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Decision 07-04-049 April 12, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Approval of Results of Summer 2007 Track of its New Generation Request for Offers and for Cost Recovery.	Application 06-11-007 (Filed November 15, 2006)

ORDER MODIFYING DECISION (D.) 07-01-041 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. SUMMARY

This order addresses the application for rehearing of Decision (D.) 07-01-041 (Decision) filed by the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN). As discussed below, the rehearing application filed by Californians for Renewable Energy, Inc. (CARE) will be addressed at a later date. After careful consideration of the rehearing application's claims, we conclude that neither the Decision's reasoning nor its result is in error. This order modifies the Decision to make its holdings clear, and to make them consistent with the Decision's discussion and the record. We deny rehearing of the Decision, as modified herein.

II. BACKGROUND

The Decision authorized Southern California Edison Company (SCE) to enter into an agreement with Long Beach Generation LLC (LBG). Pursuant to this agreement, LBG will repower 260 megawatts of peaking capacity at Long Beach and make this capacity available for ten years, starting on August 1, 2007. Prior to issuing

the Decision, we undertook the following proceedings on an expedited basis: we held a prehearing conference, one day of hearings, and received one round of briefs. Parties stipulated to a shortening of the comment time on the draft proposed decision, and we received Comments and Reply Comments. We afforded this particular proceeding expedited treated because it presented an opportunity to have additional capacity available in the very near term.

A timely application for rehearing of the Decision was filed by DRA and TURN. This rehearing application claims the Decision is in error in several respects. First, these parties claim that the Decision alters the planning reserve margin (PRM) established for SCE in *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050] (2004) __ Cal.P.U.C.3d __, in contravention of Public Utilities Code, section 1708.[1] The rehearing application makes further, subsidiary, allegations based on this claim. Second, the rehearing application claims that the Decision's findings are not supported by the record. Third, the rehearing application claims that we did not conduct the underlying proceedings in the manner required by law. The rehearing application asserts we did not require SCE to meet its burden of proving that the LBG contract's costs were warranted because they reduced risk. Also, according to DRA and TURN, the Decision improperly accepted into the record information furnished by SCE pursuant to Rule 13.9 of our Rules of Practice and Procedure,[2] which allows for official notice. The material in question is contained in the slides of a presentation given to us, and to the Commissioners of the California Energy Commission (CEC) by CEC staff (CEC Slides).

Other timely filings include an application for rehearing, filed by CARE, and responses to both applications for rehearing, filed by LBG and SCE. CARE's application for rehearing raises, among other things, federal preemption questions, and claims involving the California Environmental Quality Act (CEQA). LBG's response rebuts

[1] Subsequent section references will indicate the Public Utilities Code unless otherwise specified.

[2] The Commissions Rules of Practice and Procedure appear in the California Code of Regulations, title 20, commencing at section 1. In this document each reference to a "Rule" indicates the Rules of Practice and Procedure.

DRA and TURN's section 1708 claims, stating that the Decision did not effect a modification of *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], supra, and therefore the rehearing application's arguments on this issue are beside the point. LBG asserts that the Decision is supported by substantial evidence, and that SCE met its burden of proof. In addition the response claims that the law supports the inclusion of the CEC Slides in the record, and in any event, that the Commission is not obligated to follow rules of evidence so long as it protects the rights of parties in its proceedings. Finally, the LBG response disagrees with CARE's positions.

SCE's Response dismisses CARE's claims as "misplaced and wrong." (SCE Response, at p. 2.) SCE, too, claims that DRA and TURN's arguments regarding section 1708 are based on a misunderstanding of the Decision's effect. Further, SCE argues that the CEC Slides meet the requirements for judicial notice, and the Decision did not rely upon them for the truth of the matter. However, the SCE response agrees with DRA and TURN that Finding of Fact 8 is not supported by the record.

III. DISCUSSION

A. SCE's Planning Reserve Margin and Section 1708

In *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], supra, we established a 15%-17% planning reserve margin for SCE and other utilities. (*Id*., at p. 22 (slip op.).) Originally, the PRM was to be used as a measure of long-term reliability. (*Id.* at p. 21 (slip op.).) As our reliability and procurement policies became more refined, the 15%-17% reserve margin became the benchmark for year-ahead reliability. *Interim Opinion on Resource Adequacy* [D.04-10-035] (2004) __ Cal.P.U.C.3d __ establishes a year-ahead resource adequacy (RA) requirement that utilities such as SCE must acquire resources sufficient "to cover peak loads plus 15% to 17% planning reserve." (*Id.* at p. 9 (slip op.).)

The Decision explicitly notes that, in 2007, SCE expects to have a PRM of 19.1%, which is above the requirements of our RA program. (D.07-01-041, at p. 22.) However, the Decision explained that we did not consider the PRM to be dispositive of the issues before us. Rather, we stated we were facing a unique, rather than general,

resource adequacy problem in 2007, 2008 and 2009, south of "Path 26" (SP26).[3] "Is the LBG project a prudent 'insurance policy' to ensure reliability for summer 2007 through 2009[?] … [T]he debate about whether the July 2006 heat storm was an aberration or a trend continues—with no chance it will be resolved before the Commission must act on this Application…. If the unexpected happened again, would the system resources hold for summer 2007, or would reliability be unacceptably compromised." (D.07-01-041, at p. 21.) Thus, we engaged in a case-specific evaluation of the LBG contract to determine if it could reduce the risk of a potentially serious reliability problem.

The rehearing application claims that this approach contravenes section 1708. According to DRA and TURN, because *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], supra, only permits utilities to have a PRM of "up to" 17%, approving this contract amounts to a modification of that decision without providing notice to the parties in R.01-10-024, and an opportunity to be heard, as section 1708 requires. (Rehg. App., at p. 3.) The rehearing application further claims that the Decision contradicts a previous ruling that we "would not increase the PRM above 17% without developing additional record evidence on this issue." (Rehg. App., at p. 5.)

These claims do not demonstrate error because the Decision does not alter or change any of the text or holdings of *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], supra.[4] The PRM remains at 15%-17%. The Decision does not purport to change these numbers and does not make any claim to do so. For example, SCE's 2008 PRM is not raised to 19% or 20%. The Decision only concludes that SCE's contract with LBG should be approved because of that contract's ability to address

[3] In the Decision, and in the documents forming the record, the term "SP26" is used interchangeably with the term "SP15."

[4] Our decision in *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], *supra*, makes this clear. That decision points out that, "[p]lanning reserves involve a longer-term perspective." (*Id.* at p. 21 (slip op.).) The contract at issue here is specifically designed to provide capacity starting in August, 2007, less than nine months after SCE filled its original application. There is no inconsistency between the use of a 15% to 17% margin for long term planning and a different margin when considering actual operating reserves. And *Interim Opinion on Resource Adequacy* [D.04-10-035], *supra*, which applies to year-ahead planning requirements does not contain the "up to" language DRA and TURN rely upon.

weather-related and other concerns for 2007-2009. The rehearing application acknowledges as much, since it claims that the Decision results in an increase in the PRM "in effect" or "in practical terms …." (Rehg. App., at pp. 3, 4.) Yet the PRM is not even raised in practical terms. If the contract is not implemented—for example if SCE uses an "off ramp" to terminate the contract—the Decision does not place SCE under an obligation to obtain additional capacity to meet an increased PRM for 2007.

In fact, the Decision's approach is fully consistent with recent procurement policies and orders, which in turn are based on legitimate concerns about system reliability following the heat storm of 2006. For example, in *Changes to 2007 Utility Demand Response Programs* (2006) [D.06-11-049] __ Cal.P.U.C.3d __, we acknowledged "the extraordinary efforts undertaken to prevent a system compromise during July" 2006. We found that the fact that such measures became necessary meant the Commission should pursue "more aggressive" programs "as part of the broader effort to assure system reliability." (*Id.* at p. 8 (slip op.).) Similarly in Resolution (Res.) E-4028, dated October 19, 2006, we noted that "growth in electricity demand throughout the state and the July 2006 heat storm…exposed certain vulnerabilities in electric generation and transmission infrastructure." (*Id.*, at p. 3.)

Because the Decision does not modify *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], supra, the rehearing application's subsidiary claims also do not demonstrate error. The rehearing application is thus incorrect when it claims such modifications went beyond the scope of this proceeding. (Compare, Rehg. App., at pp. 5-6.) In addition, because the Decision does not change the PRM it is not inconsistent with the denial of the CAISO's petition to increase the winter PRM to 23% in *Petitions to Modify D.05-10-042* (2006) [D.06-12-037] __ Cal.P.U.C.3d __.[5] The rehearing application is also incorrect when it claims that the August 15, 2006 Assigned

[5] The rehearing application also overstates the holding in that decision. *Petitions to Modify D.05-10-042* [D.06-12-037], *supra*, did not hold that unless it developed a further record the Commission would not increase the PRM. Rather the Commission found that the CAISO's "petition is procedurally deficient and should therefore be denied." (*Id.* at p. 10 (slip op.).)

Commissioner's Ruling issued by President Peevey in R.05-12-013 and R.06-02-013 (August ACR) contravenes section 1708 as well. (Rehg. App., at p. 4, fn 5.) With respect to the August ACR, section 1731, subdivision (b) requires parties to file a timely application for rehearing if they wish to allege a Commission order or decision is in error. The orders implementing the ACR were adopted in Res. E-4028 on October 19, 2006, and Res. E-4031 on November 9, 2006, and the time for filing an application for rehearing has passed.

DRA and TURN also claim that approving the LBG contract despite the fact that SCE's reserves are forecast to be above the 15%-17% reserve margin requires us to further find that the PRM "is inadequate…." (Rehg. App., at p. 4.) We are not required to make such a finding because our Decision is not based on such a claim. Although the Decision addresses the same subject matter as the RA process, it reaches a different result, based on different considerations. The Decision makes clear that the 2006 heat storm called into question the ability of long-term assumptions to hold in the face of near-term realities. The Decision states, "it is a reality that actual loads and resources may differ from the forecasts. We cannot have certainty in advance about the weather and the availability of reserves…" (D.07-01-042, at p. 22.) Even though SCE currently meets its reserve requirements, we found we should ask if there are enough resources in 2007-2009, "to meet unexpected weather or resource availability." (*Ibid*.)

The Decision also makes findings to support this approach. Finding of Fact 11 states: "The Heat Storm of summer 2006 was unexpected and taxed the electricity resources of the state beyond what the Commission … had planned for." (D.07-01-041, at p. 28.) Finding of Fact 12 states: "A PRM is not the only measurement metric for reliability; the CEC also looks at operating reserves under adverse conditions." (*Ibid*.) Further, Finding of Fact 15 states: "Even though SCE has a predicted PRM of 19.1%, actual loads and resources may differ from forecasts." ((D.07-01-041, at p. 29.)

These findings are consistent with the record. The rebuttal testimony submitted by SCE explains that this application is supported by calculations that use the CEC's near-term forecasting techniques, which are different from the techniques used to

calculate the PRM. (Ex. 6, at pp. 2-3.) Other testimony shows that forecasts can differ. One SCE forecast assumed a more normal (1 in 2) summer, and estimated that with transmission limitations and generation outages, SCE would have 570 MW above the amount necessary to achieve a 7% reserve. Another forecast assumed more extreme weather (a 1 in 10 summer) and showed SCE's capacity falling below 7% reserves to only 40 MW above a 5% reserve. (Ex. 1, at p. 13.) With regard to this forecast, SCE's witness stated, "there is some possibility that the actual resource or load levels may differ from the assumptions used in the analysis. The additional capacity resulting from the [contract] may provide an additional layer of capacity insurance…." (*Ibid*.)

In the course of making its section 1708 contentions, the rehearing application also asserts there is a practical problem with the Decision's approval of the LBG contract. According to TURN and DRA, the LBG contract will run for 10 years, and will increase SCE's reserves for 2008-2017. Thus, the application claims the Decision may result in SCE having too high a PRM in the future, with the follow-on effect that SCE will be precluded from acquiring new resources, including preferred resources. DRA and TURN point out that one of the policy objectives of *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], *supra*, was to prevent utilities from making "short term investment decisions" that would prevent them from later acquiring preferred resources, such as demand response or energy efficiency. (*Id*. at pp. 24, 193.)

This claim raises policy, not legal, questions. The Decision acknowledges that it is designed to address a short term problem, and that addressing that problem will result in some disadvantages. The Decision approves the contract "on balance" and the determination to allow the contact "is not made with enthusiasm." (D.07-01-041, at pp. 23-24.) By considering the disadvantages of this contract and concluding that they were outweighed by the necessity "to ensure reliability for the summers of 2007 through 2009" we acted properly and legally. It is not error for us to adopt a particular result so long as the policies leading to that result are explained. The fact that the contract has

disadvantages does not make it legal error for us to approve it as long as we considered those disadvantages and explained why we did not find them to be determinative.

The rehearing application's final argument regarding the PRM states that the Decision "errs in suggesting that 17% is only a 'recommended ceiling.'" The 15%-17% reserve level was established in *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], *supra*. This language is not part of the Decision's main holding, which approves the LBG contract despite the fact that SCE's reserves already exceed the 15%-17% reserve margin. We have stated that we will "revisit aspects of the RPM" at the appropriate time. (*Petitions to Modify D.05-10-042* [D.06-12-037], *supra*, at p. 10 (slip op.).) Indeed, the question posed in the rehearing application should be considered in that forum, not here. To avoid taking on that issue, we will revise the Decision to remove the phrase, "recommended ceiling."

B. The Record, Official Notice, and the Decision's Findings

The rehearing application next addresses several evidentiary issues. DRA and TURN claim that there is no evidence to support Findings of Fact 8 or 13. The rehearing application further claims that the CEC Slides do not meet the requirements for official notice and may not be included in the record of this proceeding. In the alternative, DRA and TURN claim that the rules of official notice prevent us from relying on the information contained in the CEC slides.

Finding of Fact 8 states: "This PPA is measured against the benefits of increased capacity in SP26 and the cost of Stage 3 service interruption and the cost of back-up procurement by the CAISO." The rehearing application claims there was no evidence that compared the cost of the contract with the costs of a Stage 3 service interruption. (Rehg. App., at p. 6.) DRA and TURN also assert that the cost of back-up generation was not considered in evaluating the contract, and SCE concurs. (*Ibid*., see also, Response of SCE, at p. 8.)

We conclude that the claim regarding back-up procurement is correct. SCE states that the record does not contain evidence on this topic. A careful review of the

record did not reveal a reference to back-up procurement. Therefore, we will modify the Decision to remove the reference to back-up generation costs.

We will also modify the Decision to make findings on the undesirability of service interruptions that better reflect the discussion portion of the Decision. There, we acknowledged that a service interruption "has a cost to the individual business and residential customers who are without power, and the economy of the state as a whole…." However, we stated:

> No specific economic figures were produced in the record, so the Commission is not relying on this assumption in making this decision, but includes it as a point of reference. (D.07-01-041, at p. 23.)

Findings of Fact 8 and 18, and Conclusion of Law 5, will be modified to reflect this language.

The rehearing application also claims that Finding of Fact 13 is not supported by the record. That finding states:

> 13. The CEC Report indicates that the CAISO Southern California control area, SP26, [that includes SCE's service territory], has a 93.3% chance of avoiding a Stage 3 blackout summer 2007 without the LBG contract and SCE's other new peaking units and demand reduction programs, but with the proposed resources the probability is 99% that SP26 will have enough operating reserves under adverse conditions to avoid a Stage 3 emergency. (D.07-01-041, at pp. 28-29.)

The rehearing application claims this finding is unsupported because the information contained in the CEC Slides cannot be relied upon as part of the record. (Rehg. App., at p, 6.) This claim relies on DRA and TURN's contentions about the legal principles that apply when we take official notice of documents. The first of these claims—that the slides do not meet the requirements for official notice and therefore we erred in taking notice of them—is not correct. The standard for taking official notice of a document is set out in Rule 13.9. Under this standard, we may take official notice of matters that "may be judicially noticed by the courts of California." Those matters are listed in Evidence Code sections 451 and 452. The provision that is relevant here is

Evidence Code section 452, subdivision (c), which includes: "Official acts of the legislative, executive, and judicial departments of the United States, or any state of the United States."

The CEC Slides are an "official act." They were used to present information to the Joint Energy Action Plan (EAP) Update Meeting on December 11, 2006. That meeting was a publicly noticed meeting of Commissioners of this commission, representatives of the CAISO, and CEC Commissioners, announced in the Daily Calendar, pursuant to Rule 1.16. The proceedings of official government bodies have been held to a proper subject for judicial notice. (*Wilson v. Loew's* (1956) 142 Cal.App.2d 183, 188 (proceedings of House Committee on Un-American Activities), *Agostini v. Strycula* (1965) 231 Cal.App.2d 804, 806 (records and proceedings of San Francisco Civil Service Commission).) The CEC Slides are part of the proceedings of the EAP Update Meeting, and are posted on our web site as such.[6]

Similarly, SCE asserts that the CEC Slides constitute "official acts" of the CEC, since they form part of a report—presented by CEC staff in its official capacity—to a joint governmental body. (Response of SCE, at p. 6, citing *South Shore Land Co. v. Peterson* (1964) 226 Cal.App.2d 725, 742-746, *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 753.) LBG also asserts that courts have recognized that staff reports qualify as official acts. (Response of LBG, at p. 18, citing *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 621.) By way of contrast, it is clear that the slides are not "private acts" that are ineligible for judicial notice. (Cf., 1 Witkin, California Evidence (4th ed. 2000) Judicial Notice, §19, p. 114.) There is no question that the CEC Slides were prepared and delivered by CEC staff in an official capacity. The rehearing application, in essence, attempts to characterize the slides as private acts, stating, for

[6] The rehearing application quotes a general disclaimer appearing on the CEC's web site. We note that the CEC Slides posted on our web site as a record of the EAP meeting are not accompanied by a disclaimer. (See, <http://www.cpuc.ca.gov/static/energy/electric/energyaction+plan/061211_eappresentations.htm>, <http://www.cpuc.ca.gov/static/energy/electric/energy+action+plan/december+11-06+eap+public.ppt>.)

example, that there was no indication that the CEC formally approved the slides. Since it is clear that the CEC Slides are official, rather than private, acts, the Decision properly granted SCE's motion for official notice.

Moreover, to the extent there is a technical legal dispute about the status of the slides, we will not be bound by overly precise readings of the requirements of the Evidence Code. Public Utilities Code section 1701 provides that Commission proceedings:

> …shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

As LBG points out, Rule 1.2 specifically allows us to deviate from the Rules of Practice and Procedure "for good cause." Part of the relief requested by DRA and TURN in this instance is a grant of rehearing to determine if the CEC Slides can be admitted into evidence pursuant to Rule 13.10 rather than Rule 13.9. That approach amounts to the overly formal processing of evidence that the statute seeks to avoid. To the extent that the CEC Slides do not perfectly comply with the provisions of the Evidence Code that Rule 13.9 refers to, we will waive Rule 13.9 in the interest of efficiently handling this expedited proceeding.[7] The Decision will be so modified.

The rehearing application also claims that even if we take official notice of the CEC Slides, the Decision cannot rely on information contained in the slides because taking official notice of a government document does not establish the truth of the material contained in that document. (1 Witkin, California Evidence (4th ed. 2000)

[7] It is worth noting that no party is injured by such an approach. SCE's rebuttal testimony, dated December 5, 2006, alerted all parties to the fact that the CEC would be making a presentation on this topic on December 11, 2006. (Ex. 6, at p. 3.) SCE then filed the CEC Slides with a motion requesting official notice. DRA and TURN had the opportunity to oppose that motion. Further, DRA provided rebuttal information contesting some of the SCE's contentions about the CEC Slides. This approach does not appear to deny any party its due process rights.

Judicial Notice, §19, p. 114.) Further, DRA questioned the accuracy of the CEC Slides in its Comments on the PD. (Opening Comments of DRA to Proposed Decision, at p. 6, Attachment A.) This claim is based on an inconsistency between the discussion portion of the Decision and its findings. The Decision's Findings of Fact do not hold that the information in the CEC Slides is accurate.[8] They find that the CEC staff have taken a position, or as Finding of Fact 13 states, that "[t]he CEC report indicates…" certain chances of "avoiding a Stage 3 blackout [in] summer 2007 without the LBG contract…." (D.07-01-041, at p. 28.) We similarly took official notice of a letter (CAISO Letter) from the President and CEO of the CAISO stating that we did not accept this document "for the truth of the statements contained in them but for the fact that the representations were made in the documents." (D.07-01-041, at pp. 26-27.) These documents are important because they show that the conclusions reached in the Decision are consistent with the views of other experts in the reliability of the electric system, the staff of the CEC and the leadership of the CAISO. We will, however, modify the Decision to make the treatment of these two documents consistent, to make the discussion portion consistent with the findings, and to clarify our approach. We wish to treat the CEC Slides and the CAISO Letter similarly and rely on them only for the fact that certain representations were made by other experts in the field of reliability.

C. SCE's Burden of Proof

According to DRA and TURN, a utility must provide clear and convincing evidence justifying additional rates and changes, and SCE failed to do so here. (Rehg. App., at p. 8.) This standard is used in general rate cases where we evaluate a request of a utility to raise rates and the type of proof required is complex. It is important to distinguish between a general rate case and other ratemaking proceedings. A general rate case is a sophisticated administrative proceeding, and is often litigated over a lengthy

[8] In this respect, the Decision is not required to weigh the information in the CEC Slides against "DRA's information" on the probability of a Stage 3 service interruption because we do not refer to the CEC Slides for the truth of the matter. (Cf., Rehg. App., at p. 7.)

period. (See, e.g., Rule 3.2.) For example, in *Proposed General Rate Increase* (2004) [D.04-03-034] __ Cal.P.U.C.3d __, cited in the application for rehearing, the Commission discussed the differences between a utility's "ultimate burden of proof" and other parties' "burden of going forward." (*Id.*, at pp. 6-8.)

There are many reasons why we do not choose to apply these formal principles in a focused, expedited proceeding that looks only at one contract. Unlike a general rate case, where the main focus of the proceeding is the utility's justification of its request for additional revenue, one of the main issues here is reliability. Economic issues, such as the determination that utilities should incur costs for the purpose of improving reliability in 2007 through 2009, were decided in *New Generation and Long-Term Contracts* (2006) [D.06-07-029], *supra*. This record shows that the LBG contract insures against reliability risks, and we should not reject the contract by default, simply for jurisprudential reasons. Thus we do not choose to apply the burden of proof requirements of a general rate case here.

In addition, the evidentiary claims made by DRA and TURN in this portion of the rehearing application are incorrect. The rehearing application claims that there is no evidence supporting the contention that the "match between need and resources is very tight." (Rehg. App., at p. 8, quoting D.07-01-041, at p. 6.) Yet SCE presented evidence forecasting that in summer 2007 it would have only a 40MW cushion above the 5% operating reserve level in adverse conditions. (Ex. 1, Table III-1.) An SCE witness stated that in SCE's opinion, 5% operating reserves were "the most appropriate level of reserves for adverse conditions." (Ex. 6, at p. 3.) A further SCE witness described the 5.1% reserve level as "thin" and "close." (Transcript, at pp. 127, 130 (Taylor).) On this basis SCE witness Minick testified, "the Long Beach capacity [] may provide an additional layer of insurance over and above the additional resources we have included." (Transcript, at p. 12.)

The rehearing application further asserts that the evidence supporting the LBG contract is not sufficient to allow us to approve the contract on the grounds that "SCE demonstrated that it is meeting all of its resource needs," and there is no SCE

testimony "that demonstrates the asserted reduction in risk is worth the cost of the contract." (Rehg. App., at pp. 8, 9.) Essentially, these claims allege that we should give different weight to the evidence: less weight to concerns about risk and more weight to forecasts showing SCE's resources to be adequate. It is not error for us to weigh the evidence differently from DRA and TURN. The Decision approves the contract, "on balance," because the record showed that it offered us a chance to reduce risk, and we felt that this opportunity was worth taking.[9] We stated that if we did not approve the contract "and the resource is needed[,]" then the results would be worse than the results of approving the contract. (D.07-01-041, at p. 23.) In this respect we likened the contract to an insurance policy. We stated: "We cannot have certainty in advance about both the weather and the availability of reserves on any given day…." (D.07-01-041, at p. 22.) We do not believe that in the face of this uncertainty it was error to exercise our expertise and judgment by concluding that it would be prudent to obtain this additional capacity. We expressly stated that we "were bothered" by the choice facing us. (D.07-01-041, at p. 21.) But the fact that the choice was difficult to make does not mean that it was error to have chosen.

Similarly, the rehearing application's claim that SCE's forecasts show it is "meeting all its needs" attempts to re-argue the evidence. We found that forecasts and actual events can differ. The record supports this finding and in fact shows that forecasts can differ from each other. We have previously concluded that we need "broader effort to assure system reliability." (*Changes to 2007 Utility Demand Response Programs* [D.-06-11-049] s*upra*, at p. 8 (slip op.).) The claim that the reduction in risk that will be produced by additional capacity "is not worth the price of the contract" also attempts to re-argue the record. The IE Report states that the LBG contract "represents a relatively competitively priced insurance policy…." (Ex. 4, at p. 4.)

[9] We also noted that this contract has certain advantages. This contract is unique because it can actually be on-line by August 2007. The LBG plant is located in the heart of SCE's service territory meaning that its capacity can be utilized by SCE without transmission constraints. (See D.07-01-041, at pp. 23-24.)

IV. CARE'S CLAIMS

The rehearing application filed by CARE raises a number of issues. Many of these questions are being addressed in other forums. CEQA review is being performed at the local level in Long Beach. Because of the expedited nature of this proceeding, we have chosen to respond to DRA and TURN's claims at this time because it is important to resolve them quickly if this project is to move forward, as scheduled. We will respond to CARE's claims in a subsequent decision.

V. CONCLUSION

The rehearing application does not demonstrate that either the Decision's result or its reasoning is in error. The Decision does not modify or amend *Cost Recovery Mechanisms for Generation Procurement* [D.04-01-050], and therefore section 1708 is not germane to this proceeding. As discussed above, we rendered our Decision by applying our expertise and judgment to the record before us, and we properly treated information provided by the CAISO and the CEC. We included that information in the record, being guided by general principles of official notice, and attempting to avoid legal technicalities, as appropriate in a less formal administrative proceeding. We will rely on that information not for the truth of its contents but for the fact that other experts held the same views we did. To better express the basis of our holding, we will modify the Decision to clarify portions of its language. Since DRA and TURN note some places where the Decision's findings of fact are not consistent with its discussion, or with the underlying record, we will modify the Decision to address those concerns. When modified, the Decision, along with the discussion in this order, will represent an explanation of the reasoning behind our decision to adopt the LBG contract. Accordingly, we deny rehearing of the Decision, as modified, and reject the application for rehearing jointly filed by DRA and TURN. With respect to the application for rehearing filed by CARE, we will address it in a subsequent decision.

Therefore, **IT IS ORDERED** that:

1. The final paragraph on page 23, beginning, "The PD approved…" and carrying over to page 24 is restated to read:

> "The PD approved the LBG project on balance. We were persuaded that the LBG project can reduce the uncertainty we have that operating resources will be adequate for the summers of 2007 through 2009. This decision is not made with enthusiasm, nor because parties urged the Commission to follow this path. Even SCE was ambivalent about the project's need and cost-effectiveness. However, our current short-term procurement policies emphasize making provisions for summer 2007. (E.g. *Changes to 2007 Utility Demand Response Programs* [D.06-11-049], *supra*, at p. 8 (slip op.).) This project is the only one from the summer 2007-track of the New Gen RFO that meets our requirement that it be on-line by next August. Both CEC staff and the leadership of the CAISO take the position that we should make additional provisions for summer 2007. In addition, the LBG project's location allows it to be quickly repowered, and makes it attractive from a load service perspective. For example, the capacity this project will supply will be available without reliance on fallible transmission systems and no additional work or funds need to be expended to bring the energy from the LBG units to the heart of SCE's service territory. Therefore, on balance, this decision approves the project."

2. The final paragraph on page 25 beginning, "DRA opposed SCE's motion…" and carrying over to page 26 is restated to read:

> "DRA opposed SCE's Motion and simultaneously filed a Motion to Strike portions of SCE's December 18, 2006 Brief that references the CEC Report. In summary, DRA asks the Commission to weigh the unfairness to other parties if SCE were allowed to introduce new and untested evidence at this late date. We did weigh DRA's request and determined that the fact that the CEC provided this information to the Joint Agency Energy Action Plan Meeting is significant. As discussed above, this is not an application that SCE conjured up out of whole cloth. The August ACR directed SCE to proceed as it did and to bring any resources that could be on-line by August 1, 2007 to us for consideration. The existence of the CEC Report assists the Commission's analysis of the LBG contract. Knowing that the CEC staff view the 260 MW from the LBG project as important in making its Stage 1, 2 and 3 probabilities is useful. While DRA's contentions

remind us that this information cannot be determinative, the fact that the CEC compares a 99% probability that SP26 (including the LBG contract and the other resources directed in the August ACR) will have sufficient resources to avoid a Stage 3 situation with a 93% probability of a Stage 3 crisis (without those resources) shows that our estimation of risk is not inconsistent with other estimations."

3. The first, full paragraph on page 26, beginning, "We, therefore, deny DRA's Motion to Strike…" is restated to read:

"We, therefore, deny DRA's Motion to Strike and grant SCE's Request for Official Notice. Consistent with our approach to the information submitted by LBG, we accept the CEC staff's position for the fact that these representations were made at the Joint Agency Action Plan Meeting. In ruling on these motions, we are guided by legal principles of evidence, but to the extent it is necessary, we will waive the formal requirements of Rule 13.9 pursuant to our authority under Rule 1.2."

4. Finding of Fact 8, on page 28 is restated to read:

"8. This PPA is evaluated by considering, among other things, the risk and uncertainty that exist regarding capacity in SP26 for summer 2007 and the PPA's status as the least-cost bid for new 2007 capacity, and the locational advantages it offers."

5. Finding of Fact 13, on pages 28 and 29 is restated to read:

"13. Because of the Heat Storm of summer 2006, and because many new resources are not scheduled to come on line until 2010, the reliability of the system in SP26 for 2007 cannot be evaluated solely on the basis of forecasts, which differ from actual operating conditions. Our current policy is to take steps to assure reliability in 2007. SCE presented testimony in the proceeding that uncertainty exists about reliability for summer 2007 and the LBG PPA will contribute to reducing risk."

6. Finding of Fact 14, on page 29 is restated to read:

"14. The views of other experts are not inconsistent with our views on risk. CEC staff has stated that with the addition of the LBG PPA and other 2007 resources, the probability of avoiding a State 3 emergency summer 2007 is 99%, but

without the new resources the probability is only 93.3%. The leadership of the CAISO has stated that the LBG PPA will improve reliability and help avoid service interruptions."

7. Finding of Fact 17, on page 29, is restated to read:

"17. The LBG PPA is an insurance policy against the risk of insufficient resources during adverse conditions in SP26 in 2007 through 2009."

8. Finding of Fact 18, on page 29, is restated to read:

"18. Although the LBG PPA is costly, it was the least-cost conforming bid with an on-line date of August 1, 2007; thus it represents competitively priced and currently-available insurance against reliability problems."

9. Conclusion of Law 5 on page 30 is restated to read:

"5. It is consistent with our commitment to ensure reliable electric service at fair and reasonable rates to approve the LBG PPA as it provides increased capacity in SP26 during the crucial 2007-2009 period and we wish to reduce the risk of reliability problems developing from unforeseen circumstances."

10. DRA and TURN's application for rehearing of Decision 07-01-041, as modified herein, is denied.

This order is effective today.

Dated April 12, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners