

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902E) for Rehearing of Resolution E-4698.

Application 15-01-003
(Filed January 5, 2015)

**ORDER MODIFYING RESOLUTION E-4698 FOR
PURPOSES OF CLARIFICATION, AND DENYING REHEARING
OF RESOLUTION, AS MODIFIED**

I. INTRODUCTION

In Resolution E-4698, (or “the Resolution”), we approved San Diego Gas & Electric Company’s (“SDG&E’s”) Advice Letter 2600-E request for approval of the amended Power Purchase Agreement ("PPA") executed with Goal Line, a combined heat and power ("CHP") facility. The Resolution also denied SDG&E's request for incentive payments to shareholders of 10 percent of the expected savings (“shareholder incentives”) associated with the amended PPA.

SDG&E timely filed an application for rehearing which alleges the following: (1) the denial of the shareholder incentive request was arbitrary and capricious and devoid of reasoned decision-making because it deviated from established policy and precedent without adequate support or explanation; and (2) the Resolution unduly discriminates between similarly-situated utilities by granting a requested shareholder incentive to one utility but not to the other. The Office of Ratepayer Advocates (“ORA”) filed a timely response to the rehearing application, supporting the Resolution.

We have reviewed each and every issue raised in the application for rehearing of Resolution E-4698. We are of the opinion that good cause for rehearing has not been demonstrated. However, for purpose of clarification, we modify Resolution

E-4698 as set forth below. For the reasons discussed below, we deny SDG&E's application for rehearing of Resolution E-4698, as modified.

II. BACKGROUND

A. Pre-2010 QF/CHP Settlement Period

The restructuring of a Qualifying Facility/Combined Heat and Power ("QF/CHP") contract (or "PPA") between California investor-owned utilities ("IOUs") and qualified facilities ("QFs") has a very complex, controversial and litigious history. (See e.g., *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation -- Opinion Qualifying Facility Restructuring Reasonableness Letter Proposal* ("QFRRL Decision") [D.98-12-066] (1998) 83 Cal.P.U.C.2d 506, 513; see also, *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* ("Opinion on Qualifying Facility Contract Modification Issues") [D.99-02-085] (1999) 85 Cal.P.U.C.2d 158, 164-165 & 176-177 [Findings of Fact 3 & 4].) For a prolonged period of time, there was much opposition from the IOUs and QFs to restructure these historically overpriced contracts.

In an attempt to address this obstacle, in D.95-12-063, as modified by D.96-01-009,¹ we endorsed an approach to facilitate contract renegotiation that involved both a monetary incentive to shareholders and conditions that would foster voluntary, nondiscriminatory negotiations. To motivate the reluctant IOUs, we stated that when "a QF contract is renegotiated, shareholders should retain 10% of the resulting ratepayer benefits, which will be reflected by an adjustment to the Competition Transition Charge ("CTC") if the modification is approved by the Commission." (*Preferred Policy Decision* [D.95-12-063], *supra*, 4 Cal.P.U.C.2d at p. 93 [Conclusion of Law 74].)

¹ *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* ("Preferred Policy Decision") [D.95-12-063] (1995) 64 Cal.P.U.C.2d 1, as modified by *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* ("Order Adopting Corrections to Decision 95-12-063") [D.96-01-009] (1996) 64 Cal.P.U.C.2d 228.

In 1998, the Commission issued D.98-12-066 to streamline approval of contract restructuring, by adopting a Restructuring Advice Letter Filing (“RALF”) process, and a QF Restructuring Reasonableness Letter (“QFRRL”) procedure. (*QFRRL Decision* [D.98-12-066], *supra*, 83 Cal.P.U.C.2d at pp. 516-522 [Attachments A and B].) The RALF process allows an IOU, in certain non-contentious circumstances, to seek expedited Commission review and approval of beneficial restructured qualifying facility contracts through the advice letter process. Thus, the RALF process provides the IOU with an alternative to filing a formal application, which is a more burdensome process.

More specifically, the RALF process gives a utility the option to submit a voluntarily negotiated restructuring QF PPA to the Commission’s ratepayer advocacy staff (“ORA”) for a QFRRL. (*Id.* at p. 516 [Attachment A].) The process provides ORA the discretion to either grant or deny a QFRRL to the utility. (*Id.* at p. 508.) If ORA finds that the PPA is reasonable, ORA may submit a QFRRL to the Commission stating that: (1) it supports or does not oppose the PPA; (2) the proposed amendment is reasonable; and (3) the payments made under the restructured contract should be recovered from customers, subject only to the utility’s prudent administration of the contract. (*Id.* at pp. 508-509.) As we found in the Resolution and in Resolution E-4627, issued March 14, 2014, submittal of such an advice letter was *conditioned* upon the prior review and statement of support or neutrality by ORA, which it would do by issuing a QFRRL. (Resolution E-4627, p. 6; and *QFRRL Decision* [D. 98-12-066], *supra*, 83 Cal.P.U.C.2d at p. 516.)

Because a RALF advice letter filing *must* be supported by an ORA QFRRL, when ORA does not issue one, the precondition for Commission consideration of the restructured contract under that process would not be met. The purpose behind the RALF process, i.e., to allow an expedited and streamlined advice letter filing in an *uncontested* situation, would not be served, and the IOU would therefore have to submit a request for Commission approval of the amended PPA and the shareholder incentives using the formal application process.

As discussed in the Resolution and below, ORA did not issue a QFRRL in this case because it contested SDG&E's request for shareholder incentives. (Resolution E-4698, pp. 4-5 &10.)

B. Post-2010 QF/CHP Settlement Period

After more than a decade following D.95-12-063, the QF/CHP restructuring regime remained a quagmire of vociferous litigation, delay and disagreement between the interested parties. The Commission encouraged them all to enter into negotiations to settle their longstanding and unresolved issues, and we oversaw more than a year and a half of intensive negotiations on these issues. On December 16, 2010, we adopted the Qualifying Facility and Combined Heat and Power Program Settlement with the issuance of D.10-12-035,² which became effective on November 23, 2011. The Commission and all the settling parties, (including SDG&E, which participated in the negotiations and supported the Settlement) intended the new Program to be the governing QF/CHP restructuring regime going forward.

Under the terms of the Settlement, the IOUs would receive MW and GHG credits from the restructured QF/CHP contract toward their Settlement goals. (See, e.g., Section 1.2.1.5, which states that “this State CHP Program will secure additional Greenhouse Gas (GHG) emissions reduction benefits, consistent with the reduction targets of Assembly Bill (AB) 32, by adding new, efficient CHP.” (CHP Program Settlement Agreement Term Sheet, State CHP Program policy objectives, p. 5.) In adopting the settlement in D.10-12-035, we observed that the proposed settlement was “comprehensive,” and “would resolve numerous outstanding QF issues involving disputes in several Commission proceedings, and provide for an *orderly transition from the existing QF program to a new*

² *Application of Southern California Edison Company for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief (“QF & CHP Settlement”)* [D.10-12-035] (2010) ___ Cal.P.U.C.3d ___, p. 67 [Ordering Paragraph 1] (slip op.).

QF/Combined Heat and Power (CHP) program.” (*Id.* at p. 2 (slip op.), emphasis added.) We further stated:

This *new program* is designed to preserve resource diversity, fuel efficiency, greenhouse gas (GHG) emissions reductions, and other benefits and contributions of CHP. The Proposed Settlement is also designed to promote new, lower GHG-emitting CHP facilities and encourage the repowering, operational changes through utility-pre-scheduling, or retirement of existing, higher GHG-emitting CHP facilities. Additionally, the Commission finds that the Proposed Settlement provides for an appropriate allocation of the costs of the QF/CHP program to all customers in California who benefit from the CHP portfolio. The Proposed Settlement is comprehensive, . . .

(*Id.*, emphasis added.)³

D.10-12-035 also specified our *new approval process* required for PPAs arising from the procurement options in the QF/CHP Program. This included Tier 2 advice letter filings for existing CHP facilities that executed the CHP request for offer (“RFO”) PPA without material modification, and a Tier 3 advice letter process for all other CHP PPAs. (*Id.* at p. 15 (slip. op.)) Section 4.10 of the Settlement Agreement Term Sheet governs the new Commission-adopted approval process for PPAs.

³ The Resolution noted that the Settlement “does not resolve issues in numerous Commission proceedings implementing recent statutory requirements that pertain to QFs of 20 MW or less, such as new CHP systems under Assembly Bill [(“AB”) 1613 (codified as Pub. Util. Code sections 2840-2845), *except to acknowledge that the megawatt (MW) and GHG reductions will count toward the investor-owned utilities’ MW and GHG reduction targets.*” (Resolution E-4698, p. 2.) However, because this contract pertains to an existing CHP facility larger than 20 MW in size, the SDG&E/Goal Line restructured agreement is not subject to the above-mentioned AB 1613 limitations on the comprehensiveness of the Settlement.

In D.10-12-035, we concluded:

The Proposed Settlement resolves several past and ongoing disputes and will likely resolve potential future disputes among the settling parties. It establishes a framework for a QF/CHP Program *going forward* that advances state policies encouraging efficient CHP operations and promoting GHG emissions reductions.

(*Id.* at p. 58 (slip. op.), emphasis added.)

Finally, we discussed the binding and precedential effect of the approved settlement on the parties:

Rule 12.5 states the following regarding limits on the *future applicability* of a settlement:

Commission adoption of a settlement is binding on all parties to the proceeding in which the settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding. The Joint Parties request that the Commission expressly find that the Term Sheet is precedential. For good cause shown, we do so here.

(*Id.* at pp. 58-59 & 66 [Conclusion of Law 20] (slip op.), emphasis added.)

The IOUs' agreement to the Settlement was largely motivated by their ability to count the MW and GHG credits from QF/CHP restructured contracts toward their mandated Settlement goals. The IOUs, as evidenced by this instant filing, are now incentivized to seek approval of those contracts using the advice letter processes governed by the Settlement Agreement, i.e., Tier 2 or Tier 3 advice letters. The RALF process is still available for expedited treatment of renegotiated contracts, but as we explained in the Resolution, shareholder incentives are no longer justified under the new regime.

C. SDG&E'S Advice Letter 2600-E.

In Advice Letter 2600-E, dated May 8, 2014, filed pursuant to the 2010 Settlement, SDG&E listed a number of anticipated benefits the restructured contract would provide, including conversion from a “must-take” operation to a Utility Prescheduled Facility operation whereby SDG&E could have the right to schedule the Facility, rather than being required to accept energy at times that it may not be needed or cost-effective. In addition, the Amendment would lead to reduced greenhouse gas emissions and lower energy payments. The Advice Letter also states that “*the Amendment falls directly within the procurement options set forth in the QF/CHP Settlement approved in D.10-12-035, which became effective on November 23, 2011, ...*” and “[p]ursuant to the terms of the Settlement, the Amendment may be submitted for Commission approval via Tier 3 advice letter.” (Advice Letter 2600-E, pp. 1-2, emphasis added.) SDG&E also requested that “the Commission determine that any GHG reductions associated with the Amendment shall count toward SDG&E’s GHG Emissions Reduction Targets in the QF/CHP Settlement.” (*Ibid.*)

In addition, SDG&E’s Advice Letter requested an incentive payment to its shareholders of 10% of the ratepayer savings “in keeping with the ... RALF process ... which SDG&E attempted to follow.” (Advice Letter 2600-E, p. 2.) It further states that ORA’s response was that it would not issue a QFRRRL “based on an objection to the use of the RALF process to submit an Advice Letter pursuant to the QF/CHP Settlement.” (Advice Letter 2600-E, p. 2.)

III. DISCUSSION

A. The RALF process cannot be relied upon to justify SDG&E’s shareholder incentive request.

In its advice letter, filed pursuant to the Settlement Agreement, SDG&E requested approval of shareholder incentives, stating that such approval should be given in accordance with the RALF process. (Advice Letter 2600-E, p. 2.) As we explained in the Resolution, these incentives are no longer available, not because the RALF process

was not followed in this instance, but because they are not justified under the controlling Settlement terms we adopted in D.10-12-035. For RALF to apply, ORA would have had to issue a QFRRL as a precondition to us considering SDG&E's request under that process. Here, ORA did not issue a QFRRL. It contested approval of shareholder incentives, in part because they were requested in an advice letter filed pursuant to the Settlement.

In its rehearing application, SDG&E asserts that ORA was wrong in refusing to provide the QFRRL, and that the RALF process should control the approval of the shareholder incentives. These claims have no merit.

We note that whether ORA was wrong or not is immaterial to the outcome of the Resolution, because in our independent judgment, we determined that shareholder incentives are not justified under the terms of the Settlement that we adopted in D.10-12-035.

As stated above, failure to issue a QFRRL prevents initiation of the RALF process in the first place. Moreover, the mere issuance of a QFRRL does not mean automatic Commission approval of every request in an advice letter filed under the RALF process. The RALF process is only intended to expedite review. We use the QFRRL as a factor in considering whether to approve renegotiated contracts or any related requests, such as the shareholder incentive request. We rely on ORA to provide a benchmark for determining whether to require an application or to use the streamlined advice letter process for approval. (Resolution E-4627, p. 7.)

In its rehearing application, SDG&E argues that the RALF process assigned to ORA "the ministerial task" of providing the requesting utility a QFRRL. (Rehearing Application, p. 2.) SDG&E appears to be incorrectly arguing that ORA's role in the RALF process was merely to rubberstamp the proposed advice letter. However, it fails to acknowledge our rationale in D.98-12-066 with regard to ORA's role in expediting our approval process, especially when there is no controversy. As we noted:

Therefore, we will approve the use of the restructuring Advice Letter process for those filings that have the greatest likelihood of being non-controversial or approved as submitted (or nearly as submitted). These would *be those filings which garner the upfront support of ORA*, along with the QF and the sponsoring utility.... Therefore, *an ORA-approved* filing seems a reasonable candidate for a streamlined process. *We will require* that a statement of support or neutrality *from ORA be attached* to any restructuring Advice Letter filing.

(*QFRRL Decision* [D.98-12-066], *supra*, 83 Cal.P.U.C.2d at p. 513, emphasis added.)

Thus, it is clear that the QFRRL and RALF processes are meant to be used as filing tools to expedite amendments that ORA agrees with, but not when contested substantive issues exist. The Resolution was therefore correct in rejecting SDG&E's reliance on the RALF process as justification for its shareholder incentive request.

B. The Resolution's rationale for rejecting the shareholder incentive request was lawful.

We did not err in concluding in the Resolution that the shareholder incentives are not available under the 2010 Settlement Agreement. We explained the reasons for our denial, including: (1) shareholder incentives are not available to a utility under the terms of the Settlement Agreement pursuant to which Advice Letter 2600-E was filed; (2) SDG&E's RALF filing was incomplete, and therefore, there is no valid basis upon which to request shareholder benefits; (3) in light of other specific factors such as SDG&E's slow progress towards its mandated CHP procurement targets, a shareholder incentive was not justified; (4) because of the negotiated benefits the IOU's derive from the Settlement, it has in effect eliminated the need for shareholder incentives; and (5) there is no conflict in precedent, or discrimination against SDG&E that would warrant an outcome different from the one adopted in the Resolution. (See generally, Resolution E-4698, pp. 10-11.)

In response, SDG&E argues that Commission decisions, including the *Preferred Policy Decision* [D.95-12-063] and *QFRRL Decision* [D.98-12-066] “establish a clear, direct and unbroken line of policy that the RALF process is the Commission-approved procedural vehicle for presenting voluntarily renegotiated QF contracts to the Commission for review, approval *and the award of shareholder incentives* based on ratepayer savings.” (Rehearing Application, p. 10, emphasis added.) We find this argument to be without merit, because it ignores the existence of the comprehensive nature of the 2010 Settlement Agreement, and its impact on shareholder incentives as discussed below.

In the Resolution, we explained why shareholder incentives are no longer appropriate in QF/CHP contract restructuring. We stated:

Furthermore, contrary to SDG&E’s arguments, this Resolution does not improperly rely on the Settlement. The Commission adopted the contentiously-negotiated and broad Settlement as a balance of ratepayer, utility, and CHP interests and, at the request of the Settling parties, adopted the Term Sheet as precedential.⁴ Consistent with the Commission’s prior Resolutions disposing of contested issues among the parties and the Settlement’s precedential status, the Commission relies on the plain language of the Term Sheet. However, contrary to SDG&E’s dependence on the fact that the Term Sheet is silent on the issue of a shareholder incentive, its absence in no way implies that they are permissible. In fact, the Settlement endeavors to achieve benefits to electricity customers in a cost-effective manner.⁵ Aside from the fact that this procurement contributes to SDG&E’s compliance with a regulatory mandate, diverting

⁴ *QF & CHP Settlement* [D.10-12-035], *supra*, at pp. 59 & 66 [Conclusion of Law 20] (slip op.).

⁵ Settlement Term Sheet Sections 1.2.2.8, 1.2.5, and *QF & CHP Settlement* [D.10-12-035], *supra*, at p. 62 [Finding of Fact 17] (slip op.).

the restructuring's cost savings from ratepayers to shareholders would conflict with the stated objectives of the CHP Program.

(Resolution E-4698, pp. 12-13.)

SDG&E's argument that shareholder incentives are still appropriate because the Term Sheet is silent on the matter is meritless and unconvincing. As a party participant to the eighteen-month negotiations and signatory to the Settlement, SDG&E had notice and the opportunity to raise the 10% shareholder incentives as an issue and argue for their continued applicability in the new restructuring regime going forward. But it did not. The stated objectives and benefits of the new restructuring regime were sufficiently articulated in D.10-12-035 and reflected in the Term Sheet and in the Resolution, as described above. The Resolution acknowledged that nowhere in the adopted Settlement is there any reference to the 10% shareholder incentives that SDG&E argues apply. (Resolution E-4698, p. 12.)

As we noted in the Resolution, we also evaluated SD&GE's request for shareholder incentives as part of the RALF process. We want to make clear that although this was necessary to respond to SDG&E's arguments, it was not the basis for our rejection of the shareholder requests. Whether the RALF process applied or not, we rejected SDG&E's request based on the terms of the Settlement. Thus, we will modify the Decision to add the following sentence to the last full paragraph on page 10, for purposes of clarification:

However, the Commission's rejection of the request for shareholder incentives was not based on the fact that the RALF process was not completed, but on the fact that they were not available under the terms of the Settlement Agreement.

Also, Finding No. 10 should be modified to remove the phrase: "and because SDG&E did not successfully complete the Restructured Advice Letter Process."

C. We properly exercised our independent judgment in denying SDG&E's shareholder incentive request.

SDG&E's rehearing application ignores our fundamental guiding principle when considering QF/CHP contract restructuring advice letter filings under the Tier 2, Tier 3, or RALF processes: the exercise of our independent authority to review and to determine whether they should be approved or rejected.⁶ This obligation for independent review includes our consideration of whether to award shareholder incentives. In the Resolution, we appropriately exercised our independent judgment to deny SDG&E its shareholder incentives request.

In D.98-12-066, we emphasized that, regardless of whether a QFRRL is issued by ORA, “[t]he utility applicant must still meet its burden of proof in persuading the Commission that the proposed [contract] restructuring is reasonable, and the Commission, after considering the full record, must still exercise its independent judgment in approving the contract restructuring.” (*QFRRL Decision* [D.98-12-066], *supra*, 83 Cal.P.U.C.3d at p. 415 [Conclusion of Law 3].)

In the Resolution, we were not persuaded that SDG&E met its burden of proof regarding the request for shareholder incentives. SDG&E's position in general was that shareholder incentives are justified because they are necessary to encourage IOUs to enter into QF/CHP contract restructuring. But times have changed significantly since that incentive was necessary nineteen years ago. Then, the relationship between the parties was acrimonious and uncooperative. The sense of the urgent interrelationship

⁶ The California Supreme Court held, “Created by the Constitution in 1911, the [C]ommission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries. Although it has been termed a ‘quasi-judicial’ tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based. The powers and functions of the [Commission] are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates.” (*Cal. Transport Co. v. Railroad Com.* (1947) 30 Cal.2d 184, 188.)

between the climate and the environment, and California's energy policies, and our ability to create solutions to perceived challenges, was less informed.

Now, however, SDG&E has a mandate to meet different MW and CHP emissions reduction targets. As reflected in the Resolution, SDG&E was delinquent in meeting those targets. (Resolution E-4698, p. 5.) In order to reach them, SDG&E supported and agreed to the terms of the 2010 QF/CHP Settlement Agreement that governs the new regime. As a signatory to the Settlement, SDG&E is bound by the precedential process outlined in Section 4.10 of the Settlement Term Sheet that now governs QF/CHP Program contract restructuring requests for Commission approval, including advice letter filings. (See CHP Program Settlement Agreement Term Sheet "Approval of PPAs" section 4.10.1 – Tier 2 advice letters; section 4.10.2 – Tier 3 advice letters; and section 4.10.4.3 – requirement of an "EPS Compliance Letter" from the CPUC Energy Division for non-Tier 2 and 3 advice letter filings.) A "10% shareholder incentive" is not recognized in that agreement.

SDG&E's rehearing application ignores these changes, and bases its arguments on our old rationale that is no longer valid because of the Settlement Agreement. It does not explain, for example, why it would be reasonable public policy for us to rule that over and above the benefits negotiated and adopted in the Settlement Agreement, SDG&E's shareholders are entitled to an additional 10% of savings. SDG&E did not present any specific justification for the shareholder incentives in this case, beyond the simple technicality of their incorrectly perceived availability. However, SDG&E failed to convince us that to do otherwise would mean legal error. Moreover, nowhere has SDG&E argued that the 10% incentive was the reason it negotiated this particular amendment, nor has it given any other showing or reason why it should receive one. It has only incorrectly argued that the RALF process includes an incentive, and that this process is valid and controlling.

SDG&E's rehearing application also asserts that the requested shareholder incentive is not incompatible with its procurement obligations or ratepayer benefits. It claims that it is under no obligation or mandate to renegotiate legacy QF contracts and

obtain the ratepayer benefits of doing so in order to comply with the Settlement. It also asserts that the Settlement in fact emphasizes the procurement of new QF resources, which could increase costs to ratepayers. (Rehearing Application, pp. 12-13.) These arguments have no merit.

SDG&E seems to be arguing that because it has multiple valid procurement options to reach a mandated target (i.e. issuing RFOs for CHP, and re-negotiating existing CHP contracts being two of those options) its choosing of one of those options over the others somehow constitutes voluntary, non-mandated procurement. SDG&E is correct that it is not mandated to renegotiate specifically. But it is one of the accepted methods of buying CHP to meet its mandated MW and GHG emissions reduction targets -- and one of its best, and cheapest too. It is especially true here because this renegotiation changed the facility from being “must-take” to a UPF (utility prescheduled facility) -- meaning SDG&E gets to control and direct its output. This is where most of the GHG, flexibility, and cost savings come from.

Furthermore, the Settlement seeks to reduce costs. SDG&E is required to procure resources to meet its Settlement target at the least cost, which is why we require it to demonstrate in the advice letter filing that the deal is a least-cost option for ratepayers. Since the Goal Line restructuring was evaluated and found to be a least-cost means of acquiring Settlement GHG credits, then SDG&E would be required by the procurement rules to execute it. This is particularly true for SDG&E, which is behind on its Commission-ordered CHP MW and GHG emissions reduction targets.

Our determination in the Resolution, therefore, that shareholder incentives are not justified under the Settlement regime, was based on reasoned decision-making. In light of the above, SDG&E’s allegations of arbitrary, capricious and unreasonable decision-making in the Resolution have no merit, and we reject them.

D. Because the circumstances were different, there was no unlawful discrimination.

SDG&E alleges that the Resolution unduly discriminates against it in favor of a “similarly situated utility,” PG&E, by denying it its shareholder incentive request. It

uses two examples of prior Resolutions addressing PG&E advice letter filings, Resolution E-4627 and Resolution E-4389, that it alleges prove discrimination. (Rehearing Application, pp. 6-7.) Because the two PG&E filings were not similar to SDG&E's, this argument fails.

Generally, if parties are similarly situated and the Commission treats them differently, a charge of unlawful discrimination would likely have merit if there is no rational reason for the disparate treatment. (See, e.g., court decisions cited in Rehearing Application, p. 6, fn. 14.) However, as discussed in the Resolution, SDG&E has not established that PG&E's advice letters and the ensuing Resolutions were sufficiently similar to SDG&E's as to constitute unlawful discrimination. (Resolution, p. 13.) Without that core similarity, unlawful discrimination was not present.

The clearest distinction between Resolution E-4698 and Resolution E-4627 is that PG&E did not request an incentive, and SDG&E did. Also, the PG&E advice letter filing completed the RALF process and PG&E received a QFRRL, because it was not contentious, whereas SDG&E did not complete the process because its advice letter filing was contentious. (Resolution, p. 13.) Since neither IOU received shareholder incentives, SDG&E's use of incentives as the basis for its discrimination claim lacks merit, and we reject it. Moreover, SDG&E misstates our holding in Resolution E-4627. It claims that that "Resolution E-4627 *expressly* held that the RALF process *and the related shareholder incentive* remained robust even after issuance of the Settlement." (Rehearing Application, p. 7.) We took no such position with regard to shareholder incentives. In fact, Resolution E-4627 never mentions the issue.

In its rehearing application, SDG&E raises for the first time Resolution E-4389 as another example of unlawful discrimination against itself, but again, the two Resolutions involved different facts. In July 2010, ORA provided a QFRRL to PG&E for Advice Letter 3705-E, which was adopted in Resolution E-4389 in March 2011.⁷ There,

⁷ QFRRL issued by ORA to PG&E, July 2, 2010.

PG&E did request a shareholder incentive, which was granted. The timing of the advice letter, ORA's QFRRL, and the adopting Resolution, however, make that situation dissimilar to SDG&E's request, for the following reasons.

First, ORA did not issue SDG&E a QFRRL for the reasons stated above, but did provide one to PG&E because: (1) the contract resulted in lower than average contract payments; (2) the project availed itself to available tax credit incentives; (3) the seller agreed to return money for any surplus generation with interest to PG&E ratepayers; and (4) there were no legal, transmission, or operational problems and the project's financial viability was secure.⁸

More significantly, however, while Advice Letter 3705-E did include a request for a shareholder incentive, this request came *before* the Commission approved the Settlement in D.10-12-035 in December, 2010. SDG&E's claim that ORA "deviated from following well-established policy and precedent of awarding shareholder incentives" fails to acknowledge the gap in time and change in Commission policy toward shareholder incentive requests between the time ORA issued the PG&E QFRRL (July 2010) and the adoption of the Settlement Agreement in D.10-12-035, (December 2010). Also, as SDG&E acknowledges, the *Settlement only became effective on November 23, 2011*, long after ORA issued the QFRRL, and nine months after Resolution E-4389 was issued. In its response to SDG&E's rehearing application, ORA stated that had PG&E's shareholder incentive request occurred *after* December 2010, ORA likely would not have issued the QFRRL because D.10-12-035 and the Settlement eliminated the shareholder incentive.⁹

⁸ QFRRL issued by ORA to PG&E, July 2, 2010.

⁹ ORA Response to Rehearing Application, p. 6, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.* (1983) 463 U.S. 298 (1983), which holds: "Regulatory agencies do not establish rules of conduct to last forever, and an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." The Commission (as well as ORA) provided SDG&E with a reasoned analysis, including references to D.10-12-035 and the Settlement, for denying the shareholder incentive.

In light of the time and policy differences described above, Resolution E-4698 is the only Resolution that has been issued subsequent to the QF/CHP Program Settlement's effective date that addresses shareholder incentives. For that reason, and the others identified above, SDG&E's discrimination claims must fail because the respective situations were dissimilar: PG&E's advice letters were filed under the old restructuring regime, while SDG&E's was filed under the new one.

IV. CONCLUSION:

For the reasons discussed above, we modify Resolution E-4698 for purposes of clarification. We deny SDG&E's application for rehearing of Resolution E-4698, as modified, as no legal error has been demonstrated.

THEREFORE, IT IS ORDERED that:

1. For purpose of clarification, Resolution E-4698 is modified to add the following sentence to the last full paragraph on page 10:

However, the Commission's rejection of the request for shareholder incentives was not based on the fact that the RALF process was not completed, but on the fact that they were not available under the terms of the Settlement Agreement.

2. Finding No. 10 on page 14 of Resolution E-4698 is modified to remove the phrase: "and because SDG&E did not successfully complete the Restructured Advice Letter Process".

3. SDG&E's application for rehearing of Resolution E-4698, as modified, is denied.

4. Application (A.) 15-01-003 is closed.

5. This order is effective today.

Dated: May 7, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE RANDOLPH

Commissioners