PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Item #51 (Rev. 1)
AGENDA ID 14972

ENERGY DIVISION **RESOLUTION E-4874**
August 18, 2016

R E S O L U T I O N

Resolution E-4874. San Diego Gas & Electric Company requests approval of its proposed Independent Marketing Division compliance plan pursuant to Decision 12-12-036.

PROPOSED OUTCOME:

- This Resolution approves San Diego Gas & Electric Company's Advice Letter 2822-E, which proposes an Independent Marketing Division. This Resolution also defines the Independent Marketing Division as a "Rule II.B affiliate," under the Commission's Affiliate Transaction Rules.

SAFETY CONSIDERATIONS:

- There is no impact on safety.

ESTIMATED COST:

- There is no ratepayer cost, as the Independent Marketing Division shall be entirely shareholder-funded.

By San Diego Gas & Electric Company Advice Letter 2822-E, filed on November 20, 2015.

SUMMARY

This Resolution approves San Diego Gas & Electric's Advice Letter 2822-E proposing an Independent Marketing Division and declares it to be a "Rule II.B affiliate." Public Utilities Code Section 707 allows an electrical corporation to market against a community choice aggregation program provided, among other things, such marketing is done through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is

functionally and physically separate from the electrical corporation's ratepayer-funded divisions.

SDG&E has demonstrated that the required separation between the electrical corporation and the Independent Marketing Division (IMD) will be implemented as part of the formation of the IMD and that there will be adequate procedures in place to ensure that separation.

BACKGROUND

The California legislature passed Senate Bill 790 which required, among other things, that the California Public Utilities Commission adopt a Code of Conduct for the electrical corporations regulated by the CPUC relative to Community Choice Aggregators (CCAs).

In 2011 Senate Bill (SB) 790 (Leno) was enacted and codified at Public Utilities (P.U.) Code as Section 707. Among other things, the new law directed the California Public Utilities Commission (CPUC) to:

> …institute a rulemaking proceeding for the purpose of considering and adopting a code of conduct, associated rules, and enforcement procedures, to govern the conduct of the electrical corporations relative to the consideration, formation, and implementation of community choice aggregation programs authorized in Section 366.2.

P. U. Code Section 707 allows an electrical corporation to market against a community choice aggregation program provided, among other things, that such marketing is done through an IMD that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions.

P.U. Code Section 707 (a) states, in part:

> (1) Ensure that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and

that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions.

(2) Limit the electrical corporation's independent marketing division's use of support services from the electrical corporation's ratepayer-funded divisions, and ensure that the electrical corporation's independent marketing division is allocated costs of any permissible support services from the electrical corporation's ratepayer-funded divisions on a fully allocated embedded cost basis, providing detailed public reports of such use.

(3) Ensure that the electrical corporation's independent marketing division does not have access to competitively sensitive information.

(4) (A) Incorporate rules that the commission finds to be necessary or convenient in order to facilitate the development of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization paid by ratepayers.

(B) It is the intent of the Legislature that the rules include, in whole or in part, the rules approved by the commission in Decision 97-12-088 and Decision 08-06-016.

(C) This paragraph does not limit the authority of the commission to adopt rules that it determines are necessary or convenient in addition to those adopted in Decision 97-12-088 and Decision 08-06-016 or to modify any rule adopted in those decisions.

To comply with P.U. Code Section 707, the CPUC opened Rulemaking 12-02-029 and issued Decision (D.)12-12-036. Attachment 1 of that Decision is the *Code of Conduct and Expedited Complaint Procedure* (Code of Conduct).

These rules constitute a Code of Conduct, rules, and enforcement mechanisms applicable to electrical corporations relative to the consideration, formation and implementation of Community Choice Aggregators (CCAs).

The Code of Conduct, Rule 2, states that "[n]o electrical corporation shall market or lobby against a community choice aggregation program, *except through an independent marketing division* that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions [emphasis added]."

Code of Conduct Rule 22 requires:

> No later than March 31, 2013, each electrical corporation that intends to market or lobby against a CCA shall submit a compliance plan demonstrating to the Commission that there are adequate procedures in place that will preclude the sharing of information with its independent marketing division that is prohibited by these rules, and is in all other ways in compliance with these rules.

Code of Conduct Rule 22 (b) states "[a]n electrical corporation that does not intend to lobby or market against any community choice aggregation program shall file a Tier 1 advice letter no later than March 31, 2013, stating that it does not intend to engage in any such lobbying or marketing." Accordingly, San Diego Gas and Electric Company (SDG&E) filed Advice Letter (AL) 2467-E on March 29, 2013, stating that it did not intend to engage in lobbying or marketing.

However, Code of Conduct Rule 22 (b)(1) goes on to state:

> If such an electrical corporation thereafter decides that it wishes to lobby or market against any community choice aggregation program, it shall not do so until it has filed and received approval of a compliance plan as described above, with its compliance plan filed as a Tier 2 advice letter with Energy Division.

Pursuant to the above, SDG&E has decided it wishes to lobby or market against CCAs. Thus, it filed AL 2822-E, along with its

Attachment A--its CCA Code of Conduct Compliance Plan, as a Tier 2 advice letter with Energy Division on November 20, 2015. It is the first California electrical corporation to file such a plan for an Independent Marketing Division (IMD).

The Commission adopted Affiliate Transaction Rules Applicable to Large California Energy Utilities (ATR) in 1997 (D.97-12-088). Subsequent Decisions modified these Rules. The Affiliate Transaction Rules (ATRs) are designed to prevent cross-subsidization of utilities' affiliated activities by ratepayers and minimize harm to the competitive marketplace from the utility's monopoly status and market power.[1]

According to ATR II.C.1., no holding company or utility affiliate shall knowingly "direct or cause a utility to violate or circumvent these Rules, including but not limited to the prohibitions against the utility providing preferential treatment, unfair competitive advantages or non-public information to its affiliates."

Affiliate Transaction Rule II defines whether an affiliate is subject to all the Rules, or just a small subset.

ATR II.B states "[f]or purposes of a combined gas and electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity *or the provision of services that relate to the use of gas or electricity*, unless specifically exempted below [emphasis added]." Affiliates that do not use or relate to the use of gas or electricity are governed by Rule II.C which states:

> No holding company nor any utility affiliate, whether or not engaged in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, shall knowingly:
>
> 1. direct or cause a utility to violate or circumvent these Rules, including but not limited to the prohibitions

[1] D.98-08-035; and modifying decisions D.98-11-027; D.98-12-075; D.99-04-069; D.99-09-033; and most recently D.06-12-029.

against the utility providing preferential treatment, unfair competitive advantages or non-public information to its affiliates.

2. aid or abet a utility's violation of these Rules; or

3. be used as a conduit to provide non-public information to a utility's affiliate.

According to a data request response sent by SDG&E to Energy Division, dated April 1, 2016, "the IMD will be engaged in communications and lobbying. The topics may relate to energy."[2]

Affiliate Transaction Rule V. F. requires an affiliate to use a disclaimer on any marketing materials on which it uses its associated utility's logo.

In whole, Affiliate Transactions Rule V.F. (D.06-12-029, Appendix A-3) states:

F. Corporate Identification and Advertising:

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

a. the affiliate "is not the same company as [i.e. PG&E, Edison, the Gas Company, etc.], the utility,";
b. the affiliate is not regulated by the California Public Utilities Commission; and
c. "you do not have to buy [the affiliate's] products in order to continue to receive quality regulated services from the utility."

The application of the name/logo disclaimer is limited to the use of the name or logo in California.

[2] *See* Appendix, "Responses to Questions Raised in Call with Energy Division Regarding SDG&E Advice Letter 2822-E," dated April 1, 2016, page 1, footnote 2.

D.15-01-051 requires SDG&E to demonstrate its Green Tariff Shared Renewables marketing will be compliant with the CCA Code of Conduct (COC) and ensure no anti-competitive marketing.

D.15-01-051, Ordering Paragraph 18 states:

> Each of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company must comply with the Community Choice Aggregation (CCA) Code of Conduct. Any CCA marketing plans filed pursuant to the CCA Code of Conduct should demonstrate to the Commission that the Green Tariff Shared Renewables (GTSR) marketing will be compliant, ensuring that GTSR products will not be marketed in CCA territory in a way that is anticompetitive.

Furthermore, D.15-01-051 states:

> In order to ensure that marketing of the GTSR Program complies with the CCA Code of Conduct, each of the three IOUs is hereby *directed* to include GTSR marketing in any CCA Code of Conduct plan filed in the future. All selective marketing in current or potential CCA territories [footnote omitted] is prohibited.[3]

NOTICE

Notice of AL 2822-E was made by publication in the Commission's Daily Calendar. SDG&E states that a copy of the Advice Letter was mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

Advice Letter 2822-E was protested.

SDG&E's AL 2822-E was timely protested by the Alliance for Retail Energy Markets (AREM), the Climate Action Campaign (CAC) and the Sierra Club,

[3] D.15-01-051 at 153 [emphasis added].

Marin Clean Energy and the City of Lancaster (collectively "the CCA parties"), the City of Del Mar, California, the City of Solana Beach, California, the Local Energy Aggregation Network (LEAN), Shell Energy North America U.S. (SENA), the San Diego Energy District (SDED), California State Senator Marty Block, and San Diego County Supervisor Diane Jacob.

Additionally, the City of San Diego and the Center for Sustainable Energy (CSE) responded to AL 2822-E on December 10, 2015.

SDG&E replied to the protests and responses on December 17, 2015.

The following is a more detailed summary of the major issues raised in the protests and responses:

AREM:

- Launching the Independent Marketing Division (IMD) is a matter of first impression before the Commission, and merits formal Commission action. At the very least, Energy Division should treat this as a Tier 3 filing which would require formal Commission action in a resolution.
- The shared services in the IMD plan should not include public affairs lobbying.
- The CCA Code of Conduct (COC) restrictions should also apply to IMD's contractors and consultants.
- The Plan does not address any marketing efforts the IMD may undertake with respect to customers of other load-serving entities.
- The IMD should not be called "Sempra Energy Services" because it is too similar to "Sempra Energy Solutions," and will be misleading and confusing to customers because the IMD is not an ESP and Sempra Energy Services will not sell electricity.

Climate Action Campaign and Sierra Club:

- The IMD is unnecessary and counterproductive to SDG&E's stated goal of a "healthy public discussion" surrounding CCAs.

- SDG&E's IMD Compliance Plan fails to demonstrate that SDG&E has procedures in place to ensure compliance with each COC Rule, as required by Rule 22.
- The Plan omits basic information needed to assess compliance with the COC, such as the IMD's structure and function.
- SDG&E's plan to house the IMD at its parent holding company, Sempra's, headquarters does not comply with the separation requirements stated in Rule 2.
- The Plan fails to prevent the IMD's access to sensitive information through staff transfers, and fails to prevent the IMD from gaining a structural advantage through transfers of staff who have existing relationships with decision makers and the community.
- The Plan provides for impermissible shared services, such as regulatory affairs, lobbying, legal, communications, and public affairs.

The CCA parties:

- Contrary to SDG&E's position that the Compliance Plan is effective December 21, 2015, Energy Division should promptly provide notice that SDG&E may not market or lobby against any against any CCA program until the Commission has expressly approved SDG&E's Compliance Plan.
- SDG&E's Compliance Plan does not meet the requirements of SB 790 and Rule 2 of the COC because the proposed IMD is not independent, or functionally and physically separate.
- SDG&E's Compliance Plan does not comply with COC Rule 13, which restricts the use of shared services and employees, or Rule 15, which requires the marketing division to hire dedicated employees.

City of Del Mar and the City of Solana Beach:

- More information is needed in SDG&E's Plan, including how exactly they will comply with Commission rules.
- The CPUC should consider conditions on the operation of SDG&E's marketing affiliate that may include: (1) restrictions on closed door

lobbying of public officials; (2) restrictions on the transfer of funds to consultants or third parties who are not accountable to the Commission; (3) restrictions on assigning SDG&E employees and experts to the marketing affiliate; (4) prohibitions on SDG&E providing special services, funding, or other inducements to local communities who do not create CCA programs; (5) public disclosure of the amount of funds SDG&E spends on the marketing affiliate; and (6) compliance filings on the activities of the marketing affiliate.

LEAN:

- SDG&E presents no evidence that communities investigating CCAs have insufficient information that would warrant a marketing organization like the one SDG&E proposes.
- SDG&E and other utilities already have authority to provide factual information about their services.
- An unrestricted SDG&E marketing affiliate will have the ability to deploy large resources that would unfairly overwhelm the public dialog.

SENA:

- The IMD should be subject to Affiliate Transaction Rules under Section II.B.
- SDG&E's definition of "shared services" pursuant to COC Rule 13 is too expansive, and improperly includes "lobbying" and "public affairs." This improperly ignores ATR V.E.
- The rules that apply to "employees" of SDG&E and its affiliate should apply equally to consultants, contractors, agents, and their employees.

San Diego Energy District:

- Matters raised here require full explication and review in a formal proceeding and/or hearing process.
- The IMD is contrary to the legislative intent of SB 790.

California Senator Block:

- Approval of SDG&E's affiliate IMD to lobby and potentially market against CCAs will result in an uneven playing field for local governments and others who do not have the resources to match well-financed opposition.

San Diego County Supervisor Diane Jacob:

- SB 790 prohibits utilities from using ratepayer money to market and/or lobby against CCAs, and SDG&E's notice of intent is a way to avoid this prohibition.

City of San Diego (response):

- AL 2822-E should be revised to include the identities of the IMD staff, the staff reporting structure and oversight, and training staff receives.
- More information is also needed about how information technology and billing services will be separate from SDG&E and how a "firewall" will be maintained.

Center for Sustainable Energy (response):

- SDG&E should work with local governments to support the integration of Distributed Energy Resources (DER).
- The CPUC should clarify and provide direction on the requirements of the COC and ongoing compliance procedures. This should include specific direction on the content, format, and deadlines of required quarterly reports, as well as direction on the requirements and procedures for shared office and staff resources.
- SDG&E should clarify which divisions and staff activities are permitted for "loaned labor."

The following is a summary of SDG&E's Reply:

- The Substitute Sheets for SDG&E AL 2822-E, Notice of Intent and Submission of Required Compliance Plan pursuant to D.12-12-036 erroneously referred to the entity under which the IMD will be organized as "Sempra Energy Services." The entity will be named "Sempra Services Corporation."
- The IMD's First Amendment rights are protected, which will allow a more robust public dialogue on CCA.
- AL 2822-E complies with the COC and provides restrictions that are modeled after the Affiliate Transaction Rules Compliance Plan that has been submitted to and approved by the Commission every year since the Commission adopted the Affiliate Transaction Rules

DISCUSSION

Energy Division has reviewed ALAL 2822-E, all protests, responses, and SDG&E's reply to the protests and responses. Energy Division also issued data requests to SDG&E about the proposed IMD. SDG&E replied promptly to all data requests. They appear as Appendices following this Resolution.

The question is whether SDG&E has demonstrated to the CPUC, through its A.L 2822-E and Attachment A, that there are adequate procedures in place that will preclude the sharing of information with its IMD that is prohibited by these rules, and is in all other ways in compliance with these rules.

1. SDG&E has demonstrated there are adequate procedures in place to preclude the sharing of information with its Independent Marketing Division (IMD), as prohibited by the CCA Code of Conduct (COC), and is in all other ways in compliance with the COC, unless otherwise noted.

SDG&E's AL 2822-E and Attachment A, its CCA Code of Conduct (COC) Compliance Plan, along with its responses to multiple rounds of data requests have sufficiently demonstrated that SDG&E has adequate procedures in place to preclude the sharing of information with Sempra Services Corporation (SSC), which is its Independent Marketing Division (IMD). The Compliance Plan is in all other ways in compliance with the Commission's CCA COC. To the extent

that SDG&E's Compliance Plan is inconsistent with the CCA COC, we note that the CCA COC controls. Pursuant to CCA COC, Rule 22 a), "an electrical corporation shall submit a revised compliance plan thereafter by Tier 2 advice letter served on all parties to this proceeding whenever there is a proposed change in the compliance plan for any reason."

Therefore, since the data request responses reflected substantial clarification and changes relative to SDG&E's original Compliance Plan, SDG&E must file a revised Compliance Plan via Tier 2 advice letter. The revised Compliance Plan shall incorporate all of the information contained in the data request responses as well as procedures designed to comply with the below ordering paragraphs. Until such time as the above advice letter is filed and approved, SDG&E should consider its responses to the attached data requests incorporated by reference into its COC Compliance Plan provided in AL 2822-E.

P. U. Code Section 707 and the resulting COC created rules governing the conduct of an electrical corporation relative to a community choice aggregation program. If an electrical corporation wishes to engage in marketing or lobbying efforts against CCAs, very specific safeguards were put in place, in the form of the IMD as described in the CCA COC. In this case, SDG&E has done everything required to demonstrate to the Commission that there are adequate procedures in place to prevent the unlawful sharing of information, personnel, and resources with its IMD. While we expect that the IMDs will not make false or misleading claims or give the appearance of speaking on behalf of CCAs, our authority in this regard is limited to that provided to the Commission by P.U. Code Section 707.

The protestors raised some important questions regarding the sufficiency of SDG&E's demonstration. Some of these important questions helped inform multiple rounds of data requests to SDG&E. After careful review and consideration, we have determined that SDG&E's request meets the criteria required to approve this advice letter and consequently, the creation of California's first Independent Marketing Division for the purpose of marketing or lobbying relative to CCAs. However, several areas warrant further clarification and guidance in this Resolution. Those areas are: the sharing of personnel, the application of ATR II.B, and the marketing of the Green Tariff Shared Renewables program.

2. Sempra Services Corporation is prohibited from sharing its own staff with Sempra Services Energy Corporation to engage in marketing or lobbying. For the purposes of this prohibition, it is the actual job function of the person not just the job title or name of a department that determines whether the sharing is prohibited.

CCA COC, Rule 13 states:

> As a general principle, an electrical corporation may share with its independent marketing division joint corporate oversight, governance, support systems and support personnel; provided that support personnel shall not include any persons who are themselves involved in marketing or lobbying.

In its original compliance plan attached to AL 2822-E[4], SDG&E proposed to share "regulatory affairs, lobbying, [and] legal …" services. While these services would normally be allowed by the ATRs to be shared between a utility and an affiliate, COC Rule 13 explicitly prohibits the sharing of employees "who are themselves involved in marketing or lobbying" between an electrical corporation and an IMD.

Energy Division noticed this disparity and brought it to SDG&E's attention via a data request dated February 23, 2016. On March 4, 2016, SDG&E replied to Energy Division's data request by acknowledging that "SDG&E intended to list permissible shared services [presumably under the Affiliate Transaction Rules] … COC Rule 13 allows shared services except for employees engaged in marketing and lobbying … Thus, lobbying, as covered by the COC, will not be a shared service." [5]

While SDG&E acknowledged in the above-quoted data request response that lobbying is not an authorized shared service, significant comments on the draft resolution raised concerns as to whether other personnel roles involved in marketing and lobbying should also be covered under COC Rule 13.

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[4] *See* AL 2822-E, Attachment A, pp. 11-12.
[5] *See* Appendix, "SDG&E's response to Energy Division data request," dated March 14, 2016, p 4.

Because the language of COC Rule 13 specifically prohibits the sharing of personnel that "are themselves engaged in marketing or lobbying" and does not specify the departments or titles of such personnel, we are concerned that unless the job functions are used in complying with this COC, it would circumvent the purpose of the COC. If job functions are not used as the determinant, the electrical corporation could use certain titles such as communications, public affairs, or regulatory relations for personnel actually engaged in lobbying and marketing.

Consequently, the prohibition against sharing of personnel that "are themselves engaged in marketing or lobbying" shall be interpreted by a holistic review of the job functions of the personnel in question. This review will focus on the duties and responsibilities of the personnel, not merely their title or department.

Additionally, commenters noted the need for clarification on the term "personnel" in COC Rule 13. "Personnel" will be interpreted in this context to include not only employees, but all agents, including contractors and consultants.

Thus, pursuant to COC Rule 13, SDG&E and Sempra Services Corporation are prohibited from sharing employees and agents, including contractors and consultants, engaged in marketing or lobbying.

3.The proposed Independent Marketing Division provides a service that relates to the use of electricity, and therefore, is covered by all Affiliate Transaction Rules, pursuant to ATR II.B.

While the CCA Code of Conduct does not require the IMD to be created as an affiliate, SDG&E chose to locate its IMD inside an already existing affiliate Sempra Services Corporation (SSC). In the Substitute Sheet for AL 2822-E, SDG&E contends that the CPUC:

> … requires SDG&E to label all affiliates as 'covered' by its Affiliate Transaction Rules (ATR) when submitting advice letters informing the Commission about new affiliates. Certain covered affiliates are subject to all of the ATRs due to Rule II.B., and others are subject to a subset of them as set forth in

> Rule II.C. In the case of this Advice Letter, SDG&E means to indicate that the CCA entity, [Sempra Services Corporation], is "covered" by the ATRs as set forth in Rule II.C., and not falling within Rule II.B.

SDG&E further explains in AL 2822-E:

> Communications on a wide range of energy industry issues, which may include CCA, will be made by a covered affiliate that is functionally and financially independent from SDG&E. Notwithstanding the fact that this activity will take place in a covered affiliate, SDG&E is implementing the Code of Conduct and Compliance Plan being submitted herein as is required for an entity that could be construed as meeting the definition of 'Marketing Division' that was adopted in D.12-12-036. This entity will be funded entirely by shareholders, located in a subsidiary of Sempra Energy, subject to both the Affiliate Transaction Rules applicable to covered affiliates and the CCA Code of Conduct, and will be treated like a 'covered affiliate' under the Affiliate Transactions Rules with regard to separation requirements related to operations, information technology, financial books, facilities and protection of non-public utility information. It, as well as SDG&E, will also comply with the rules of the CCA Code of Conduct. Should these communication responsibilities be moved in the future, SDG&E will update its compliance plan by Tier 2 advice letter.

SDG&E argues that its IMD, known as "Sempra Services Corporation" (SSC), despite the suggestion in its very name, "will not be engaged in the provision of any product that uses electricity or provision of services that relate to the use of electricity."[6] Therefore, SDG&E contends, SSC should not be subject to all of the ATRs, but rather to only a very small sub-set in ATR II.C. Despite this fact, as stated in the background section above, SDG&E also admits that SSC will be

[6] *See* Appendix, "Responses to Questions Raised in Call with Energy Division Regarding SDG&E Advice Letter 2822-E," dated April 1, 2016, p 1.

"engaged in a communications/information business. The topics may involve energy."[7]

It is certain that if SSC performs any information services or communication services at all, those services will relate to the use of electricity. Advocating for or against a particular electricity generation provider (such as a CCA) inherently "relates to the use of electricity." As a counter-example, if SSC's stated mission was to communicate solely on telecommunication policy, or some other topic wholly un-related to the energy/electricity industry, that would likely not be deemed to "relate to the use of electricity" for purposes of ATR II.B. Since SSC will be providing services relating to the use of electricity, it meets the definition of an affiliate in ATR II.B.

In recent years, CPUC staff has monitored energy utilities' compliance with the ATRs, and has aggressively urged the utilities to err on the side of classifying affiliates as "covered" or "Rule II.B" affiliates, subject to *all* of the ATRs, as opposed to only a very small sub-set thereof. Requiring more utility affiliates to be subject to the ATRs minimizes cross-subsidization by ratepayers of utilities' outside, non-ratepayer-benefiting business activities. Thorough application of the ATRs also minimizes any distortion of the competitive marketplace of energy-related products and services by virtue of utilities' massive size, resources, and influence. Similarly requiring SSC to be subject to all ATRs is in line with recent CPUC policy.

4. SDG&E has complied with the requirement in D.15-01-051 to demonstrate to the Commission that its Green Tariff Shared Renewables (GTSR) program marketing will be compliant with the Community Choice Aggregation (CCA_ Code of Conduct (COC) to ensure that GTSR products will not be marketed in CCA territory in a way that is anticompetitive.

As stated above, D.15-05-051, Ordering Paragraph 18 requires SDG&E's GTSR program marketing to comply with the COC. Any CCA marketing plans filed pursuant to the COC must demonstrate to the Commission that the GTSR marketing will be compliant, ensuring that GTSR products will not be marketed

[7] *See* Appendix, "Responses to Questions Raised in Call with Energy Division Regarding SDG&E Advice Letter 2822-E," dated April 1, 2016, p 1, footnote 2.

in CCA territory in a way that is anticompetitive. While no mention was made of GTSR in SDG&E's AL 2822-E or Attachment A thereto (the CCA COC Compliance Plan), Energy Division issued data requests to SDG&E. SDG&E responded thusly to Energy Division's data request regarding SDG&E's demonstration of compliance with the Green Tariff Shared Renewables marketing requirements:

> SDG&E has also already filed and received approval of a Green Tariff Shared Renewables Marketing Plan, as required in D.15-01-051. (*See* Resolution, E-4734, issued October 2, 2015.) SDG&E's GTSR Marketing Plan explains how SDG&E will avoid selective marketing in areas where CCA exist or where a CCA implementation plan has been adopted by a local authority. SDG&E's CCA COC [Compliance Plan, as described in Attachment A to AL 2822-E] explains how SDG&E will comply with all requirements of D.12-12-036 and includes SDG&E's commitment not to market or lobby against CCA in any areas where the CCA exists or where a CCA implementation plan has been adopted by a local authority. SDG&E has also submitted a declaration in compliance with Rule 22 of the Code of Conduct set forth in Attachment 1 of Decision D. 12-12-036, confirming that SDG&E does not intend to market or lobby against any CCAs. (*See* SDG&E Advice Letter 2467-E.) SDG&E will comply with every provision of its GTSR Marketing Plan as well as its CCA COC [Compliance Plan, as described in Attachment A to AL 2822-E].[8]

In AL 2744-E, which was approved by Resolution E-4734, SDG&E declared "[i]n the event a CCA is formed during the period of this [GTSR] program, SDG&E is fully prepared to comply with the Commission directive regarding adherence to the CCA Code of Conduct …"

[8] *See* Appendix, "Email from Kellen Gill, titled 'Follow-Up Question on AL 2822-E,'" dated May 2, 2016.

Therefore, though GTSR compliance with CCA COC was not provided in the original SDG&E AL 2822-E or Attachment A thereto, Energy Division is satisfied that, through its data request response above, SDG&E has complied with the requirements of D.15-05-051, Ordering Paragraph 18; and its GTSR program marketing will be required to comply with the CCA COC on an ongoing basis.

5. The Community Choice Aggregation (CCA) Code of Conduct (COC) and Public Utilities Code provide only limited jurisdiction over the Independent Marketing Division (IMD). Specifically, the expedited complaint procedure in the CCA COC only applies to electrical corporations, not to Sempra's IMD.

P.U. Code Section 707 and the CCA COC provide the framework for the CPUC's jurisdiction over electrical corporations' interactions with their IMD. P.U. Code Section 707 (a) (1) orders the CPUC to implement a Code of Conduct which, among other things, "[e]nsure[s] that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions (emphasis added)." This statute specifically permits IMDs to market or lobby against CCAs. The CPUC's oversight of the IMD here is limited to prevention of unlawful sharing of information, personnel, and resources with an electrical corporation as specifically provided for in the CCA COC and the P.U. Code.

Pursuant to P.U. Code Section 707, the CPUC implemented D.12-12-036, the CCA Code of Conduct (COC). CCA COC, Rule 24 provides an expedited complaint procedure for CCAs (including prospective CCAs) to use if they allege a violation of the COC by an electrical corporation. Rule 24 states in part, "[a] complaint filed … by an existing or prospective community aggregator or community choice aggregation program alleging a violation of an electrical corporation's obligation to cooperate fully … shall be resolved in no more than 180 days (emphasis added)…" Rule 24 specifically identifies that an electrical corporation will be subject to the COC's expedited complaint procedure; it does not identify the IMD as being subject to the COC's expedited complaint procedure.

Similarly, the CCA COC Rule 9 applies to the electrical corporation and not to the IMD. CCA COC Rule 9 states: "An electrical corporation shall refrain from: 1) speaking on behalf of CCA … 2) giving any appearance of speaking on behalf of any CCA program; or 3) making any statement relating to the community choice aggregator's rates or terms and conditions of service that is untrue or misleading (emphasis added)…"

In contrast, CCA Rule 10 specifically applies to both the electrical corporation and an IMD when it explicitly states: "an electrical corporation and its independent marketing division shall keep separate books and records (emphasis added)." When read together, Rule 9 and Rule 10 indicate that certain COC rules apply to both electrical corporations and IMDs, while other rules apply only to electrical corporations.

Therefore, the CCA COC only applies to IMDs where such application is explicitly enumerated. Importantly for CCAs and prospective CCAs, the expedited complaint procedure contained in the CCA COC is not explicitly applied to IMDs. Thus, the expedited complaint procedure only applies to SDG&E, not to its IMD.

COMMENTS

Public Utilities Code Section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, the draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from then.

The Commission has carefully reviewed various parties' comments on the draft resolution and have provided clarifications and made changes in response to comments where warranted. Parties' comments are summarized in the Appendix of this Resolution.

FINDINGS

1. San Diego Gas & Electric Company's Independent Marketing Division, Sempra Services Corporation falls within the Affiliate Transaction Rules definition of an affiliate under Rule II.B, as it is providing a service that relates to the use of gas or electricity.

2. San Diego Gas & Electric Company's Advice Letter 2744-E, as approved by Resolution E-4734, serves to satisfy the requirements of D.15-05-051, Ordering Paragraph 18, that SDG&E demonstrate to the Commission its Green Tariff Shared Renewables marketing plan will be compliant with the Community Choice Aggregation Code of Conduct and not market in CCA territory in an anti-competitive way.

3. Pursuant to the Community Choice Aggregation Code of Conduct, employees and agents, including consultants and contractors, of Sempra Services Corporation and San Diego Gas & Electric Company who are involved in marketing/lobbying are not permitted to be shared between the Independent Marketing Division and San Diego Gas & Electric Company.

4. To the extent that San Diego Gas and Electric Company's Code of Conduct Compliance Plan is inconsistent with the Community Choice Aggregation Code of Conduct, the Community Choice Aggregation Code of Conduct controls.

5. San Diego Gas & Electric Company's responses to the attached data requests which appear below as Appendices shall be considered incorporated by reference into its Code of Conduct Compliance Plan

provided in Advice Letter 2822-E, pending the filing and approval of its revised Compliance Plan as ordered below.

6. The Community Choice Aggregation Code of Conduct applies to Independent Marketing Divisions to the extent explicitly provided in the Code of Conduct.

7. The expedited complaint procedure in the Community Choice Aggregation Code of Conduct applies to San Diego Gas & Electric Company, not to its Independent Marketing Division.

THEREFORE IT IS ORDERED THAT:

1. San Diego Gas and Electric Company's Advice Letter 2822-E and associated Compliance Plan (including its responses to data requests which appear as Appendices below), requesting to establish an Independent Marketing Division pursuant to Decision 12-12-036, is approved.

2. Pursuant to Code of Conduct Rule 22 a), San Diego Gas and Electric Company shall file a revised Compliance Plan, via Tier 2 advice letter, reflecting the information contained in their data request responses and the directions of these ordering paragraphs.

3. The Independent Marketing Division shall be fully operationally, functionally, financially and physically separate from SDG&E.

4. The Independent Marketing Division shall be funded entirely by shareholders.

5. The Independent Marketing Division shall operate as a "Rule II.B" affiliate and shall be subject to all of the Commission's Affiliate Transaction Rules.

6. The Independent Marketing Division, an affiliate, shall comply with the logo/disclaimer requirements of Affiliate Transactions Rule V.F.

7. San Diego Gas and Electric Company shall not share with its Independent Marketing Division, employees or agents (including contractors or consultants) who are themselves involved in marketing or lobbying. "Involved in marketing or lobbying" shall be interpreted by review of the job functions of the personnel in question. This review shall focus on the duties and responsibilities of the personnel, not merely the title or department.

8. San Diego Gas and Electric Company and its Independent Marketing Division, Sempra Services Corporation, shall conduct training for all its employees and agents, including contractors and consultants, to ensure that they are in compliance with the Community Choice Aggregation Code of Conduct and with the Affiliate Transaction Rules. San Diego Gas and Electric Company and Sempra Services Corporation also shall conduct audits and compliance reviews to ensure the rules are being followed.

9. Commencing in 2017 and pursuant to Community Choice Aggregation (CCA) Code of Conduct Rule 24, San Diego Gas and Electric Company and the Independent Marketing Division shall be subject to the Code of Conduct compliance audit for calendar years 2015 and 2016, and biennial audits thereafter, so long as it continues to operate.

10. Commencing in 2017 and pursuant to Affiliate Transaction Rule VI., transactions between San Diego Gas and Electric Company and the Independent Marketing Division shall be subject to the Affiliate Transaction Rule compliance audit for calendar years 2015 and 2016, and biennial audits thereafter, so long as it continues to operate.

11. San Diego Gas and Electric Company shall file a report with the Energy Division detailing the amount of spending and shareholder funding of the Independent Marketing Division. This report shall be filed annually on March 31, beginning in 2017, covering the previous calendar year, and should be published to its website. These reports shall continue annually until March 31, 2019, unless the Commission decides to extend them.

12. Pursuant to Community Choice Aggregation Code of Conduct Rule 4, San Diego Gas and Electric Company shall file a quarterly report with the Energy

Division and make it available on its website. This report shall be filed no later than one month after the end of each quarter. These reports shall be required as long as the Independent Marketing Division exists.

13. San Diego Gas and Electric Company and the Independent Marketing Division shall comply with the Community Choice Aggregation Code of Conduct (Decision 12-12-036) as it relates to the Green Tariff Shared Renewables marketing.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on August 18, 2016, the following Commissioners voting favorably thereon:

_____
TIMOTHY J. SULLIVAN
Executive Director

APPENDIX

Summaries of the Comments

"CCA Parties" (Marin Clean Energy and the City of Lancaster)

- The Commission should establish a schedule for an additional round of comments to allow all parties to vet the proposal. SDG&E should file a Tier 2 Advice Letter with a modified Compliance Plan.
- The Draft Resolution's existing requirement that the ATRs apply in their entirety to the IMD should be retained.
- The rules regarding shared employees and resources to also apply to Sempra, not just to SDG&E.
- In order to mitigate confusion of customers, elected officials, and government officers, the IMD should be required to create an approved disclaimer for representatives to use in all communications that explains that they are a division distinct from SDG&E and funded by shareholders.
- The Commission should require SDG&E to submit quarterly reports to address accounting, lobbying and marketing activities, competitively sensitive information, shared services, and governance.
- The IMD should be required to maintain a website explaining the IMD, identifying its employees, and that provides a mechanism for processing complaints about the IMD.
- The Commission should clarify that the Code of Conduct expedited complaint procedure is available for enforcement of violations of the Code of Conduct, despite the fact that the IMD is SDG&E's affiliate. SDG&E proposed a hybrid of construct of its IMD under the Code of Conduct and the Affiliate Transaction Rules, and that voluntary decision should not interfere with enforcement mechanisms.

"Competitive Choice Parties" (Shell Energy North America, the Alliance for Retail Energy markets, and the Direct Access Coalition)

- The draft resolution's existing requirement that the ATRs apply in their entirety to the IMD should be retained.
- The CPUC Energy Division's extensive data requests of SDG&E covered substantive issues that should have been made public contemporaneously to

all parties. This resulted in an unfair opportunity for SDG&E to lobby and influence the resolution, and all parties should have the opportunity to comment.

- Substantive data requests and responses should be shared publically for Advice Letters that are protested.

City of Del Mar

- The expedited complaint procedure should be available for both existent and prospective CCAs.
- While it is beneficial that the IMD will strictly comply with the Affiliate Transaction Rules, it is unclear if the IMD will be truly separate from SDG&E. Enhanced reporting and disclosure may help ensure this separation.
- No sharing of any services between the IMD and SDG&E should be permitted.

Climate Action Campaign and Sierra Club

- SB 790 and the Code of Conduct should be applied to Sempra Energy in the same manner as SDG&E.
- The language that applies the full ATRs to the IMD should be maintained.
- The IMD should not use shared resources with SDG&E that are involved with marketing, such as regulatory affairs, legal, and communications.
- SDG&E employees, directors, and officers should be prohibited from sitting on the IMD's board.
- Employees who have had access to sensitive or proprietary information in the past three years should be prohibited from transferring to the IMD.
- SDG&E or Sempra employees with prior lobbying experience should be prohibited from transferring into the IMD.

Local Energy Aggregation Network (LEAN)

- Code of Conduct Rule 13, which prohibits the sharing of services or employees involved with lobbying or marketing between the utility and it's IMD, should also be applied to departments such as public affairs, legal,

regulatory affairs, and communications because those departments are also involved in lobbying and marketing.

- The Commission should prohibit SDG&E employees who have access to sensitive or proprietary information in the past three years from transferring to the IMD.
- The Code of Conduct should apply to SDG&E's IMD consultants, contractors, vendors, and agents.
- Allowing SDG&E's officers and employees to sit on the IMD's board of directors goes against the Code of Conduct Rule 2 requirement that the IMD be "functionally separate" from the SDG&E.
- One consolidated reporting requirement for the IMD would be more efficient and clear. The draft resolution references or requires disparate reporting requirements across venues related to the IMD's use of shared services, shareholder funding and spending, employee transfers, and COC compliance issues.

SDG&E

- The findings of this draft resolution would create significant confusion under the existing ATR rules.
- Imposition of Rule II.B of the Affiliate Transaction Rules is unnecessary and contrary to the requirements of D.12-12-036. This sort of change should require a new rulemaking.
- SDG&E's IMD will not be engaged in the provision of any product that uses electricity or the provision of any services that relate to the use of electricity, and consequently should not fall under Rule II.B.
- Applying the ATR's to a company that engages in First Amendment activities raises serious concerns which could ultimately undermine the Commission's IMD frame work.

Two parties also provided letters to President Picker and Commissioner Florio regarding this draft resolution, and are summarized as follows:

San Diego Energy District Foundation

- The draft resolution does not go far enough to balance the power of utility holding companies as they seek to propagate their views on community choice.
- Pursuant to the intent of SD 790, the Code of Conduct and the expedited complaint process should be applied to all personnel, actions, and contacts of "Sempra Services Corporation."
- In order to mitigate customer confusion, the IMD should identify and disclose on all its materials, websites, and ads that its interests are the same as SDG&E, even if its funding is distinct.
- Any Sempra actions that trigger a Code of Conduct expedited complaint should also trigger a CPUC mandates for Sempra to fund a "Market Imbalance Reimbursement Fund" to reimburse pro-CCA voices in an equal amount to Sempra's anti-CCA spending for one year.

STAY COOL for Grandkids

- STAY COOL for Grandkids supported the Climate Action Campaign and Sierra Club's comments.
- Citizens deserve a level playing field, and SDG&E should not have an unfair advantage over CCA.

<u>California Public Utilities Commission (CPUC) Data Request to San Diego Gas & Electric Company (SDG&E) re: AL 2822-E</u>

1. What types of communications (e.g., flyers to specific customers, telemarketing, public meetings, e-mails; etc.) does SDG&E anticipate making, via its proposed Independent Marketing Division (IMD) that might be "communications that could be construed as marketing or lobbying under D.12-12-036"?

SDG&E Response to Question 1:

SDG&E does not intend to make "communications that could be construed as marketing or lobbying under D.12-12-036" via the IMD or otherwise. The IMD will be a separate entity that will make its own determinations about its communications and speech.

2. What specifically does SDG&E anticipate its IMD representing and/or communicating to the public that could be construed as a violation of the Code of Conduct (COC), but for the IMD? In other words, what is the IMD going to be saying to the public regarding CCAs?

SDG&E Response to Question 2:

See response to No. 1, above. The IMD will act as a separate entity from SDG&E, consistent with the CCA Code of Conduct. Because it will determine its own communication strategy, SDG&E cannot predict what the IMD will say to the public regarding CCAs. SDG&E will comply with the CCA Code of Conduct.

3. What training to comply with the COC and Affiliate Transaction Rules (ATRs) will be provided to staff of the IMD? If possible please provide these training materials, including any existing drafts.

SDG&E Response to Question 3:

The IMD staff will receive ATR and COC training on an annual basis, consistent with SDG&E's practice regarding the ATRs. The training materials are attached hereto.

4. Are there and/or will there be SDG&E employees who work at Sempra corporate's physical headquarters? If so, how does SDG&E plan to maintain that its IMD will be functionally and physically separate from its ratepayer funded divisions when it intends to house its IMD at its parent company, Sempra's, headquarters, given that Sempra and SDG&E employees often publicly represent the two entities interchangeably?

SDG&E Response to Question 4:

The IMD will be functionally and physically separate from its ratepayer funded divisions in the same manner by which SDG&E handles separation under the ATRs as well as the COC. Furthermore, the employees of the IMD will not be SDG&E employees. SDG&E's currently effective ATR Compliance Plan states as follows:

> ***V.C. Sharing of Plant, Facilities, Equipment or Costs***
> *A utility shall not share office space, office equipment, services, and systems with its affiliates, nor shall a utility access the computer or information systems of its affiliates or allow its affiliates to access its computer or information systems, except to the extent*

> *appropriate to perform shared corporate support functions permitted under Rule V.E. of these Rules. Physical separation required by this rule shall be accomplished preferably by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. This provision does not preclude a utility from offering a joint service provided this service is authorized by the Commission and is available to all non-affiliated service providers on the same terms and conditions (e.g., joint billing services pursuant to D.97-05-039).*

Furthermore, the Code of Conduct Rule 11 states:

> *An electrical corporation shall not share office space equipment, services, and systems with its independent marketing division, nor shall an electrical corporation access the computer or information systems of its independent marketing division or allow its independent marketing division to access its computer or information systems, except to the extent appropriate to perform shared corporate support functions. Physical separation required by this rule shall be accomplished by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. (See D.97-12-088, App. A, Part V.C.)*

Procedures and Mechanisms to Promote Compliance Facilities Separation:
As of the filing of this report, SDG&E's headquarters are located at the Century Park facility in San Diego. No covered affiliate personnel share this facility. The Century Park facility has workspace for Sempra Energy Corporate and SoCalGas shared service personnel.

In addition to the Century Park Facility, SDG&E has some shared service personnel occupy separate suites (restricted card access) in Sempra Energy's Headquarters ("HQ") building and are located on a separate floor away from all covered affiliate employees. All building operations support areas accessed by maintenance personnel and porters to support these daily building operations and functions remain in locked areas of the HQ building and are card-key controlled. Access throughout the entire HQ facility is card-key controlled to support and maintain continuous separation between the shared service personnel and all other building tenants.

5. Regarding COC Rule 5, what procedures does SDG&E have in place to ensure compliance? In particular, please address how an employee of Sempra or SDG&E, who transfers to the IMD, would be prevented from sharing with the IMD, the confidential or competitively sensitive information that they possess from their prior position?

SDG&E Response to Question 5:

SDG&E conducts exit interviews with all employees that transfer from SDG&E to Sempra Energy Corporate or an affiliate. During the exit interview, employees will be required to sign an anti-conduit statement acknowledging that they will not share confidential utility information to benefit the IMD. In addition to the exit interview, an "asset inventory" will be conducted to review material that the employee requests to take to the IMD. SDG&E will retain the assets that may not be transferred pursuant to the Rules.

6. Please describe the IMD's proposed place within the Sempra Utilities' corporate structure. Could use a simple org chart format

SDG&E Response to Question 6:

The IMD is will be a subsidiary of Sempra Energy. As noted in our supplemental Compliance filing, the IMD will be organized as Sempra Services Corporation, which is a subsidiary of Sempra Energy. Please refer to the attached organizational chart demonstrating the corpoprate structure of Sempra Services Corporation.

7. Please provide an organizational chart for the IMD, with proposed employee names and titles listed. In addition, for each employee, provide a historic record of where each employee was employed prior to the IMD.

SDG&E Response to Question 7:

The organizational structure of this entity is still being finalized but it is anticipated that Sempra Services Corporation will have an officer, a director, and two manager-level employees. Please refer to the attached draft organizational chart for an example structure.

8. COC Rule 13 prohibits sharing employees between the utility and the IMD "who are themselves involved in marketing or lobbying." However, on page 11 and 12 of its Compliance Plan, SDG&E proposes to share "regulatory affairs, lobbying, [and] legal …" How does this comply with COC Rule 13? Was this intended to be corporate shared functions?

SDG&E Response to Question 8:

SDG&E intended to list permissible shared services. COC Rule 13 allows shared services except for employees engaged in marketing and lobbying otherwise prohibited by the COC. Thus, lobbying, as covered by the COC, will not be a shared service.

9. Are SDG&E Board of Directors members allowed to be employed by the IMD or sit on the IMD Board? If so, provide the legal authority that allows such a relationship?

SDG&E Response to Question 9:

At this time, Sempra Services Corporation will not have an SDG&E Director on its Board of Directors or as an employee. And there is no plan for that to happen. Note that this is permissible, however, so long as the Director is not personally engaged in marketing or lobbying (as opposed to acting in an oversight and governance capacity).

COC Rule 15 states, "Except as permitted in Rule 13 of this Code of Conduct, employees of an electrical corporation's independent marketing division shall not otherwise be employed by the electrical corporation." Rule 13 allows this employment for governance and oversight, which is the function of a Director. It states, "As a general principle, an electrical corporation may share with its independent marketing division joint corporate oversight, governance, support systems and support personnel; provided that support personnel shall not include any persons who are themselves involved in marketing or lobbying."

10. What kind of monitoring will SDG&E or Sempra conduct of the IMD to ensure compliance with the COC and ATRs?

SDG&E Response to Question 10:

This will be addressed with controls, such as internal audits and compliance reviews.

11. On what basis does SDG&E contend that the IMD is not covered by Affiliate Transaction Rule II.B? Please provide a detailed response that clearly indicates SDG&E's rationale and assumptions, as well as citations to any referenced legal authority.

SDG&E Response to Question 11:

All affiliates are "covered" by ATR Rule 11.B. Some affiliates are subject to all of the ATRs and other affiliates are subject to a subset of the ATRs. The question turns on whether the affiliate offers an energy-related product or service to the market. Sempra Services Corporation will not sell any product or service, and will not be a market participant in the California energy markets. Accordingly, it would be subject to a subset of the ATRs. The Commission explained this in Resolution E-3548. There, the Commission rejected the notion that an entity is subject to all of the ATRs simply because it has energy expertise. In that proceeding, parties argued that SDG&E's then-parent company, Enova, was subject to all of the ATRs. The parties contended that "Enova clearly provides services that relate to energy, that its employees are actively involved in strategic planning and 'in the development of new ventures….'"[9] In response, SDG&E explained that:

> …the mere presence of energy experts in the parent company 'does not mean that the parent company provides energy or energy-related products or services.' If this were so…all energy holding companies would necessarily fall under the ambit of these Rules.[10]

The Commission agreed with SDG&E and concluded that the parties:

> …**presented no evidence that the holding company actually produces a product or service to any particular market**. These Rules are designed to foster competition in new and growing energy markets engendered by the restructuring of the electric industry. If Enova, or the new parent of the merging Enova and Pacific Enterprises, Sempra, **participates in any of these markets by providing a product which uses energy or a service which is related to energy**, it will become an 'affiliate' for the purpose of these Rules (emphasis added).[11]

In Resolution G-3461, the Commission confirmed that an affiliate engaging in a business that simply relates to energy is not subject to all of the ATRs. In that Resolution, the Commission addressed the classification of certain Pacific Gas and Electric Company ("PG&E") affiliates. Two of the affiliates, PEC II and PEC III, provided financing services to companies engaged in the rooftop-solar business. The Commission

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[9] Resolution E-3548 at 9, *citing* Protest at 3.

[10] *Id.*, *citing* Response at 4-5.

[11] *Id.*

concluded that, although PEC II and PEC III were affiliates of PG&E and invest in energy businesses, they were not subject to all of the ATRs. Thus, an affiliate is not subject to all of the ATRs simply because it engages in activities that relate to energy. The question is whether the entity offers an energy product or service. Here, the IMD will be engaged in communications and lobbying. The topics may relate to energy. Accordingly, just like PEC II and PEC III, a subset of the ATRs will apply to Sempra Services Corporation.

12. Describe the plan or process to confirm the IMD's contractors and consultants comply with the COC and the ATRs?

SDG&E Response to Question 12:

As with the ATRs, internal controls will include audits and compliance reviews. The IMD and SDG&E are required not to use their own contractors or consultants in a manner that would circumvent the COC. SDG&E includes ATR language in its major contracts with vendors. SDG&E anticipates adding COC language. The IMD will include ATR and COC language in its major contracts with vendors.

13. Does SDG&E interpret the IMD to be subject to the expedited complaint procedure described in the COC or ATRs?

SDG&E Response to Question 13:

With respect to complaints that arise from a CCA, then the COC complaint procedure would apply. To the extent the complaint alleges a violation of the ATRs (*e.g.*, it is alleged that the IMD was improperly used as a conduit to send non-public utility information to an Energy Marketing Affiliate) then the complaint procedure in the ATRs would apply.

14. How does Sempra/IMD plan to <u>identify</u> that the communications coming from the IMD are not representative of, or paid for by, SDG&E?

SDG&E Response to Question 14:

The IMD will be subject to the same ATRs previously discussed and therefore it will maintain separate books and accounts, funded by shareholders of Sempra Energy. There will be no allocation of costs from SSC to SDG&E.

15. Under SDG&E's interpretation of the COC and ATRs, could the IMD share competitively sensitive information with Sempra (as opposed to SDG&E), or vice-versa? Why not.

SDG&E Response to Question 15:

The IMD will not be in a position to obtain non-public competitive information from SDG&E that could be shared with Sempra or any other entity. However, to the extent that the IMD otherwise obtains or develops its own competitive information, it may share that information with Sempra. There is no rule or law prohibiting the sharing of information under these circumstances. Further, Sempra has oversight responsibilities. Sempra may not act as a conduit of information to the IMD for information that cannot be provided to the IMD by SDG&E.

16. What specific procedures does SDG&E have in place to ensure compliance with the reporting requirements in COC Rules 4 and 13?

SDG&E Response to Question 16:

SDG&E will employ the same procedures set forth in its effective ATR Compliance Plan.

17. How do SDG&E and the IMD plan to comply with D.15-01-051, Ordering Paragraph 18? It states:

> Each of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company must comply with the Community Choice Aggregation (CCA) Code of Conduct. Any CCA marketing plans filed pursuant to the CCA Code of Conduct should demonstrate to the Commission that the Green Tariff Shared Renewables (GTSR) marketing will be compliant, ensuring that GTSR products will not be marketed in CCA territory in a way that is anticompetitive.

SDG&E Response to Question 17:

SDG&E will comply by implementing its COC compliance plan, which is the subject of this Advice Letter.

18. Does SDG&E plan to file a separate Advice Letter notifying the Commission of the Creation of a New Affiliate?

SDG&E Response to Question 18:

As noted above, the IMD will be organized under an exisiting affiliate of Sempra Energy (the IMD will operate under the existing Sempra Services Corporation) so no advice letter is required. To the extent a new affiliate is created, then SDG&E would follow its ATR Compliance Plan by notifying the Commission.

19. Has SDG&E undertaken any marketing or lobbying activities against CCAs since the filing of this Advice Letter?

SDG&E Response to Question 19:

No.

RESPONSES TO QUESTIONS RAISED IN CALL WITH ENERGY DIVISION REGARDING SDG&E ADVICE LETTER 2822-E

I. An IMD Is Not Covered By All of the Affiliate Transaction Rules Under Section II.B.

Energy Division has raised a question as to whether section II.B. of the Commission's Affiliate Transaction Rules (ATRs) apply to an Independent Marketing Affiliate (IMD). Section II.B. limits the applicability of all of the ATRs to affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity unless the rules explicitly provide for broader applicability as follows:

> *For purposes of an electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity. . . . However, regardless of the foregoing, where explicitly provided, these Rules also apply to a utility's parent holding company and to all of its affiliates, whether or not they engage in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity.*[1]

The IMD will not be engaged in the provision of any product that uses electricity or provision of services that relate to the use of electricity.[2] Instead, it will be engaged in a set of activities that the Commission

[1] See, D.06-12-029, Appendix 3, at p. 3.

[2] See, SDG&E's Response to Data Request 11 of the California Public Utilities Commission (CPUC) Data Request to San Diego Gas & Electric Company (SDG&E) re: AL 2822-E:

"All affiliates are "covered" by ATR Rule 11.B. Some affiliates are subject to all of the ATRs and other affiliates are subject to a subset of the ATRs. The question turns on whether the affiliate offers an energy-related product or service to the market. To the extent the IMD engages solely in the communications area, it would be subject to a subset of the ATRs. The Commission has spoken to this issue.

In Resolution E-3548, the Commission rejected the notion that an entity is subject to all of the ATRs simply by being energy experts and the like. In that proceeding, parties argued that SDG&E's then-parent company, Enova, was subject to all of the ATRs. The parties contended that "Enova clearly provides services that relate to energy, that its employees are actively involved in strategic planning and 'in the development of new ventures….'" In response, SDG&E explained that:

> *…the mere presence of energy experts in the parent company 'does not mean that the parent company provides energy or energy-related products or services.' If this were so…all energy holding companies would necessarily fall under the ambit of these Rules.*

The Commission agreed with SDG&E and concluded that the parties:

> ***…presented no evidence that the holding company actually produces a product or service to any particular market.*** *These Rules are designed to foster competition in new and growing energy markets engendered by the restructuring of the electric industry. If Enova, or the new parent of the merging Enova and Pacific Enterprises, Sempra, participates in any of these markets by providing a product which uses energy or a service which is related to energy, it will become an 'affiliate' for the purpose of these Rules (emphasis added).*

In Resolution G-3461, the Commission again confirmed that an affiliate engaging in a business that simply relates to energy is not subject to all of the ATRs. In that Resolution, the Commission addressed the classification of certain Pacific Gas and Electric Company ("PG&E") affiliates. Two of the affiliates, PEC II and PEC III, provided financing services to companies engaged in the rooftop-solar business. The Commission concluded that, although PEC II and PEC III were affiliates of PG&E and invest in energy businesses, they were not subject to all of the ATRs. Thus, an affiliate is not subject to all of the ATRs simply because it engages in activities that relate to energy. The question is whether the entity offers an energy product or service. Here, the IMD is

engaged in a communications/information business. The topics may involve energy. Accordingly, a subset of the ATRs applies to the IMD."

specifically addressed through its adoption of a Community Choice Aggregation (CCA) Code of Conduct (COC) in D. 12-12-036. In that decision, the Commission summarized its order as follows:

> *This decision adopts a Code of Conduct governing the treatment of Community Choice Aggregators by electrical corporations, and establishes an expedited complaint procedure applicable to complaints filed by Community Choice Aggregators against such corporations. These new rules and procedures are intended to provide Community Choice Aggregators with the opportunity to compete on a fair and equal basis with other load serving entities, and to prevent investor-owned electric utilities from using their position or market power to undermine the development or operation of aggregators. This Code of Conduct will also assist customers by enhancing their ability to make educated choices among authorized electric providers. The Code of Conduct and complaint procedure contained in Attachment 1 to this decision have been developed in compliance with Senate Bill 790, (Leno), Stats 2011, ch. 599, which was adopted by the California State Legislature in 2011.*[3]

The Commission explained that it was acting pursuant to its statutory mandate under SB790 and that the rules it was adopting were designed to avoid placing more restrictions than necessary on any LSE:

> *In SB 790, the legislature directed the Commission to develop rules and procedures that "facilitate the development of community choice aggregation programs, … foster fair competition, and … protect against cross-subsidization paid by ratepayers." [Footnote omitted.] In developing the Code of Conduct and enforcement mechanisms adopted here, our goal, consistent with this statute, is to provide CCAs with the opportunity to compete on a fair and equal basis with other load serving entities (LSEs), and to prevent utilities from using their position or market power to gain unfair advantages. Ultimately, we believe that such a Code of Conduct should benefit customers by preserving their ability to make educated choices among authorized electric providers. Unfair practices by any market participant, and particularly one with market power, may result in a reduction in customer choices, contrary to the public interest.*
>
> ***We have endeavored to craft rules that accomplish the goals of SB 790 without placing more restrictions than necessary on any LSE.*** *This approach maintains an appropriate balance between the needs of different electricity providers, thereby preserving customer choice. This section describes the revised rules contained in Attachment 1 and adopted in this decision, and explains the rationale for changes from the modified draft rules on which the parties commented earlier in this proceeding.* [4]

Where the Commission has developed a record, issued a decision, and adopted a Code of Conduct that is specifically intended to address marketing and/or lobbying activities relative to CCA, it could not have also intended to subject utility LSEs to section II.B. of the ATRs. This is particularly the case here, where the Commission has indicated that the CCA COC was designed, in part, to avoid "placing more

[3] See, D. 12-12-036, at p.
[4] See, D. 12-1-036, at p. 6

restrictions than necessary on any LSE." [5] Indeed, there would have been no need for the COC if the IMD was a "covered affiliate" subject to all of the ATRs.

However, all affiliates, including the IMD, are subject to a subset of the ATRs. This is due to the language in Rule II.B. that states, "*However, regardless of the foregoing, where explicitly provided, these Rules also apply to a utility's parent holding company and to all of its affiliates, whether or not they engage in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity.*" This means, for instance, the IMD cannot be used by SDG&E as a means to circumvent the ATRs. As an example, SDG&E could not provide non-public utility information to the IMD for the purpose of having the IMD pass along that information to a "covered affiliate" that is subject to all of the ATRs.

The CCA COC covers the majority of subjects addressed in the ATRs, and includes analogous provisions to provisions that cover energy affiliates as defined under section II.B.:

- Non-discriminatory access to customer information (ATR: IV.A.; COC:)
- Access to non-public utility information (ATR: I.V.B.; COC: 5, 8)
- Non-discriminatory access to utility services (ATR: III.B.2,3,4, and 5; COC: 7, 14, 17, 18, 20)
- Separation (ATR: V; COC:)
    - Corporate entities (ATR V.A.; COC:)
    - Books and records (ATR: V.B.; CO: 10)
    - Sharing of Plant, Facilities Equipment or Costs (ATR: V.C.; COC: 11)
    - Joint Purchases (ATR: V.D.; COC: 12)
    - Corporate Support (ATR: V.E.; COC: 4, 13)
    - Employees (ATR: V.G.; COC: 15, 16)
    - Regulatory Oversight (ATR: VI.; COC: 21, 22, 23)[6]

The Commission clearly imposed ATR-type restrictions on IMDs that were crafted specifically for this purpose: to address concerns about the affiliate relationship with the IMD. However, unlike the ATRs, which are designed to cover utility affiliates, the CCA COC applies to IMDs, which can be located within the utility, as an independent division.[7] Moreover, D.12-12-036 does not include any direction that IMDs be covered by all of the ATRs. The fact that the Commission did not state any intention to impose all of the ATRs on IMDs in D.12-12-036 makes it clear that the ATRs were only intended to apply to IMDs, "where explicitly provided [that] these Rules also apply to a utility's parent holding company and to all of its affiliates, whether or not they engage in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity."[8]

[5] See, D. 12-1-036, at p. 6.
[6] References are to the ATRs as modified in D. 06-12-029, Attachment A and the CCA COC adopted in D.12-12-036, Attachment
[7] See, D. 12-12-036, at p. 12-13; California Public Utilities Code, Section 707(a)(1).
[8] See, D.06-12-029, Appendix 3, at p. 3.

II. SDG&E Has Already Complied with D.15-01-051 With Respect to Filing of its Green Tariff Shared Renewables Program Marketing Implementation Plan

Energy Division has raised a question concerning the filing of a marketing plan by the IMD regarding the marketing of SDG&E's Green Tariff Shred Renewables (GTSR) program that was authorized in D.15-01-051. As is discussed in greater detail below, neither D.15-01-051, the decision authorizing the GTSR program, nor D.12-12-036, the decision adopting the Community Choice Aggregation (CCA) Code of Conduct (COC), require an IMD to file a marketing plan. This is consistent with California Public Utilities Code Section 314(b) which limits the Commission's authority to inspect books, records and other documents of utility affiliates to those with respect to transactions between the affiliate and the electrical corporation. However, D. 15-01-051 does require utilities to file a GTSR Marketing Implementation Plan, which SDG&E did pursuant to a tier 3 Advice Letter on May 13, 2015.[9]

In D.15-01-051, the Commission authorized utilities to offer a GTSR program, subject to certain limitations and requirements, including a requirement that utilities submit for approval their proposed GTSR Marketing Implementation Plans. In its GTSR decision, the Commission rejected concerns that utility use of bill inserts could be detrimental to CCAs but agreed that IOU marketing plans must include a description of how the IOUs will avoid selective marketing in areas where CCA exist or where a CCA implementation plan has been adopted by a local authority:

> *Of the additional protections recommended by ORA, we agree that prohibiting bill inserts would provide protection for the CCAs, but we do not see such a prohibition as a customer protection. There is no basis for not allowing IOUs to include information on new tariffs with customer bills. Therefore, the IOUs may use bill inserts to market their GTSR Program. The IOUs are, of course, required to comply with the CCA Code of Conduct. [Footnote omitted.] It is noteworthy, given MCE's concerns about bill inserts, that the CCA Code of Conduct recognizes that "[c]ommunications that are part of a specific program that is authorized or approved" by this Commission are not part of the 'marketing' covered by the CCA Code of Conduct. [Footnote omitted.] To alleviate the concerns of CCAs, however, we require that marketing plans include a description of* ***how the IOUs*** *will avoid selective marketing in areas where CCA exist or where a CCA implementation plan has been adopted by a local authority.*[10]

The forgoing discussion of GTSR marketing activities focuses exclusively on potential marketing efforts by IOUs. As a result, Conclusion of Law 63 is focused on IOU marketing plans and budgets ("63. The IOUs should propose more detailed marketing plans and budgets in a Tier 3 Advice Letter, and should continue to file marketing plans and budgets annually"). Similarly, Conclusion of Law 66 requires the IOUs to comply with the CCA Code of Conduct ("66. The IOUs should be required to adhere to the CCA Code of Conduct when marketing the GTSR Program"). Ordering Paragraph 2 requires IOUs to submit Green Tariff marketing plans. Ordering Paragraph 18 requires compliance with the CCA COC by IOUs:

[9] SDG&E AL 2744-E, which was approved by the Commission in Resolution E-4734, issued October 2, 2015.
[10] See, D. 15-01-051, at pp. 137-138.

> "*18. Each of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company must comply with the Community Choice Aggregation (CCA) Code of Conduct. Any CCA marketing plans filed pursuant to the CCA Code of Conduct should demonstrate to the Commission that the Green Tariff Shared Renewables (GTSR) marketing will be compliant, ensuring that GTSR products will not be marketed in CCA territory in a way that is anticompetitive.*"

The forgoing Ordering Paragraph implements the Commission's decision, "To alleviate the concerns of CCAs, however, we require that marketing plans include a description of ***how the IOUs*** will avoid selective marketing in areas where CCA exist or where a CCA implementation plan has been adopted by a local authority."[11] Here, again, the focus is on activities by IOUs.[12]

SDG&E submitted its Green Tariff Shared Renewables program Marketing Implementation Plan for approval under its Tier 3 Advice Letter 2744-E on May 13, 2015, and its marketing Implementation Plan was approved in Resolution E-4734 on October 1, 2015.

Finally, the Commission's authority to inspect books, records and other documents of a utility affiliate is limited to documents regarding transactions between the utility and the affiliate. In that regard, Public Utilities Code Section 314(b) provides:

> *(b) Subdivision (a) also applies to inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, an electrical, gas, or telephone corporation, or a water corporation that has 2,000 or more service connections,* ***with respect to any transaction between the*** *water,* ***electrical****, gas, or telephone* ***corporation and the*** *subsidiary,* ***affiliate****, or holding corporation on any matter that*

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[11] See, D. 15-01-051, at pp. 137-138 (emphasis added).

[12] Ordering Paragraph 18 of D.15-01-051 also references the CCA COC. In that regard, it is important to note that the focus of marketing restrictions adopted in the CCA COC though D.12-12-036 is also on utilities:

> *. . . the Code of Conduct adopted in this decision defines and places limits on* ***utility*** *marketing and lobbying activities that could discourage exploration of or interest in a CCA.*[12]

Public Utilities Code Section 707, which was enacted pursuant to the provisions of SB790, similarly focuses restrictions on permissible CCA marketing and lobbying activities on activities undertaken by electrical corporations. For example, section 707 requires that the CCA COC:

> "*Ensure that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions*."

Section 707 also requires the Commission to ensure that the CCA COC:

> "*Limit the electrical corporation's independent marketing division's use of support services from the electrical corporation's ratepayer-funded divisions, and ensure that the electrical corporation's independent marketing division is allocated costs of any permissible support services from the electrical corporation's ratepayer-funded divisions on a fully allocated embedded cost basis, providing detailed public reports of such use*."

In both of the forgoing respects, Section 707 is focused on utility marketing activities.

> *might adversely affect the interests of the ratepayers of the water, electrical, gas, or telephone corporation. (See, California Public Utilities Coe Section 314(b), emphasis added.)*

A marketing plan of an IMD is not a document, "with respect to any transaction between," an electrical corporation and an affiliated IMD. Instead, it is a plan for the exercise by the IMD of its Constitutional free speech rights, created and implemented independently from the electrical corporation.

Follow-Up Question on AL 2822-E
Tuesday, March 15, 2016:

Hi Will,

As discussed, following is SDG&E's response to Energy Division's data request regarding SDG&E's demonstration of compliance with the Green Tariff Shared Renewables marketing requirements.

> *SDG&E has also already filed and received approval of a Green Tariff Shared Renewables Marketing Plan, as required in D.15-01-051. (See Resolution, E-4734, issued October 2, 2015.) SDG&E's GTSR Marketing Plan explains how SDG&E will avoid selective marketing in areas where CCA exist or where a CCA implementation plan has been adopted by a local authority. SDG&E's CCA COC explains how SDG&E will comply with all requirements of D. 12-12-036 and includes SDG&E's commitment not to market or lobby against CCA in any areas where the CCA exists or where a CCA implementation plan has been adopted by a local authority. SDG&E has also submitted a declaration in compliance with Rule 22 of the Code of Conduct set forth in Attachment 1 of Decision D. 12-12-036, confirming that SDG&E does not intend to market or lobby against any CCAs. (See SDG&E Advice Letter 2467-E.) SDG&E will comply with every provision of its GTSR Marketing Plan as well as its CCA COC.*

We hope this resolves the outstanding question you pose below and look forward to the next steps. Please contact me if you need anything else.

Kind Regards,

Kellen

Kellen C. Gill

California Regulatory Affairs
San Diego Gas & Electric

Office: (619) 696-2972 Mailing Address: SDG&E CP3-2F, 8330 Century Park Ct., San Diego, CA 92123-1530
E-mail: KGill@semprautilities.com

From: Maguire, William [mailto:William.Maguire@cpuc.ca.gov]
Sent: Tuesday, April 19, 2016 4:55 PM
To: Gill, Kellen
Subject: Follow-Up Question on AL 2822-E

Follow up question:

In its April 1 statement, SDG&E states that "neither D.15-05-051… nor…the Code of Conduct require an IMD to file a marketing plan." It also states that it has already submitted its Green Tariff Shared Renewable Marketing Implementation Plan in Advice Letter 2744-E, approved by Commission Resolution E-4734. These statements are true. But, if SDG&E wishes to market or lobby against CCAs, it is separately required to file a CCA Code of Conduct plan, as it has done in AL 2822-E. That is what is contemplated by Ordering Paragraph 18 from D.15-05-051 where it refers to "[a]ny CCA marketing plans filed pursuant to the CCA Code of Conduct…"

To be sure, look at p. 153 of D.15-05-051, where is states: "In order to ensure that marketing of the GTSR Program complies with the CCA Code of Conduct, each of the three IOUs is hereby **directed** to include GTSR marketing in any CCA Code of Conduct plan filed in the future. All selective marketing in current or potential CCA territories[footnote omitted] is prohibited [emphasis added]."

What else could it be referring but the CCA Code of Conduct Compliance Plan you have submitted in AL 2822-E. SDG&E needs to supplement its Compliance Plan to "demonstrate to the Commission that the Green Tariff Shared Renewables (GTSR) marketing will be compliant, ensuring that GTSR products will not be marketed in CCA territory in a way that is anticompetitive." See D. 15-05-051 at Ordering Paragraph 18.

It may be that all the required demonstrations were already in AL 2744-E. However, AL 2822-E needs to at least make reference to them and likely demonstrate how, in changed circumstances, SDG&E plans to comply.

Best,

Will Maguire
Regulatory Analyst
Energy Division | Market Structure and Design
California Public Utilities Commission
505 Van Ness Ave | San Francisco, CA 94102
(415) 703-2642 | william.maguire@cpuc.ca.gov

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