

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development.

Rulemaking 01-10-024

**ASSIGNED COMMISSIONER'S RULING DENYING MOTION OF
THE UTILITY REFORM NETWORK AND
THE UTILITY CONSUMERS ACTION NETWORK
SEEKING THE RECUSAL OF COMMISSION PRESIDENT PEEVEY**

This ruling denies the motion filed on April 26, 2004, by the Utility Reform Network (TURN) and the Utility Consumers Action Network (UCAN) requesting my recusal from any Commission vote on the motion of San Diego Gas and Electric Company (SDG&E) seeking approval of its Grid Reliability Capacity Request for Proposals (RFP) to enter into new electric resource contracts.

TURN and UCAN argue that my involvement in the negotiations between SDG&E and Calpine that resulted in the Otay Mesa agreement raise substantial doubts about my impartiality with regard to any Commission decisions arising out of the SDG&E RFP. However, TURN and UCAN's arguments both mischaracterize the role I have played in this proceeding and manifest a fundamental misunderstanding of the policy role assigned to all Commissioners in Commission proceedings of this nature.

As the Assigned Commissioner in this rulemaking, I have taken an active role in encouraging SDG&E to pursue the RFP approach as a means to obtain new resources to meet its grid reliability needs. As evidenced in my Assigned Commissioner's Ruling of July 8, 2003, I have also encouraged SDG&E to pursue such beneficial variants of conforming proposals so that not only will SDG&E's ratepayers be provided with superior reliability, economic, and environmental

benefits, but that such proposals will also conform to the principles of the state's Energy Action Plan and to the Commission's other important policies and goals. I believe it was entirely appropriate for me to express, and to seek implementation of, my overarching policy preferences with respect to the procurement by a regulated utility subject to the Commission's jurisdiction of adequate resources to meet the needs of that utility's ratepayers. While I had no preconceived notions about the outcome of the parties' negotiations, I believe it was entirely appropriate to facilitate the negotiation of an agreement, and I have done so. Moreover, I need not apologize for, or shrink from, exercising my responsibility in this regard, as it is inherent in my function and role as a member of this Commission for me, or any other Commissioner for that matter, to articulate and express such overarching policy preferences. Indeed, it is my opinion that to fail to do so would be a derogation of my responsibilities and a disservice to all of the constituencies of this Commission. Thus, the TURN/UCAN motion manifests a fundamental blindness to the policymaking function of this Commission's members.

However, the TURN/UCAN motion also mischaracterizes the nature and extent of my role in the negotiation process. This motion purports to show that because a member of the Commission's Legal Division (who is not a member of my advisory staff) sat in on various meetings between SDG&E and Calpine that took place during the course of the RFP process, somehow I "took a central role in the negotiations between SDG&E and Calpine." (TURN/UCAN motion, at 9.) This mischaracterization is based on an extrapolation of the facts that is incorrect. In particular, TURN/UCAN's reliance on the fact that there were *ex parte* meetings between either SDG&E or Calpine and myself in no way proves any bias or prejudgment on my part of the matters at issue in this proceeding. As all experienced parties in Commission proceedings know, such *ex parte* meetings are a

regular feature of the decision-making process in proceedings of this nature, and all parties including TURN and UCAN, are entitled to seek such meetings.

Contrary to the implications in TURN/UCAN's motion, SDG&E and Calpine reached an arm's length agreement on the terms of a 10-year power purchase agreement without any direct or indirect intervention on my part as to the terms and conditions of the agreement the parties would negotiate. At no point during the proceeding did I have any fixed views concerning the specific terms and conditions of that agreement.

Moreover, during the course of the RFP process I maintained an open mind with regard to the SDG&E procurement. At no time during RFP process did I have any predetermined outcome in my mind as to what would be the "best" or the "right" outcome of SDG&E's RFP process or which terms and conditions the final agreements should contain. To the contrary, like all of my colleagues, I have awaited the litigated outcome of the RFP process, and must be persuaded by the record evidence in the proceeding that SDG&E's proposed selections are in the best interests of SDG&E's ratepayers.

Nonetheless, even if the scenario depicted by the moving parties were entirely accurate, it hardly demonstrates that I lack the level of impartiality to vote on any decision arising out of the SDG&E RFP, or on any other issue in this rulemaking. In an administrative proceeding such as the instant rulemaking, a decisionmaker may be disqualified only upon a clear and convincing showing that he or she has an unalterably closed mind on matters critical to the disposition of the proceeding. *Assn. of National Advertisers, Inc. v. Federal Trade Com.* (D.C. Cir. 1979) 627 F.2d 1151, 1170. The moving parties have failed to show that I have a closed mind with regard to the outcome of the SDG&E RFP process or, more specifically, the Otay Mesa agreement. To the contrary, during the course of this proceeding I have had and will continue to have an open mind as to whether the particular

agreements -- including the terms and conditions of the Otay Mesa agreement -- brought to the Commission for approval are reasonable and in the public interest. I have considered the evidence introduced into the record concerning the SDG&E procurement with an open mind, and will continue to do so up to the time when the full Commission will vote on SDG&E's motion for approval to enter into the various resource procurement contracts it has proposed. In fact, I have proposed an Alternate Decision that modifies a key financial term of the rate treatment that SDG&E has presented to us for approval.

Moreover, as SDG&E has pointed out in its response, the moving parties rely on legal authority that is inapplicable to the instant proceeding. The moving parties rely on cases involving factual determinations of past behavior and the ensuing imposition of disciplinary measures. The instant rulemaking, in contrast, involves a policy determination as to whether the SDG&E agreements are reasonable and in the public interest. The standard moving parties would apply would significantly constrain administrative decisionmakers in their ability to carry out their policy-based functions.

Rather, in a proceeding of this nature, disqualification requires clear and convincing evidence of an unalterably closed mind. Moving parties have failed to meet this standard; indeed, they have pointed to nothing that would show an unalterably closed mind.

Therefore, **IT IS RULED** that the motion is denied.

Dated May 25, 2004, at San Francisco, California.

Michael R. Peevey
Assigned Commissioner