

Decision 15-11-024

November 5, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902E) for Authority to Partially Fill the Local Capacity Requirement Need Identified in D.14-03-004 and Enter into a Purchase Power Tolling Agreement with Carlsbad Energy Center, LLC.

Application 14-07-009
(Filed July 21, 2014)

ORDER MODIFYING DECISION 15-05-051
AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. INTRODUCTION

In June 2015, applications for rehearing of Decision (D.) 15-05-051¹ (“*Decision*”) were filed by Californians for Renewable Energy, Inc. (“CARE”), Protect Our Communities Foundation (“POC”), the Office of Ratepayer Advocates (“ORA”), the Center for Biological Diversity (“CBD”), the Sierra Club and World Business Academy (“Academy”). In the *Decision*, we conditionally approved the application of San Diego Gas & Electric Company (“SDG&E”) (Application (“A.”) 14-07-009) to enter into a purchase power tolling agreement (“PPTA”) with Carlsbad Energy Center, LLC. The conditions include reducing the PPTA contract capacity from the proposed 600 MW to 500 MW, and committing the remaining 100 MW to preferred resources or energy storage. SDG&E, Carlsbad Energy Center, and the California Independent System Operator Corporation (“CAISO”) filed timely responses to the applications for rehearing.

¹ The official versions of Commission decisions since 2000 are maintained on the Commission’s web site, and can be searched for at: <<http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>>. D.13-03-029 is available at: <<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M063/K535/63535568.PDF>>.

We have carefully considered all the arguments presented by rehearing applicants, and have concluded that good cause for rehearing has not been shown. However, in order to clarify and correct certain holdings, we will modify portions of the *Decision*. Accordingly, rehearing of the *Decision*, as modified, is denied.

II. DISCUSSION

A. California Environmental Quality Act Review

CBD contends that we erred in failing to complete an environmental review pursuant to the California Environmental Quality Act (“CEQA”) prior to our approval of the Carlsbad PPTA. According to CBD, CEQA requirements apply to our approval of PPTAs because that approval is discretionary, and involves our review of specific contractual terms that concern physical aspects of the environment. (CBD App. Rehg., at pp. 3-6.) CBD further argues that our PPTA approval will cause direct physical changes in the environment, and therefore CEQA requires that the action be reviewed. CARE also argues that we were required to undertake a CEQA review. (CARE App. Rehg., at p. 8.)

Despite CBD’s protests, we have adequately explained the reasons that PPTA approvals are not CEQA projects. (See *Decision*, at pp. 29-31.) Pursuant to CEQA, a CEQA project must be one of the following:

- (a) An activity undertaken by a public agency.
- (b) An activity undertaken by a person which is supported... from one or more public agencies.
- (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(Pub. Resources Code, § 21065.)

SDG&E’s application is not a CEQA project because our consideration of SDG&E’s application for authorization to enter into the Carlsbad PPTA does not fit within any of these categories. Our PPTA proceedings are utility applications for authority to enter into agreements with power generators to purchase electricity. In PPTA proceedings, we evaluate the proposed contracts for consistency with Commission

requirements, and decide on whether to authorize the utilities to enter into the contracts and recover costs of the PPTA in rates. These proceedings are largely in the nature of reasonableness reviews in advance of the utility's commitment. (See § 454.5(d)(2).) As such, we do not issue "a lease, permit, license, certificate, or other entitlement for use," to the utility when approving a PPTA, and a PPTA application is not a CEQA project.

Moreover, as we have explained, in PPTA applications, the utility, and not the project proponent, is the applicant. Here, we do not have jurisdiction over Carlsbad Energy Center, the underlying project proponent, and do not approve or disapprove the generation project itself. (See *Decision*, at p. 30.) It is Carlsbad Energy Center which is actually proposing to construct the plant, and its application to construct the Carlsbad Project has been considered by the California Energy Commission ("CEC") in separate proceedings outside of this agency.

In its argument, CBD does not acknowledge or rebut our explanation that PPTA applications do not fit within the CEQA definition of project. Instead, CBD focuses on other required elements for triggering CEQA review requirements, such as whether the project is discretionary (Pub. Resources Code, § 21080 (a)), and whether it may cause a physical change in the environment (Pub. Resources Code, § 21065). (CBD App. Rehg., at p. 2.) This argument is misplaced, because regardless of whether the PPTA review is discretionary, or has potential to impact the environment, SDG&E's PPTA application does not fit within the definition of a CEQA project pursuant to the Public Resources Code.

In quoting a portion of Public Resources Code section 21065, CBD omits the portion quoted above that specifies that only certain types of actions constitute CEQA projects. As a result, CBD fails to counter our conclusion that the PPTA application does not fit within the CEQA definition because it is not issuance of "a lease, permit, license, certificate, or other entitlement for use." (Pub. Resources Code, § 21065.)

Similarly, CBD's objection that our explanation of why SDG&E's application is not a CEQA project is not "legally cognizable" (CBD App. Rehg., at p. 14) is mistaken. CBD claims that our "entire argument" that the Carlsbad PPTA is not a

project “is based entirely upon a 1979 denial of a writ and a 1986 Commission decision that cites only to the 1979 denial.” (*Ibid.*) CBD goes on to argue that the writ denial is not citable authority. (*Id.*, at 14-18.) To the contrary, our reference to the 1979 writ denial, *Palmer v. Public Utilities Commission*, SF# 23980, is not relied upon as precedent. Rather, *Palmer* is only noted in a quote from one case in a long line of Commission decisions and Energy Division resolutions concluding that PPTA applications, and ratemaking applications generally, are not CEQA projects.² It is these decisions that constitute the well-established precedent. Thus, the basis for our conclusion that PPTA applications are not CEQA projects is based on the CEQA statutory language, as explained above, and that conclusion is strongly supported by Commission precedent.

CBD raises a number of other claims regarding how and when we must conduct the Carlsbad PPTA CEQA review. (CBD App. Rehg., at pp. 10-13.) Again, all of these arguments fail because SDG&E’s Carlsbad PPTA application is not a CEQA project, and therefore, none of the CEQA review requirements are applicable. (See *Decision*, at pp. 30-31, fn 23.)

CARE suggests that the fact that we conditioned approval of the Carlsbad PPTA on a 500 MW limit, as opposed to the 633 MW³ that was proposed in the PPTA application, requires us to conduct a CEQA review on the Carlsbad Energy Center project with the new amount. Although CARE asserts that, “the Commission is requiring a reduction in size of the Carlsbad Project,” (CARE App. Rehg., at p. 2), we do not have direct jurisdiction over Carlsbad Energy Center or the Carlsbad Project. As such, we

² These cases include *Re PG&E Solar Flats PPA*, Res. E-4686, October 16, 2014, at p. 17; *Re PG&E 2008 Long-term Request for Offers*, D.10-07-045 (2010), at p. 21; *Re SDG&E Esmeralda Truckhaven Geothermal PPA*, Res. E-4171, July 31, 2008, at p. 16; *Re PG&E Dinkey Creek PPA*, D.86-10-044 (1986), at pp. 16-17, 1986 Cal. PUC LEXIS 642; *Application of Rancho Las Posas Water Co. for Rate Increase*, 1978 Cal. PUC LEXIS 1246 [writ subsequently denied in *Palmer v. Commission, supra.*.]

³ Regarding the discrepancy between the 600 MW and 633 MW amounts, SDG&E explains, “The Project has a nominal capacity of 600 MW. Since the amount of available capacity from combustion turbine

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cannot “require” changes to the project. All we have done is detailed conditions under which we approve SDG&E’s contract to purchase energy from the Carlsbad Project. It is theoretically possible for Carlsbad to build the same capacity plant and sell the power not purchased by SDG&E to others.

The CEC is the agency reviewing Carlsbad Energy Center’s proposal. If for any reason CARE believes that the CEC’s CEQA review does not adequately cover the project Carlsbad Energy Center will build, CARE must raise that with the CEC, and not here. Because we have no CEQA project before us to review, CARE’s arguments about the adequacy or nature of the CEQA review are misplaced.

B. Consistency with Prior Commission Decisions

CARE, POC, ORA, Sierra Club, and the Academy claim that the *Decision* errs in approving the Carlsbad PPTA because that approval is inconsistent with our findings in the *Track 4 Decision* [D.14-03-004], and other Commission holdings. These parties argue that: (1) our conclusions regarding the timing of SDG&E’s LCR needs conflict with the *Track 4 Decision*; (2) our conclusions about the Encina Plant retirement conflict with the *Track 4 Decision* and earlier decisions; (3) we failed to prioritize preferred resources in violation of the *Track 4 Decision* and other directives; and (4) our renewed consideration of the timing of SDG&E’s LCR need conflicts with the process we have established to consider need during general procurement proceedings, and not at the PPTA approval stage. None of these arguments have merit.

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varies according to ambient conditions at the plant site, capacity payments are capped at 633 MW.” (SDG&E Carlsbad Energy PPTA Application, at p. 1, fn 1.)

1. Consistency Regarding Timing of SDG&E 2018 Reliability Need

Rehearing applicants⁴ challenge our interpretation of the *Track 4 Decision* holdings regarding the timing of SDG&E's reliability needs, and claim the *Decision* is inconsistent with the Commission's earlier holdings. These arguments cite Track 4 conclusions that SDG&E is authorized to procure between 500 MW and 800 MW of electrical capacity "by the end of 2021," (*Track 4 Decision*, at p.143), and "both SCE and SDG&E have sufficient supplies to meet projected demands ... through at least 2018, even with the unexpected retirement of SONGS." (*Id.*, at p. 124, Finding of Fact 5.) According to these parties, our conclusion that SDG&E's reliability needs will become critical in 2018 is inconsistent with the our earlier holdings in Track 4.

As the *Decision* notes, the *Track 4 Decision* also states that reliability needs, "may become critical as early as 2018..." (*Track 4 Decision*, at pp. 49, 134, Finding of Fact 91.) The *Track 4 Decision* also describes "potential reliability issues surfacing starting in 2018." (*Track 4 Decision*, at p. 11.) As Carlsbad Energy Center and SDG&E respond, our decision to base the Carlsbad PPTA approval on a 2018 SDG&E LCR need, is consistent with these Track 4 holdings.

Ultimately, our conclusions regarding the timing of SDG&E's reliability need are not in conflict with the *Track 4 Decision* as a whole.⁵ Because Track 4 unambiguously authorizes SDG&E to procure 500 to 800 MW of capacity by 2022, it holds that capacity will be needed by that time. But Track 4 did not foreclose the possibility that capacity would be needed earlier. Despite stating that SDG&E will not have reliability needs "through at least 2018," the *Track 4 Decision* also states a few times that needs may become critical as early as 2018. (*Track 4 Decision*, at pp. 11, 49, 134, Finding of Fact 91.)

⁴ "Rehearing applicants" refers to one or more parties who have filed for rehearing of the *Decision*.

⁵ As will be discussed below, in addition to there not being a conflict, the Track 4 record also strongly supports the conclusion that SDG&E's LCR need will arise in 2018.

The rehearing applicants and the *Decision* offer dueling interpretations concerning the *Track 4 Decision* statements about whether SDG&E's LCR need will materialize in 2018. ORA suggests that the approval of the Pio Pico PPTA was the uncertainty that was tacitly acknowledged by the statements that need may arise "as early as 2018." (ORA App. Rehg., at p. 7.) Because the Pio Pico PPTA now has been approved, ORA argues that the referenced need has disappeared. The *Decision*, on the other hand, interprets "as early as 2018" as referencing the uncertainty of the retirement of the Encina Plant. The *Track 4 Decision* itself actually references neither occurrence.

Given the ambiguous language, all that the *Track 4 Decision* can legitimately be interpreted as holding regarding the timing of SDG&E's LCR need is that it is uncertain when it will occur, although it will be at some point after 2017 and before 2022. Holdings in the *Decision* about when SDG&E's need will arise are therefore best understood as new holdings, on an issue that was not definitively resolved in Track 4.

We will modify the *Decision* to clarify that, because this issue was not clearly resolved in the *Track 4 Decision*, the current *Decision* contains new holdings that conclude that SDG&E's established LCR need will arise in 2018. As discussed below, these conclusions are based on evidence in the record, which includes the Track 4 evidence that was incorporated into this proceeding.

2. Consistency with Prior Conclusions regarding Encina Plant Retirement

Rehearing applicants argue that the *Decision* mistakenly relies on a LCR need resulting from the retirement of the Encina Plant despite their allegations that: (1) the LCR need that will stem from that event was met by our approval of the Pio Pico PPTA; and (2) the *Track 4 Decision* only authorizes additional procurement for needs caused by the SONGS shut down, and not once-through cooling ("OTC") plant retirements. Whether the *Decision* can base its reliability determination on the Encina Plant retirement is significant because, "The main argument for contracting bilaterally rather than awaiting the results of an RFO [Request for Offers] is that 'delaying action on this Application to await the results of SDG&E's all-source RFO likely will jeopardize

the timely retirement of Encina [Power Station] and/or create a significant reliability gap.’ (SDG&E opening brief at 12.)” (*Decision*, at p. 12.)

Rehearing applicants claim it is error to now rely on the need arising from the Encina Plant retirement, because that event was already “assumed and accounted for,” in prior Commission decisions. (Sierra Club App. Rehg., at p. 9.) As ORA notes, the Commission addressed the impact of OTC retirements on SDG&E’s LCR need in earlier decisions. (*Re Track I and Track III LTPP* [D.12-04-066, D.13-03-029].) The *Track 4 Decision*, which provides SDG&E with authorization to fill the LCR need at issue in this proceeding, specifically concerns the impact of the SONGS shutdown. Rehearing applicants therefore contend that our approval of the Carlsbad PPTA based on the Encina retirement is inconsistent with these prior decisions.

Contrary to the assumptions underpinning these arguments, the impacts of the Encina retirement and the SONGS outage on SDG&E’s LCR are intrinsically connected. Although the impacts of these two events were at least partially discussed in separate Commission decisions, both events impact the amount of capacity in the SDG&E service territory. Accordingly, although we had already assumed and addressed the Encina Plant retirement in *SDG&E Local Capacity Requirement* [D.13-03-039] and the *Pio Pico PPTA Decision* [D.14-02-016], it is not accurate to say that the impact of that retirement had been fully “accounted for” in those earlier decisions. Both of those decisions predate our consideration of the impact of the SONGS outage in the *Track 4 Decision*. In the Track 4 proceeding we relied on evidence demonstrating that the SONGS shutdown will exacerbate the reliability issues and LCR need that will be created by the Encina retirement. (*Track 4 Decision*, at p. 136, Conclusion of Law 14, Exh. 31, CAISO Sparks Track 4 testimony, at p. 20.) Therefore, in relation to SDG&E LCR need, the Encina retirement and the SONGS outage must be considered as a whole. (*Ibid.*)

In addition, the Track 4 SDG&E LCR need assessment is based upon the Encina retirement occurring at the end of 2017, and the Track 4 record supports the conclusion that without additional capacity, SDG&E’s capacity shortfall will begin in 2018. In Track 4, we concluded that SDG&E needs to procure 500 - 800 MW to meet it

LCR need by the end of 2021. (*Track 4 Decision*, at p. 143, Ordering Paragraph 2.) The evidence we relied upon to make our Track 4 need determinations shows that there is no major event that is projected to occur between 2018 and 2022 that will increase SDG&E's LCR need during that time. (Exh. 31, CAISO Sparks Track 4 testimony, at p. 23, Table 11.) Accordingly, if SDG&E has LCR need in 2022, based on the record, that need would also be present in 2018.

Thus, the Encina Plant retirement was a factor in our Track 4 need determination, and it is not error for the *Decision* to rely upon the timing of that event as justification for approving the Carlsbad PPTA. Moreover, from review of the evidentiary record and our earlier holdings, SDG&E's LCR need will arise in 2018, triggered by the Encina Plant retirement. We will modify the *Decision* to state this more clearly.

For these reasons, the argument that the *Decision* conflicts with *SDG&E Local Capacity Requirement* [D.13-03-039] and the *Pio Pico PPTA Decision* [D.14-02-016] is also incorrect. The *Pio Pico PPTA Decision* addressed the LCR need that would be caused by the Encina retirement as evaluated in March 2013, the time we issued *SDG&E Local Capacity Requirement* [D.13-03-039]. But no party points to any statement that claims that due to the approval of the Pio Pico PPTA, we completely and permanently accounted for any and all impacts of the Encina retirement. In particular, as discussed, the retirement of SONGS, not yet considered in the *Pio Pico PTTA Decision*, exacerbates the impact of the loss of Encina's 900 MW. The *Pio Pico PPTA Decision* only holds that the 300 MW PPTA was sufficient to address the loss of Encina at that time, before we analyzed the shutdown of SONGS. Clearly, the 600 MW difference that will be left after the Encina retirement can further impact SDG&E reliability concerns when the additional loss stemming from the shutdown of SONGS is considered.

Therefore, rehearing parties' arguments that our reliance on the Encina retirement is inconsistent with our earlier holdings is incorrect.

3. Consistency with Track 4 Preferred Resources Holdings

Rehearing parties also argue the *Decision* ignores the Track 4 requirement that SDG&E must fill its authorized LCR need with preferred resources (renewable energy and energy storage) “to the extent feasible.” (*Track 4 Decision*, at p. 97.) As discussed in greater detail in Section IV concerning preferred resource mandates, the *Decision* does not violate the Track 4 preferred resources holdings, because our commitment to prioritizing preferred resources must be balanced with the State’s need for reliability. (See, e.g., *Track 4 Decision*, at p. 13.)

The *Decision* finds that the Carlsbad PPTA is needed to satisfy SDG&E’s 2018 reliability need. (*Decision*, at pp. 34-35, Finding of Fact 14, Conclusions of Law 8, 10.) Therefore, our approval of that PPTA does not conflict with the requirement that SDG&E attempt to procure preferred resources. Because our reliability conclusions are adequately supported, we are justified in weighting reliability concerns as higher priority than procuring the maximum amount of preferred resources.

4. Consistency with Established Commission Practice

More broadly, ORA argues that our conclusion that SDG&E will have LCR need in 2018 stemming from the Encina Plant retirement departs from our established procurement and planning process. Pursuant to this process, we determine utility LCR need in general procurement decisions, such as the *Track 4 Decision* and earlier decisions. As ORA notes, PPTA decisions generally do not reconsider those determinations, absent an unforeseen emergency. (See ORA App. Rhg., at p. 8; *Track 4 Decision*, at p. 5.)

Our limited deviation from the ideal process in this case is not legal error. First, the approval of the Carlsbad PPTA largely follows our announced procurement process. Carlsbad notes that the *Track 4 Decision* authorizes SDG&E to fill up to 600 MW of the identified LCR from conventional resources, and provides that SDG&E may enter into bilateral contracts. (Carlsbad Energy Center App. Rhg., at p. 14.) The *Decision* is consistent with all the Track 4 restrictions and findings. The only way that

the *Decision*, as modified in this Order, deviates from the typical procurement proceedings, is that it makes a definitive conclusion about an issue that the Track 4 proceeding left undecided – specifically the date that SDG&E will begin to have reliability need. Beyond this limited clarification, the Carlsbad PPTA approval process is entirely consistent with our standard procurement process.

In any event, our statement of our model process cannot be understood as an immutable mandate. Rather, it is a statement of our goals in making procurement determinations. Ultimately, we have the discretion to determine how to organize our proceedings. (*Pacific Telephone and Telegraph Co v. Public Utilities Comm.* (1965) 62 Cal. 2d 634, 647.) Even if the process did not conform with what we have stated we consider ideal, such a deviation would not amount to legal error.

In this case, because there is no clear guidance in the *Track 4 Decision* regarding exactly when SDG&E’s LCR need will arise, we must make that finding in the *Decision*. Our statement of the ideal procurement process does not require us to find conclusive holdings in earlier decisions where they do not exist.

5. Section 1708

A number of parties suggest that due to the alleged inconsistencies between the *Decision* and our earlier decisions, we have violated section 1708. Although no party has expounded upon this argument, section 1708 provides that the Commission may, after providing notice and an opportunity to be heard “as provided in the case of complaints, rescind, alter, or amend any order or decision made by it.” Therefore, we would violate section 1708 if we modified a final Commission decision without providing the parties with notice or an opportunity to be heard.

As discussed, our earlier decisions, specifically the *Track 4 Decision* [D.14-03-004], the *Pio Pico PPTA Decision* [D.14-02-016], and *SG&E Local Capacity Requirement* [D.13-03-039], are not inconsistent with the *Decision*. The only possible holding from a past decision that parties can argue is altered, is that SDG&E will have sufficient supply, “through at least 2018, even with the unexpected retirement of SONGS.” (*Track 4 Decision*, at p. 124, Finding of Fact 5.) However, as discussed, this

holding is inconsistent with other holdings in the *Track 4 Decision* that state the SDG&E's LCR needs may become critical in 2018. Thus, since the *Decision* is consistent with Track 4 to the extent possible, it cannot be considered to "rescind, alter, or amend" the *Track 4 Decision*.

In any event, the parties had notice and opportunity to be heard regarding SDG&E's reliability needs and the impact of the Encina retirement on SDG&E's LCR, as discussed more fully in the next section. For these reasons, the *Decision* does not violate section 1708.

C. Scoping Memo Issues

A number of parties argue that the findings in the *Decision* exceed the scope of the proceeding as set forth in the Scoping Memo. Although these arguments do not demonstrate error, we will make one modification to delete holdings regarding synchronous condenser clutch technology.

1. Encina Plant Retirement

CARE, ORA, Sierra Club, POC and the Academy all argue that our reliance on the Encina Plant retirement to approve the Carlsbad PPTA is in error since the status and impact of the Encina Plant is outside the scope of the proceeding. Due to the intrinsic interconnection between the impact of the SONGS shut down and the Encina Plant retirement, as well as the wording of the Scoping Memo and the substance of the proceeding, this argument fails.

ORA cites Rule 7.3 of our Rules of Practice and Procedure which states the scoping memo, "shall determine the schedule (with projected submission date) and issues to be addressed." (Cal. Code Regs., tit. 20, Rule 7.3.) Parties also rely on *Southern California Edison Co. v. Public Utilities Com.* ("*Edison*") (2006) 140 Cal. App. 4th 1085. In *Edison*, the Court overturned our adoption of prevailing wage regulations in a proceeding that was scoped specifically to develop rules for "bid shopping" and "reverse auctions" in utility contracting.

In this case, our reliance on, and discussion of, the Encina retirement is within the scope of the Scoping Memo, and consistent with Rule 7.3. In relevant part, the Scoping Memo provides that:

The issues to be determined are:

1. Does the application comply with SDG&E's procurement authority as granted by D.14-03-004 [*Track 4 Decision*]?
2. Should the LCR identified in D.14-03-004 be adjusted to account for transmission projects identified in the CAISO's 2013-2014 TPP? If so, how?
3. Is the Carlsbad PPTA a reasonable means to meet the 600 megawatt (MW) of identified LCR that D.14-03-004 determined may be met by conventional resources? This issue includes consideration of the following:
 - Should the Carlsbad PPTA be required to submit to SDG&E's request for offers Refueling Outage process, whether for the entirety of SDG&E's LCR need or only for the 600 MW identified as permissibly to be met by nonpreferred resources?
 - Is the Carlsbad PPTA the best fit for the identified need? This, in turn, encompasses consideration of whether there are better and available alternatives to meet this need.
 - Does the Carlsbad PPTA provide additional benefits above and beyond the identified need?
 - Will the Carlsbad PPTA enhance the safe and reliable operation of SDG&E's electrical services?
 - Are the price, terms and conditions of the Carlsbad PPTA reasonable?
 - Are any other commitments made by SDG&E that are contingent on approval of the Carlsbad PPTA reasonable?

(September 12, 2014 Scoping Memo, at pp. 3-4.)

A number of these listed issues encompass the impact of the Encina retirement on SDG&E's LCR need. Most basically, as discussed above and in the

Decision, the Encina retirement is relevant to whether the “Carlsbad PPTA a reasonable means to meet the 600 megawatt (MW) of identified LCR....” It is also relevant to the sub-issues of whether the Carlsbad PPTA is the best fit for identified need, and whether “the Carlsbad PPTA [will] enhance the safe and reliable operation of SDG&E’s electrical services?” During the prehearing conference, the ALJ confirmed that Issue 3 should be interpreted broadly, and specifically included the necessity and reasonableness of the proposed online date. (Prehearing Conference (“PHC”) Transcript, at pp. 16-27.)

In addition, SDG&E and others raised the topic of the Encina retirement a number of times early in the proceeding, and other parties responded on those issues. (See, e.g., Exh. 1 SDG&E, Baerman, at pp. 1-7; Transcript at pp. 204-218.) For this reason, rehearing parties cannot contend that they were unaware that SDG&E believed that the impact of Encina was in the scope of SDG&E’s application, or that those parties lacked an opportunity to be heard.

In these ways, the current case is entirely distinguishable from *Edison*, *supra*, 140 Cal. App. 4th 1085. In *Edison*, not only was the prevailing wage issue entirely outside the scope of scoping memo, but it was also only raised at the tail end of the proceeding, with effectively only three days for parties to respond to the new issues. (*Edison*, at p. 1106.) Here, the Encina impact issue is fairly interpreted as within the issues described in the Scoping Memo, and the issue was raised early in the proceeding with a number of opportunities for parties to respond.

The contention that the Encina retirement is outside the scope of the proceeding appears to be in part based on the misunderstanding that the impact of the Encina retirement is entirely independent from the impact of the SONGS shutdown on SDG&E’s LCR. As described above (see *supra*, § II.B.2.), these events are intrinsically interconnected.

POC also argues that any consideration of the relative merits of continued Encina operation versus the Carlsbad Energy Center are outside the scope of the proceeding. Again, the issues of whether the Carlsbad PPTA is the best method for meeting the LCR need, and whether the Carlsbad PPTA would enhance the “reliable

operation of SDG&E's electric service" (Scoping Memo, at p. 3), are to be construed broadly. (See PHC Transcript, at p. 28.) POC specifically challenges our conclusions that the Carlsbad PPTA has environmental advantages over the Encina Plant and enjoys the support of the City of Carlsbad, as outside the scope of the proceeding. (POC App. Rehg., at p. 16.) Because both conclusions are relevant to the issues of the best method for meeting the LCR need, and whether there are better alternatives, the holdings are within the scope of the proceeding.

2. 500 MW Modification

CARE argues that our approval of a 500 MW PPTA, rather than the originally proposed 633 MW amount, is outside the scope of the proceeding. Again, this type of issue falls squarely within Issue 3 of the Scoping Memo.

Issue 3 is "Is the Carlsbad PPTA a reasonable means to meet the 600 megawatt (MW) of identified LCR that D.14-03-004 determined may be met by conventional resources?" (Scoping Memo, at p. 3.) It includes the sub-issue, "Is the Carlsbad PPTA the best fit for the identified need? This, in turn, encompasses consideration of whether there are better and available alternatives to meet this need." (*Ibid.*) Clearly, our conclusion that a 500MW PPTA is preferable to the amount proposed qualifies as consideration of a "better and available alternative" to meet the identified need. Therefore, our approval of the 500 MW alternative is not outside the scope of the proceeding.

In addition, the specific possibility of a smaller project was raised in testimony. (See Exh. 1 SDG&E Baerman, at p. 37; Transcript at p. 35.) Therefore CARE also had specific notice of that type of issue, as well as an opportunity to be heard.

3. Synchronous Condenser Clutch Technology

ORA and POC take issue with our requirement directing SDG&E, "to evaluate the feasibility and cost-effectiveness" of synchronous condenser clutch technology. (*Decision*, at p. 22.) Both ORA and POC maintain that this issue is outside the scope of the proceeding and was introduced after the record was closed. (ORA App.

Rehg., at p. 11.) Carlsbad Energy and SDG&E respond that, although ordering the feasibility study is not legal error, it has no impact on the approved Carlsbad PPTA. SDG&E states it has no objection to removing that provision since no benefit to the Carlsbad Energy Center stemming from the technology has been found. (SDG&E Response, at p. 18.)

We will delete our holdings concerning synchronous condenser clutch technology, because there is no record support indicating that this technology will be beneficial to the Carlsbad PPTA. We agree with Carlsbad Energy and SDG&E that this holding has no impact on our approval of the Carlsbad PPTA, and is not necessary to the *Decision*.

D. Preferred Resource Mandates

CARE, CBD, POC, the Academy, and the Sierra Club argue that the *Decision* fails to heed various requirements that mandate that an electric utility prioritize energy efficiency, demand-side resources, and renewable resources to meet its procurement needs. These requirements are found in section 454.5, our Loading Order, and various Commission decisions, including the *Track 4 Decision*. POC also contends the *Decision* violates the broader Executive Order B-30-15, which requires state agencies to implement measures to reduce greenhouse gas emissions, and take climate change into account.

As we have explained, the Loading Order, set forth in the 2008 Energy Action Plan and subsequent Commission decisions,

...established that the state, in meeting its energy needs, would invest first in energy efficiency and demand-side resources, followed by renewable resources, and only then in clean conventional electricity supply. (Energy Action Plan 2008 Update at 1.)

(*Re Modified Bundled Procurement Plans* [D.12.01-033], at p. 17.)

We reiterated this mandate in the *Track 4 Decision*:

Section 454.5(b)(9)(C) states that utilities must first meet their “unmet resource needs through all available energy efficiency and demand reduction resources that are cost-

effective, reliable and feasible.” Consistent with this code section, the Commission has held that all utility procurement must be consistent with the Commission’s established Loading Order, or prioritization... Instead of procuring a fixed amount of preferred resources and then procuring fossil-fuel resources, the IOUs are required to continue to procure the preferred resources “to the extent that they are feasibly available and cost effective.”

(*Track 4 Decision*, at pp. 13-14.)

Applying these principles to SDG&E’s LCR, we stated, “SDG&E should also pursue significant percentages of procurement to replace SONGS through preferred resources, energy storage, and consistency with the Loading Order.” (*Track 4 Decision*, at p. 96.) Track 4 mandated that SDG&E procure 25 MW of the identified capacity need from energy storage, and 175 MW from preferred resources. We ordered the remaining 600 MW to “be procured through any set of resources appropriate to meet LCR need in the SDG&E territory, consistent to the extent feasible with the Loading Order.” (*Track 4 Decision*, at p. 97.)

The State and this Commission also have repeatedly emphasized the need to balance the pursuit of energy efficiency measures and renewable resources with the State’s need for reliable electric service. As we noted in Track 4, “California law repeatedly emphasizes the importance of maintaining the reliability of the electric grid.” (*Track 4 Decision*, at p. 13, citing § 334 [“Reliable electric service is of paramount importance to the safety, health, and comfort of the people of California.”], and other similar provisions in the Public Utilities Code.) The *Track 4 Decision* holds that the need for reliability is paramount in the utility’s procurement efforts. (See, e.g., *Track 4 Decision*, Conclusion of Law 37 [“It is prudent to promote preferred resources to the greatest extent possible, subject to ensuring a continued high level of reliability.”].)

Rehearing applicants argue that in filling the first 500 MW of SDG&E’s LCR need with conventional resources, in the form of electric capacity from the Carlsbad Energy Center, we failed to heed the preferred resource and energy efficiency mandates. As these parties note, SDG&E’s contracting bilaterally with Carlsbad Energy Center in

advance of the completion of the Track 4-required RFO deprived us of full information regarding the availability of preferred resources before SDG&E fills the majority of its LCR need. However, the rationale for allowing the SDG&E to contract bilaterally with the Carlsbad Energy Center is based on SDG&E's LCR needs, specifically the retirement of the Encina Plant which creates reliability needs beginning in 2018. The importance of prioritizing reliability when procuring resources is reiterated in the *Decision*. (*Decision*, at p. 14.) As discussed, because this reliability need is supported by the evidence in the record, the weighting of the reliability need versus the preference for renewables is within our discretion. (See *Clean Energy Fuels Corp. v. Public Utilities Com.* (“*Clean Energy*”) (2014) 227 Cal.App.4th 641, 649.)

In addition, we took a number of measures to guarantee that SDG&E would procure preferred resources to meet its LCR need, in compliance with the Loading Order requirements, in both the *Track 4 Decision* and the *Decision*. As mentioned, the *Track 4 Decision* requires that SDG&E fill 25 MW of its 800 MW need from energy storage and 175 MW from preferred resources. (*Track 4 Decision*, at p. 97.) In ordering those amounts, the Commission increased SDG&E's suggested amount of 120 MW to be procured from preferred sources. (*Id.*, at p. 96.) Moreover, as SDG&E has noted, it anticipates procuring 407 MW of preferred resources through dedicated proceedings. (*Ibid.*) Finally, in approving the Carlsbad PPTA, we mandated that the 100 MW residual procurement authority, resulting from the decrease in the PPTA, be filled only with preferred resources or energy storage. (*Decision*, at p. 31.) In these ways, we have endeavored to meet the requirements of the Loading Order, while taking reliability and feasibility into account.

The Sierra Club takes issue with our reliance on Track 4 Finding of Fact 83, concerning reliability. That finding states:

Pursuing procurement of preferred resources consistent with the Loading Order must be balanced by ensuring that grid operations are not potentially compromised by excessive reliance on intermittent resources and resources with uncertain ability to meet LCR needs.

(*Track 4 Decision*, at p. 133, Finding of Fact 83; *Decision*, at p. 33, Finding of Fact 11.) According to Sierra Club, the *Decision* errs in relying on that finding since, “it does not pertain to the Track 4 need authorization,” and is inconsistent with Track 4’s findings that SDG&E could meet up to 100% of its need with preferred resources. (Sierra Club App. Rehg., at pp. 12-13.)

The Sierra Club misinterprets our holdings. First, this finding is a general statement of the paramount importance of reliability, a principle we have repeatedly emphasized in a number of our decisions. As such, regardless of the context, it is valid for us to cite the holding in support of our reasoning. Furthermore, as cited in the *Decision*, Finding of Fact 83 is not inconsistent with the Track 4 directives. Contrary to the Sierra Club’s implications, Track 4 did not find, as a factual matter, that SDG&E *could* fill up to 100% of its need with preferred resources. Rather, we provided that SDG&E “may” procure its entire capacity need through any set of resources “consistent *to the extent feasible* with the Loading Order....” (*Track 4 Decision*, at p. 97, emphasis added.) That feasibility is in large part limited by the reliability concerns emphasized throughout the *Track 4 Decision*, and in Finding of Fact 83.

POC’s argument that we violated Executive Order (“EO”) B-30-15, issued April 29, 2015, is similarly without merit. That order establishes a new greenhouse gas reduction target, and requires that state agencies prioritize climate change considerations. POC highlights two requirements in the EO: (1) that state agencies “shall implement measures” to achieve the greenhouse gas reduction target, and (2) that state agencies should take “climate change into account” in their decisions, and “employ full life-cycle accounting to evaluate and compare infrastructure investments and alternatives.” (EO B-30-15.)

First, POC fails to specify in what manner it believes the EO has been violated. It simply states that approval of the PPTA for gas-fired generation over preferred resources “is unlawful.” (POC App. Rehg., at p. 4.) But POC provides no support for its implication that we are unable to ever approve the use of gas-fired generation, regardless of the need or circumstances. The EO simply provides that

agencies must implement measures and consider climate change impacts. We have incorporated these concerns into many of our proceedings in numerous respects.

Moreover, the Governor issued EO B-30-15 on April 29, 2015, long after the evidentiary record had been submitted and both the Proposed Decision and the Alternate Decision had been issued. At the time of the EO, all pertinent analysis had already been undertaken. POC makes no argument explaining why the EO should be applied retroactively, and, indeed, such an interpretation is disfavored. (*Di Genova v. State Board of Education* (1962) 57 Cal.2d 167, 176.)

In light of the foregoing, rehearing applicants have not demonstrated that the *Decision* violates the Loading Order or any other preferred resource mandate.

E. Substantial Evidence

The Sierra Club, CARE and POC allege that key findings in the *Decision* are not based on substantial evidence. The Sierra Club and CARE focus specifically on our findings concerning the reasonableness of the costs of the Carlsbad PPTA, as well as findings about the importance of the Carlsbad Energy Center in addressing SDG&E's reliability concerns. POC argues that our reliance on analysis from the Independent Evaluator and CAISO is not justified.

Our factual findings will be upheld as long as they are supported by substantial evidence. (See § 1757.) When reviewing the legal sufficiency of a challenged decision we do not reweigh the evidence. As the Second District Court of Appeal recently explained, the Commission's findings of fact:

...are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence. When conflicting evidence is presented from which conflicting inferences can be drawn, the PUC's findings are final.

(*Clean Energy, supra*, 227 Cal.App.4th at p. 649.) The rehearing parties' challenges concern the weight of the evidence, and cite the existence of conflicting evidence.

Because all of our holdings are supported by substantial evidence, there is no legal error.

The Sierra Club and CARE challenge our conclusion that the terms and conditions of the Carlsbad PPTA are reasonable. (*Decision*, at p. 35, Conclusion of Law 10.) According to the Sierra Club and CARE, because relevant market data was not available, our reasonableness conclusion mistakenly relies upon a flawed comparison with the Pio Pico PPTA. CARE argues that, in our comparison, we neglected to consider Pio Pico’s operating restrictions. (CARE App. Rehg., at p. 6.) Sierra Club contends that the Pio Pico PPTA originated from a different market (“a fossil-fuel-centric 2009 RFO limited to conventional generation and demand response”), and that the Carlsbad PPTA is larger than the Pio Pico PPTA, and therefore has greater economies of scale. (Sierra Club App. Rehg., at p. 14.)

Notwithstanding these arguments, substantial evidence supports our conclusion that the Carlsbad PPTA is reasonable. The Independent Evaluator report, included in SDG&E’s testimony, concludes that in light of the need to procure energy by 2018, the cost of the Carlsbad PPTA is reasonable. (Exh. 1, SDG&E, App. D, at pp. 30-32, 39-40.) Going beyond simply comparing the price to Pio Pico, the Independent Evaluator also considered generating costs in New England and New York, as well as cost information from the CEC. (*Id.*, at pp. 30-31; see also *Decision* at p. 34, Finding of Fact 15.)

Although there is other supporting evidence in SDG&E’s testimony, the *Decision* relies upon the Independent Evaluator analysis, and cites the Independent Evaluator conclusion that, “the Carlsbad PPTA generally balances risk and adequately protects the interests of customers (Ex. 1, App. D at 39-40).” (*Decision*, at p. 25.) We also noted in response to CARE’s argument concerning differences in operating restrictions, “In any event, the Independent Evaluator’s economic analysis purports to take into account contract pricing as well as the operational parameters of the Carlsbad PPTA. (Ex. 1, App. D at 27.)” (*Decision*, at p. 27.) The fact that the Sierra Club and CARE would weigh that evidence differently than we did does not demonstrate legal error.

Accordingly, POC's contention that we improperly delegated our authority to the Independent Evaluator and CAISO lacks merit. (POC App. Rehg, at p. 13.) Essentially, POC objects to the fact that we gave great weight to the Independent Evaluator's and CAISO's reports, but, as discussed, that is not a valid basis for challenging the legality of a decision. Contrary to POC's allegations, we have not ceded our statutory obligations to protect ratepayers. Rather, in fulfilling our statutory responsibilities, we found the evidence from CAISO and the Independent Evaluator to be convincing.

POC also argues that our assumption that the Encina Plant will retire at the end of 2017 is not supported by evidence, and it is inconsistent to discuss Encina's characteristics if we are assuming that plant will retire. (POC App. Rhg., at pp. 17-18.) We have not found that the Encina Plant will retire in 2017, because the retirement of Encina is a future event that is outside the Commission's control. However, we have concluded the Encina "facility is undesirable and its continued operation would only occur as a response to an emergency." (*Pio Pico PPTA Rehearing Decision*, [D.14-06-053], at p. 38.) Accordingly, we have assumed the retirement of Encina in a number of decisions, based on its scheduled retirement and the fact that there are environmental considerations that militate towards that result.

Despite this assumption, the merits of the Encina Plant are relevant to the Carlsbad PPTA, because Encina's environmental impacts, in particular, make its continued operation a less attractive choice. If the Carlsbad Energy Center did not exist, and there were a potential reliability gap, it would be more likely for Encina to continue operating beyond its projected retirement date. It is in no way inconsistent for the *Decision* to discuss the specific attributes of the Encina Plant that explain why we would not want to run the risk of triggering an Encina operating extension as an alternative way to meet SDG&E's reliability needs. For this reason POC's argument is specious.⁶

⁶ Although not a substantial evidence allegation, in its Encina argument, POC also maintains that we erred in failing to consider energy storage alternatives. POC cites its testimony about some of the advantages

(footnote continued on next page)

Finally, the Sierra Club asserts that our conclusion that the Carlsbad PPTA would provide “renewable resources integration benefits due to its flexible dispatchability” (*Decision*, at p. 34, FF 14), lacks evidentiary support. The Sierra Club cites POC testimony that, “the Carlsbad facility’s flexible attributes do not provide added system benefit.” (Sierra Club App. Rehg., at p. 15.)

Again, the existence of conflicting evidence does not demonstrate legal error in our conclusion. Moreover, the Sierra Club cites POC testimony that relies upon Commission language specifically concerning whether there is a need for flexible resources *beyond* the established LCR need. (See Exh. 14 POC, Powers, at pp. 11-12.) That language does not suggest that flexibility in resources procured to meet a LCR lacks any benefit. (Carlsbad Energy Center Response, at p. 36.) Indeed, it is difficult to deny the benefit of flexibility in generation resources. In any event, substantial evidence exists supporting our conclusion. This evidence includes SDG&E testimony about the benefits of flexible resources (Exh. 1, SDG&E Baerman, at pp. 5-6), and the CAISO testimony about the advantages of flexible generation (Exh. 4, CAISO, at pp. 7-8).

F. Ex Parte Contacts

POC alleges that we improperly relied on ex parte contacts to approve a smaller version of the Carlsbad facility with “clutch” technology. (POC App. Rehg, at p. 8.) POC takes issue with the fact that on March 13, 2015, after the ALJ issued the Proposed Decision, NRG met with Commissioner Picker’s office. Because the

(footnote continued from previous page)

of energy storage. (POC App. Rehg., at p.18.) The *Decision* considers energy storage and other alternatives generally in the “Best Fit” section. (*Decision*, at p. 12 et seq.) In short, we found that SDG&E’s reliability needs outweighed the potential benefits of waiting to see if renewable energy and other alternatives would be available. In this way, the *Decision* considers the energy storage alternative. POC’s brief testimony describes some benefits of energy storage, but POC does not suggest any particular energy storage project that could meet the reliability need in question in the applicable timeline. (Exh. 14, POC Powers testimony, at pp.12-13.) Therefore POC cannot argue that there was any concrete energy storage proposal that would meet SDG&E’s LCR needs in a timely fashion that the Commission neglected to consider. Notably, the Commission is pursuing energy storage alternatives, and specifically provided for it in the *Track 4 Decision*.

subsequently issued Alternate Proposed Decision reduces the PPTA amount, and provides for an evaluation of clutch technology and VAR support, POC contends that the changes are based on the ex parte contacts. POC misunderstands our holdings and fails to demonstrate legal error.

The actual events occurred as follows: On March 13, 2015, a week after the ALJ issued the Proposed Decision denying the PPTA, NRG met with Commissioner Picker's office. On March 18, 2015, NRG filed an ex parte notice concerning the communication, and two days later, on March 20, 2015, NRG filed comments on the Proposed Decision, suggesting for the first time on the record that a smaller PPTA could be approved. (See March 20, 2015 Carlsbad Energy Center Comments.) In response to allegations that NRG's ex parte notice was incomplete, NRG amended its ex parte notice on March 30, 2015 to specify that during the March 13 ex parte contact, NRG mentioned the possibility of the Commission approving a smaller PPTA. In its March 30 ex parte notice, NRG denies that the earlier notice was inadequate, and adds that Commissioner Picker's office gave no indication about how the Commission would respond to NRG's smaller PPTA proposal. (March 30, 2014 NRG ex parte notice.)

On April 6, 2015, Commissioner Picker issued his Alternate Proposed Decision, which proposes to approve a 500 MW PPTA, instead of the 600 MW amount originally proposed. Although in its comments Carlsbad Energy Center suggested that the additional 100 MW be included in the PPTA automatically in the event SDG&E fails to procure sufficient resources with the RFO, the Alternate provides that the 100 MW residual procurement authority, "must consist of preferred resources or storage." (*Decision*, at p. 2.)

POC makes no argument that the ex parte contacts in question violate our ex parte rules. Instead, POC alleges that the reduction in the size of the PPTA, as well as addition of clutch technology, is not based on the record in the proceeding, and is based on secret information and hearsay. POC's evidentiary arguments are misplaced because there is no indication that there is any evidence outside the record that we relied upon, and all of our holdings are based on evidence in the record.

Although POC refers to secret information and confidential documents (POC App. Rehg., at p. 9), there is no indication that such information exists. All that is in the record is that NRG raised the possibility of approving a 500 MW PPTA as an alternative approach in an ex parte meeting, a week in advance of filing this suggestion in early comments on the Proposed Decision. There is no legal error in communicating a suggestion in a legitimate and noticed ex parte communication before officially submitting that suggestion in a proceeding.

Regarding the clutch technology, POC misunderstands our holdings, which only provide for an evaluation of the use of that technology, and do not incorporate it into the PPTA approval. (*Decision*, at pp. 22, 36-37.) Moreover, POC provides no support for its assumption that this idea was communicated during an ex parte contact. In any event, because our references to synchronous condenser clutch technology are deleted in today's order, POC's argument is moot.

Finally, all the evidence we relied upon to approve the 500 MW Carlsbad PPTA as reasonable is in the record. There were extensive testimony and filings concerning the reasonableness of the proposed 600 MW Carlsbad Energy PPTA, as discussed. In approving the smaller PPTA, we specified that the reduced PPTA would be "subject to the same *per-unit* price and other terms and conditions," ensuring that the new PPTA similarly would be reasonable. (*Decision*, at p. 2.) In addition, the smaller PPTA has the additional advantage of providing for an additional 100 MW to be procured from preferred resources or energy storage. The record, our prior decisions and relevant law all strongly support that this additional procurement from preferred resources is advantageous to the public. (See, *supra*, § II.D.) For these reasons, there is adequate record support for approval of the smaller 500 MW Carlsbad PPTA.

POC's cited authority and arguments are inapposite. POC cites *Ohio Bell Tel. Co. v. Public Utilities Com.* (1997) 301 U.S. 292, for the proposition that we cannot rely on confidential documents. Yet POC has not identified any confidential report or information that has been relied upon. The only new "information" communicated at the ex parte contact was that the Commission could consider a smaller alternative PPTA, and

that information was repeated a week later in a formal filing in the proceeding. To the extent POC suggests there was other information or documents transmitted during the March 13 ex parte meeting, POC provides no support for that contention.

Similarly, POC's assertions that we relied on uncorroborated hearsay are unfounded. POC never mentions what that hearsay evidence is. There is no indication that any type of evidence, hearsay or not, was communicated or offered during the ex parte meeting. In any event, since the *Decision* and its conclusions were based on substantial evidence in the record, there is no legal error.

G. Commissioner Florio Bias

POC next contends the *Decision* violates due process because Commissioner Florio was biased about the outcome before the proceeding began. In support of its allegation, POC cites Commissioner Florio's prehearing conference statement that to give parties, "some sense of where the wind was blowing.... [I]f I were an intervenor trying to decide how to allocate scarce resources, I would not allocate them to this proceeding." (PHC Transcript, at pp. 63-64, POC App. Rehg., at p. 6.)

POC cites a number of bias cases that apply bias standards in judicial proceedings (see, e.g., *Hall v. Harker* (1999) 199 Cal.App.4th 836), but those cases are not relevant here. In a ratemaking proceeding, such as this one, which is considered a quasi-legislative proceeding for the purpose of due process analysis, the appropriate standard is articulated in *Association of National Advertisers, Inc. v. Federal Trade Commission* (hereafter "*ANA*") (D.C. Cir. 1979) 627 F.2d 1151, 1170.)

We have cited and adopted the *ANA* standard in evaluating questions of bias in quasi-legislative proceedings. As we have explained, there is a presumption of impartiality and a decisionmaker may be disqualified "only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." (*SCE 2009 General Rate Case* [D.09-08-028], at p. 51.) Any challenge to a decisionmaker's presumed impartiality must

meet the “clear and convincing” test in order to rebut the presumption of administrative regularity. (*ANA*, at p. 1170.)

In *ANA*, the Court specifically noted that the disqualification of every decisionmaker who held opinions on the appropriate course of future action “would eviscerate the proper evolution of policymaking” and substantially interfere with the development of agency policy. (*Id.*, at p. 1174.) Accordingly, “[m]ere proof that the official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute” is not enough to overcome the presumption that an official is objective and fair. (*Nehemiah Corp. of Am. v. Jackson* (E.D. Cal. 2008) 546 F. Supp. 2d 830, 847, citing *Housing Study Group v. Kemp* (D.D.C. 1990) 736 F. Supp. 321, 332.)

Commissioner’s Florio’s statements must be understood in the context of the broader point he was making. In particular, before he stated that parties may not want to allocate resources to the proceeding, Commissioner Florio stated, “...[G]o back and look pretty carefully at the comments on the LTPP [Track 4] proposed decision that were filed, particularly by SDG&E and NRG, and the changes that were made to the proposed decision.” (PHC Transcript, at p. 63.) Considering this context, Commissioner Florio was primarily sharing his interpretation of the *Track 4 Decision*, and his view that our earlier decision contemplated the need for the project under review. Applying the *ANA* standard, Commissioner Florio’s statements do not demonstrate bias or a constitute due process violation.

H. POC’s Public Records Act Request

POC also demands access to documents it requested in a November 20, 2014 Public Records Act (“PRA”) request to the Commission. POC alleges that it requested documents pertinent to the Carlsbad PPTA proceeding, and has not received those documents. On that basis, POC asks that we suspend the effective date of the *Decision*, in the event we do not grant rehearing.

POC's PRA request is not in the record of this proceeding, and therefore cannot be appropriately addressed in an application for rehearing. Other procedural vehicles exist, such as those described in General Order 66-C, which may more properly address POC's concerns. Moreover, information relevant to particular proceedings is generally obtained via discovery conducted in that proceeding. POC provides no explanation concerning why it could not make use of those processes.

In any event, "[t]he purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." (Cal. Code Regs., tit. 20, Rule 16.1 (C).) POC's PRA allegations do not demonstrate legal error in the *Decision*. POC's request to suspend the *Decision* for reasons outside the record is not appropriately addressed in an application for rehearing.

I. ORA Identified Errors

ORA requests that we correct two minor errors in the *Decision*. In one, the *Decision* mischaracterizes ORA's position (*Decision*, at p. 17), and the other is a typo (*Decision*, at p. 28). We will modify the *Decision* to correct the identified errors.

J. Request for Oral Argument

Pursuant to Rule 16.3 Cal. Code Regs., tit. 20, Rule 16.3), the Sierra Club requests oral argument on its application for rehearing. Rule 16.3 provides:

- (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
- (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
 - (2) changes or refines existing Commission precedent;
 - (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or
 - (4) raises questions of first impression that are likely to have significant precedential impact.

The Sierra Club's primary basis for requesting oral argument is our "material deviation" from the *Track 4 Decision*. (Sierra Club App. Rehg., at p. 15.) As discussed, the *Decision* did not deviate from the *Track 4 Decision*. Moreover, Sierra Club failed to explain how oral argument would "materially assist the Commission in resolving the application..." (Rule 16.3 (a).) For these reasons, we deny Sierra Club's request for oral argument.

III. CONCLUSION

For the reasons discussed above, we will modify the *Decision* in certain respects, as specified in this Order, and deny rehearing of the *Decision* as modified.

THEREFORE, IT IS ORDERED that:

1. The last sentence of the sole full paragraph on page 16 of the *Decision*, beginning with "These statements..." is deleted, and replaced with the following:

In light of these ambiguous holdings, we conclude that D.14-03-004 did not make a final determination concerning when SDG&E's established LCR need will arise.

2. The paragraph beginning on page 16 and ending on page 17 of the *Decision* is deleted and replaced with the following:

We find that there is sufficient evidence, from testimony in this proceeding, as well as from evidence incorporated from the Track 4 proceeding, to conclude that SDG&E's reliability needs will begin in 2018, assuming, as we have, that the Encina Plant retires in accord with its planned retirement schedule. We agree with CAISO that its Track 4 testimony (Exh. 31) and its 2013-1014 TPP study (Ex. 32) demonstrate a 2018 need for generation in the Carlsbad area. We note as well, that taking the Track 4 conclusions regarding SDG&E's 2022 LCR need as a given, it follows that SDG&E will have that need in 2018. From the evidence before us, we find that no major event is projected to occur in SDG&E's service territory between 2018 and 2022 that would cause a major increase in SDG&E reliability need. (Exh. 31, CAISO Sparks Track 4 testimony, at p. 23, Table 11.)

3. "ORA" is deleted from the second sentence in the first full paragraph on page 17 of the *Decision*.

4. The following sentence is added to the second line on page 18 of the *Decision*:

We note as well that we have previously recognized that the Encina Plant is “undesirable and its continued operation would only occur as a response to an emergency.” (*Pio Pico PPTA Rehearing Decision*, [D.14-06-053], at p. 38.)

5. The last paragraph on page 21 continuing to page 22 of the *Decision* is deleted.

6. “§ 3654.1” is replaced with “§ 365.1” on the first line on page 28 of the *Decision*.

7. “365.1 (cc)(2)” is replaced with “§365.1 (c)(2)” on the eleventh line from the bottom on page 28 of the *Decision*.

8. Finding of Fact 8 in the *Decision* is deleted and replaced with the following:

Assuming that the Encina Plant retires as scheduled, an SDG&E reliability need will arise in 2018.

9. Conclusion of Law 5 of the *Decision* is modified to read:

D.14-04-003 acknowledged that SDG&E’s LCR need could arise as early as 2018, but did not make a final determination about the timing of the LCR need.

10. Rehearing of the *Decision*, D.15-05-051, as modified herein, is denied.

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This order is effective today.

Dated November 5, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners

I dissent.

/s/ CATHERINE J.K. SANDOVAL

Commissioner