



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company and San Diego Gas & Electric Company for approval of Their Separate Emerging Renewable Resource Program.

Application No. 07-07-015

**REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES
ON THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY
AND SAN DIEGO GAS AND ELECTRIC COMPANY FOR APPROVAL OF
THEIR SEPARATE EMERGING RENEWABLE RESOURCE PROGRAM**

I. INTRODUCTION

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the schedule set by Administrative Law Judge (ALJ) DeBerry on October 30, 2007, the Division of Ratepayer Advocates (DRA) submits the following reply brief on the Application of Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E) for approval of their separate emerging renewable resource program (ERRP).

PG&E and SDG&E filed a joint opening brief and the Independent Energy Producers (IEP) also filed an opening brief. Both opening briefs like DRA's opening brief seek to define the parameters of the ERRP without opposing the entire program. However, there are discrete differences in the parties' recommendations. DRA's reply brief addresses some of these differences.

II. DRA'S RESPONSE TO OPENING BRIEF OF PG&E AND SDG&E

PG&E and SDG&E make the same recommendations in their Application for their opening brief. Thus, they seek approval of \$30 million and \$15 million dollar budgets respectively, Commission review and approval of ERRP projects through Tier 1 advice

letters and recovery of ERRP expenditures as an electric energy procurement expense. DRA supports these requests upon the conditions set forth in DRA's opening brief.

The Commission does not have to make the findings PG&E and SDG&E recommended in their opening briefs in order to approve the ERRP Application. In addition, DRA would like to clarify its position respecting the role of the Procurement Review Group (PRG) in the ERRP, the extent of the Emerging Renewables Coordinating Council's (ERRCC) involvement in project selection and ratepayer's interest in any intellectual property (IP) developed in the program.

A. PG&E AND SDG&E'S RECOMMENDED FINDINGS

PG&E and SDG&E recommend that the Commission should find as follows in approving the ERRP Application:

- The ERRP has the potential to accelerate the introduction of additional renewable energy resources and help drive the cost curve for targeted emerging renewable technologies and resources.
- The potential benefits of utility customer funding of the ERRP will accrue to utility customers.
- The ERRP structure and process maximizes the potential benefits of ERRP funding.
- Utility customer interests are adequately protected through the use of the Coordinating Council the Procurement Review Group, and the use of the Advice Letter Process to approve program expenditures.
- The initial ERRP projects proposed by PG&E and SDG&E should be approved.
- The recovery of ERRP costs in the ERRA should be approved.

(PG&E and SDG&E's Opening Brief, p.7.)

The Commission should not make all these findings because they are not necessary for the Commission approval of the ERRP Application. Only recommended findings numbers 1, 6 and 5 may be supported by the record of this proceeding. However, to hold that the benefits of the ERRP accrue only to customers as opposed to

the shareholders and the market, as a whole, or to find that the structure of the ERRP and its Coordinating Council, ensure more adequate protection for customers is mostly conjecture and not supported by substantial evidence in light of the whole record of this proceeding. DRA has maintained that unless the conditions proposed in DRA's opening brief are adopted by the Commission decision in this proceeding, the current structure of the ERRP and the ERRCC may not offer the best protection for ratepayers.

Further, DRA is concerned that Southern California Edison (SCE) may claim the findings PG&E and SDG&E propose in their opening brief as precedent for setting up its own emerging renewable resources program with very different attributes.

B. PROCUREMENT REVIEW GROUPS

The Commission should clarify that the PRG does not add any protective elements to the interests of customers in the ERRP. This clarification will ensure that the ERRP decision does not set an unnecessary precedent that clothes PRGs with a substantive role in any respect. Even the applicants' claim that "the PRG role is advisory"¹ may be subject to a dispute about the role of the PRGs, and such disputes should be avoided in this proceeding.

PRGs were created primarily to review utility procurement proposals that may be expedited in the regulatory process, and the utilities have the discretion not to submit items to the PRGs. The ERRP in its proper context is not a procurement program and utilities should not be compelled to present ERRP projects to the PRG as well as the ERRCC. While DRA would like PG&E and SDG&E to present their ERRP projects to the PRGs, DRA believes they should have the complete discretion to decide whether to make such a presentation to the PRGs.

The California Energy Commission (CEC) has strongly objected to the PRG process. The CEC stopped participating in the process on principle stating that such participation was inconsistent with the CEC's open decision making processes. To

¹ PG&E and SDG&E's (hereinafter also referred to as "Applicants") Opening Brief, page 13.

include the CEC in the ERRCC while making the PRGs a required step in the process for reviewing ERRP projects might discourage the CEC's participation in the ERRCC. This difference in the membership of the two entities may lead to a situation where the support of one entity is used to discredit the opposition of the other entity.

C. ERRCC'S INVOLVEMENT IN PROJECT RECOMMENDATION

PG&E and SDG&E appear to construe the limitations on the Coordinating Council's responsibilities too broadly. Specifically, their opening brief states:

Counsel for DRA distinguished the consultative role of the Coordinating Council from the discretionary role of the utilities and state that "DRA does not want to overstep the discretion of the utilities in making determinations as to what is (an appropriate ERRP project.)"². PG&E and SDG&E agree with DRA's limitations on the Coordinating Council's responsibilities.

(PG&E and SDG&E's Opening Brief, p.12.)

DRA expects the utilities will have the sole discretion to identify projects they want to bring to the Coordinating Council, but beyond this limitation, DRA's opening brief stated the scope of the Coordinating Council roles DRA would support as a condition of the ERRP. Any attempt to construe DRA's statements in the hearing room as a limitation on the Coordinating Council's roles should be done in the context of the argument presented in DRA's opening brief.

Thus, PG&E and SDG&E's claim that "DRA's sole concern was whether its participation on the Coordinating Council would allow it to influence the project selection process as needed to protect consumer interests"³ is wrong. DRA expects the primary determination of the best interest of consumers in the ERRP will be established in the Commission decision approving or denying the ERRP application in whole or in

² Citing: Reporters Transcript of Proceedings for the Second Prehearing Conference on October 30, 2007, page 43.

³ PG&E and SDG&E's Opening Brief, page.5.

part. DRA's role through the Coordinating Council would simply be to monitor protections established in the Commission decision and report any inconsistencies to the Commission.

D. RATEPAYER INTEREST IN ERRP INTELLECTUAL PROPERTY

PG&E and SDG&E recognize that “[i]n pursuing the ERRP project, new IP could be developed.”⁴ However, PG&E and SDG&E's proposal for the treatment of any IP resulting from the program is ambiguous.

In pursuing the ERRP project, new IP could be developed. Each project will be unique and the circumstances concerning which parties own which rights thereto and in which amounts should be dealt with as these issues present themselves. The Joint Applicants' view is that pursuant to Commission policy, any such rights to share in such newly developed IP would be owned by the sponsoring utility for the benefit of its ratepayers. ...

It is, however, totally inappropriate, as a matter of policy in this proceeding, to decide, as some suggest, that this new IP will be provided to the public at large for free for possible exploitation by private parties for their own benefit. Ratepayer funds will have been used to develop this new IP, should any be developed, and ratepayers should have the right to the benefits. How ratepayers will benefit from owning and exploiting new IP should be determined at the time IP is developed, not in an abstract way at this time.

(PG&E and SDG&E's Opening Brief, p.15.)

This proposal is ambiguous because it claims that “IP would be owned by the sponsoring utility for the benefit of its ratepayers” while arguing that “[r]atepayer funds will have been used to develop this new IP ... [and] How ratepayers will benefit from owning and exploiting new IP should be determined at the time IP is developed.” In the first instance the utilities “own” the IP and the second instance ratepayers “owning and exploiting new IP” is to be determined. The Commission should clarify this ambiguity in

the decision by finding that any new IP developed in the ERRP belongs to ratepayers in direct proportion to ratepayers' contribution to the ERRP budget. Thus, PG&E and SDG&E would be holding such new IP in trust for ratepayers subject to Commission determination on the proper treatment or dissemination of such IP in the public interest.

Equally important to determining who owns any newly developed IP, is giving notice that a new IP has been developed, different from and exclusive of the existing IP that formed the basis of the resources under demonstration. As a practical matter, only the utilities and the project contractors will have this information, and unless they make it known to the Coordinating Council, the issue might never arise. Placing PG&E and SDG&E in the role of trustees imposes upon them the fiduciary duty to inform ratepayers of any such development.

III. DRA'S RESPONSE TO IEP'S OPENING BRIEF

The IEP recommends that PG&E and SDG&E bear the costs of some of the ERRP projects just as the owners of independent power projects bear their costs, and that any information developed through the ERRP be made publicly available to the market.

One of DRA's conditions for supporting the ERRP in the opening brief is that PG&E and SDG&E shareholders contribute to their respective ERRP budgets. This condition serves the same purpose as IEP's position that "PG&E's shareholders should be at risk for portions of the study to the same extent that the shareholders or the owners of IPPs are at risk for their projects"⁵ when considered in the context of cost of service ratemaking. Investor owned utilities (IOUs) and independent power producers are not similarly exposed to market costs, even when they fairly compete against each other, because ratepayers bear the cost of services the IOUs procure for them subject to the terms of the contract and other regulatory decisions. Therefore, DRA views IEP's

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⁴ Opening Brief of PG&E and SDG&E, page 15.

⁵ Opening Brief of IEP, page 6.

recommendation for shareholder responsibility as being supportive of DRA's condition for shareholder contribution.

However, IEP's recommendation for the dissemination of information gained from the ERRP may be premature at this time. DRA recommends that such determination be made in consultation with the ERRCC when the information becomes available.

Respectfully submitted,

/s/ NOEL A. OBIORA

Noel A. Obiora
Staff Counsel

Attorney for the Office of
Ratepayer Advocates

California Public Utilities
Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-5987
Fax: (415) 703-2262

November 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document **REPLY BRIEF OF DIVISION OF RATEPAYER ADVOCATES ON THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY AND SAN DIEGO GAS AND ELECTRIC COMPANY FOR APPROVAL OF THEIR SEPARATE EMERGING RENEWABLE RESOURCE PROGRAM** in **A.07-07-015**.

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on November 29, 2007, at San Francisco, California.

/s/ ROSEMARY MENDOZA

Rosemary Mendoza

N O T I C E

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