have sought Commission input ***prior to*** expending significant resources to develop five projects without assurance that the Commission would agree with its interpretation. Complainant claims that it is not gaming the system, and yet it developed and submitted to SCE ***five*** ~~projects~~project PPRs prior to filing a complaint, with the knowledge that SCE was going to reject each of the PPRs. Given that none of the IOUs have permitted solar plus storage developers to enter the AANP queue, the requested remedy would be unjust and unreasonable to both SCE's customers and other project developers.[67] Rather, if

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64 *Id.*, pp. 23-25 (stating, among other things, that it filed the PPR for Project 1 "hoping that SCE would change its mind" and that SCE's interpretation of its own tariff was "belated, unilateral and obstructive . . .")

65 *See, e.g.*, D.01-11-066, p. 8 ("Statewide programs must be uniform, with consistent terms and requirements throughout all the utilities' service territories.").

66 In *Madera,* the Commission reversed PG&E's decision to unilaterally change its interpretation of tariff language after PG&E and the other California gas utilities had previously interpreted the phrase in the same manner. The Commission there stated that, the "law is clear that tariffs must be uniformly enforced to prevent discrimination." D.84-04-006, p. 19 ("We conclude that PG&E has unilaterally deviated from its filed tariff and should be required to adhere to it for all its customers.").

67 *See* D.12-04-051, p. 9 (stating that any change in the tariff that might be warranted by a change in policy should be made in a rulemaking and not in a complaint case); *see also* D.91-11-053, p. 7 ("The only parties to the complaint are [Complainant] and PG&E. If we addressed the issues tendered by [Complainant] in this proceeding, [other affected parties] would be denied notice and an opportunity to be heard prior to modification of Commission decisions that affect their [] interests.").

the Commission does not dismiss the Complaint based on the merits, it should consider the issue in Rulemaking 11-05-005[68] or encourage Complainant to file a petition to modify the underlying decisions in the Rulemaking, to allow all interested parties to participate, to give other developers an opportunity to submit a storage project into the AANP Product Type queue on an equal basis, and to allow the IOUs to seek necessary PPA modifications to implement a solar plus storage project as an AANP Product Type.

The Commission should deny Complainant's Motion for Summary Judgment and grant SCE's Motion to Dismiss for the reasons set forth in this Response and in SCE's Motion to Dismiss and Answer. If the Commission agrees that the Projects meet the AANP definition of the Tariff, it should assess the appropriate remedy in the Rulemaking proceeding, not in the individual complaint case.

WHEREFORE, SCE prays:

1. That the Complaint and relief requested are denied; and
2. For such other relief as the Commission may deem just and equitable.

Respectfully submitted,

JANET S. COMBS
ELLEN A. BERMAN
VIVIAN A. LE

/s/ *Ellen A. Berman*
By: Ellen A. Berman

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

October ~~24~~27, 2017

[68] *See Order Instituting Rulemaking Regarding Implementation and Administration of the Renewables Portfolio Standard Program*, issued May 10, 2011 ("Rulemaking").

Attachment ~~1~~

~~ReMAT Program Participation Request Form~~A

Redline Comparison of Original Response And Revised Response

[ACTUAL ATTACHMENT OMITTED FROM REDLINE AND REMOVED FROM EVIDENTIARY RECORD]