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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

January 30, 2023

**Agenda ID #21314****TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-432:**

This is the draft Resolution of Administrative Law Debbie Chiv Resolving K.21-11-001. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Comments shall be served (but not filed) within 20 days of the date that the draft Resolution was mailed and published on the Commission's website [link], as provided in Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments shall be served upon all persons on this proceeding's service list and on ALJ Chiv at [DBB@cpuc.ca.gov](mailto:DBB@cpuc.ca.gov).

/s/ MICHELLE COOKE

Michelle Cooke

Acting Chief Administrative Law Judge

MLC:sgu

Attachment

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Resolution ALJ-432  
Administrative Law Judge Division  
[Date]

**RESOLUTION**

RESOLUTION ALJ-432. Resolves the Appeal K.21-11-001 of Citation E-4195-0107 by San Diego Community Power.

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**SUMMARY**

This resolution resolves San Diego Community Power's (SDCP or Appellant) appeal of Citation No. E-4195-0107 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation E-4195-0107 cites and fines SDCP for failing to procure its September 2021 month-ahead system Resource Adequacy obligation. This Resolution denies the appeal, and this proceeding is closed.

**BACKGROUND**

On July 15, 2021, San Diego Community Power (SDCP or Appellant) filed its September 2021 month-ahead system Resource Adequacy (RA) compliance filing.<sup>1</sup> On July 26, 2021, the California Public Utilities Commission's (Commission) Energy Division sent SDCP a deficiency notice, indicating a need to procure additional megawatts of system RA and provided a deadline of August 2, 2021 to come into compliance. On August 3, 2021, Energy Division confirmed that SDCP had not cured its September 2021 month-ahead system RA deficiencies.

On October 4, 2021, the Commission's Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-0107 to SDCP. A penalty of \$581,817.60 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified. On November 3, 2021, SDCP filed a notice of appeal of Citation E-4195-0107.

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<sup>1</sup> We note that while CPED and SDCP submitted filings that redacted the deficiency month and RA type for this citation appeal, SDCP's November 3, 2021 Notice of Appeal disclosed this information.

On November 17, 2021, CPED filed its Compliance Filing pursuant to Resolution ALJ-377. On December 30, 2021, CPED and SDCP filed a Response to the Administrative Law Judge's (ALJ) ruling requesting responses. On January 10, 2022, the ALJ issued a ruling setting the proceeding schedule. Prepared testimony was served by parties on April 26, 2022, and reply testimony was served on May 20, 2022.

On June 17, 2022, CPED and SDCP filed a Joint Submission pursuant to the ALJ's ruling requesting information. In the Joint Submission, CPED and SDCP stated that while there are disputed facts, any additional evidence elicited at a hearing is unlikely to be probative or materially important in resolving the appeal. CPED and SDCP therefore agreed to waive cross-examination and that there was no need for a hearing.

Opening briefs were submitted on September 19, 2022, and reply briefs were submitted on October 11, 2022. On December 9, 2022, the ALJ granted parties' joint motion to admit evidence based on parties' stipulation.

## **STANDARD OF REVIEW**

### **1. Applicable Rules and Decisions on RA Enforcement and Citation Appeals**

Public Utilities (Pub. Util.) Code § 380 governs California's Resource Adequacy program. Section 380(e) addresses enforcement of the RA requirements and provides that:

The commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner. Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities.

In Decision (D.) 05-10-042, the Commission adopted a penalty regime for load-serving entities (LSEs) that fail to procure sufficient system RA capacity.<sup>2</sup> Resolution E-4017 established a citation program to enforce the Commission's RA program requirements and included a schedule of penalties. Resolution E-4195, adopted on November 6, 2008, superseded and replaced Resolution E-4017 in its entirety, and updated the schedule of penalties for violations of the RA requirements. Resolution E-4195 has been modified by several decisions, including D.10-06-036, D.11-06-022, D.14-06-050, and D.19-06-026.

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<sup>2</sup> D.05-10-042 at Conclusion of Law (COL) 21.

Resolution ALJ-377 established a standardized appeal process for citation appeals and applies here. Pursuant to Resolution ALJ-377, Commission staff has the burden to prove by a preponderance of evidence the case supporting issuance of a citation. If that initial burden is met, the burden shifts to the appellant “to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.”<sup>3</sup>

Lastly, in D.98-12-075, the Commission identified five factors to consider in determining the appropriate level of a fine: (1) the severity of the offense, (2) the entity’s conduct, (3) the entity’s financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest.<sup>4</sup> The five-factor test is applicable in reviewing this citation appeal.

## **DISCUSSION**

### **1. The Citation Correctly Identified and Calculated Appellant’s September 2021 Month-Ahead System RA Deficiencies**

The parties agree that the citation correctly identified Appellant’s September 2021 month-ahead system RA deficiencies and that the citation correctly applied the RA penalty schedule to those deficiencies when calculating the penalty amount.<sup>5</sup> As such, CPED has met its burden to demonstrate that Appellant’s September 2021 month-ahead system RA procurement was deficient by the amount shown on the citation and that the penalty amount was correctly calculated based on the established penalty schedule.

Under Resolution ALJ-377, once Commission staff has met its initial burden, the burden shifts to Appellant to demonstrate that a violation did not occur and the citation should not issue, or that the amount of the penalty is inappropriate. Appellant also has the burden to prove any affirmative defenses.

### **2. Appellant Failed to Meet its Burden to Prove that It Was “Impossible” to Procure RA Resources**

SDCP asserts an affirmative defense that it was “impossible” for it to obtain the necessary RA resources. Specifically, SDCP alleges that “the lack of available resources made it impossible” for SDCP to meet its September 2021 system RA obligations and

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<sup>3</sup> ALJ-377, Appendix A.

<sup>4</sup> See D.98-12-075, 1998 Cal. PUC LEXIS 1018, at 52-59.

<sup>5</sup> SDCP Response to ALJ’s E-mail Ruling, December 30, 2021, at 2; CPED Response to ALJ’s E-mail Ruling, December 30, 2021, at 1.

that “it was impossible for SDCP to procure the necessary resources at any price.”<sup>6</sup> For the reasons discussed below, we find that SDCP failed to meet its burden to prove an impossibility defense.

First, September 2021 system RA resources were available for procurement in 2020 through investor-owned utilities’ (IOU) requests for offer (RFO) solicitations; however, SDCP opted not to participate in all IOU solicitations. San Diego Gas & Electric Company (SDG&E) issued a solicitation on June 15, 2020 and Southern California Edison Company (SCE) issued a solicitation on September 17, 2020, both of which included September 2021 RA resources.<sup>7</sup> Yet, SDCP only bid into SDG&E’s solicitation.<sup>8</sup> SDCP argues that it chose not to participate in SCE’s solicitation because it was waiting for SDG&E to respond to its pending bids and that if SDCP bid into SCE’s solicitation and was selected, this “could have resulted in double procurement....”<sup>9</sup>

We are not persuaded by SDCP’s argument. SDCP provides no evidence that its offer in SDG&E’s solicitation was binding or could not have been withdrawn, if selected by SDG&E. Rather, if SDCP was notified of a “shortlist” selection by SDG&E, SDCP could have withdrawn a selected offer in SCE’s solicitation. By voluntarily choosing not to participate in SCE’s solicitation for available RA resources, SDCP fails to demonstrate that it was “impossible” to procure September 2021 system resources.

Second, when SDCP participated in SDG&E’s 2021 RFO solicitations, SDCP submitted bids that were far below what it knew, or should have known, was necessary to procure RA resources, which resulted in rejected offers.<sup>10</sup> Prior to bidding into SDG&E’s solicitations, SDCP received several RA “market updates” that included current bidding/trading prices for September 2021 system RA. After receiving a “market update” on March 30, 2021,<sup>11</sup> however, SDCP submitted an offer in SDG&E’s April 13, 2021 solicitation that was well below the “market update” bidding price for

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<sup>6</sup> SDCP Opening Brief, September 19, 2022, at 17, 19.

<sup>7</sup> CPED Opening Brief, September 19, 2022, at 5 (citing Exhibit CPED-2C, Prepared Testimony of Stephanie Wu at 3-4, Attachment 4 (April 13, 2021 SDCP Response to March 16, 2021 CPED data request DR-ELE-00174-1, Declaration of John Dalessi at Paragraph 18)). We note that Pacific Gas and Electric Company held RFO solicitations in 2019 for September 2021 system RA. However, SDCP did not submit its implementation plan and statement of intent to serve customers to the Commission until December 2019. See Exhibit SDCP\_02, Reply Testimony of Byron Vosburg, May 20, 2022, at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Exhibit SDCP\_02, Reply Testimony of B. Vosburg, at 3.

<sup>10</sup> CPED Opening Brief at 6 (citing Exhibit CPED-2C, Testimony of S. Wu, at 8).

<sup>11</sup> See Exhibit CPED-2C, Testimony of S. Wu, Attachment 12 (March 30, 2021, E-mail Exchange between SDCP and Tullett Prebon).

September 2021 system RA.<sup>12</sup> SDG&E rejected SDCP's bid days later.<sup>13</sup> Similarly, after receiving multiple "market updates" on May 4, June 7, June 9, and June 15, 2021 with current bidding/trading prices,<sup>14</sup> SDCP submitted an offer in SDG&E's June 25, 2021 solicitation that fell well below each of the "market update" bidding prices for September 2021 system RA.<sup>15</sup> SDG&E rejected SDCP's bid three days later.<sup>16</sup>

SDCP's pattern of bidding below the "market update" bidding price continued with several other 2021 solicitations offering September 2021 RA products: three solicitations from Electricite de France in June and July 2021 and The Energy Authority's (TEA) July 8, 2021 solicitation.<sup>17</sup> SDCP's offers in all of these solicitations were rejected.<sup>18</sup> In numerous solicitations in 2021, SDCP repeatedly bid below the known bidding price for September 2021 system RA and SDCP's offers were repeatedly rejected. Based on this evidence, SDCP fails to demonstrate that it was "impossible" to procure September 2021 system resources. SDCP merely demonstrates that it was not possible to procure system RA resources at the below-market price that SDCP was willing to pay.

Third, despite SDCP's claims that system RA prices were not excessive, SDCP rejected available RA resources that it deemed were too expensive. In SDCP's Notice of Appeal, SDCP attests that it "is not claiming that the cost of System RA was excessive, or that the program was financially constrained in its procurement efforts."<sup>19</sup> Yet, in SDCP's testimony, Byron Vosburg testifies that a "major contributing factor" of SDCP's inability to meet its RA obligations was due to a "lack of incentives for LSEs, generators, and marketers to timely sell excess RA at reasonable prices."<sup>20</sup> SDCP's assessment that RA prices were not "reasonable" is confirmed in an October 28, 2020 email between SDCP's broker, Pacific Energy Advisors, Inc., and a third-party broker, Tullett Prebon, in which Tullett Prebon informs that September 2021 system RA is available at a specific starting

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<sup>12</sup> Exhibit SDCP\_01, Prepared Testimony of B. Vosburg, April 26, 2022, at 13.

<sup>13</sup> *Id.*

<sup>14</sup> Exhibit CPED-2C, Testimony of S. Wu, Attachment 14 (May 4, 2021 E-mail Exchange between SDCP and Tullett Prebon), Attachment 15 (June 7, 2021 E-mail Exchange between SDCP and Equus Energy Group), Attachment 16 (June 9, 2021 E-mail Exchange between SDCP and Tullett Prebon), Attachment 17 (June 15, 2021 E-mail Exchange between SDCP and Tullett Prebon).

<sup>15</sup> Exhibit SDCP\_01, Testimony of B. Vosburg, at 14.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 16-17.

<sup>18</sup> *Id.*

<sup>19</sup> Notice of Appeal of SDCP from Citation No. E-4195-0107, at 14.

<sup>20</sup> Exhibit SDCP\_01, Testimony of B. Vosburg, at 10.

price.<sup>21</sup> John Dalessi of Pacific Energy Advisors rejects the RA product outright, indicating that the price is unreasonable.<sup>22</sup>

By declining available September 2021 RA products that SDCP considered too expensive, SDCP fails to demonstrate that it was “impossible” to procure September 2021 system RA resources. Rather, SDCP merely shows that it was not possible to procure system RA resources at what SDCP deemed to be “reasonable prices.”

The evidence clearly demonstrates that September 2021 system RA products were available to SDCP for procurement. However, SDCP failed to participate in SCE’s RFO solicitation for available resources, consistently bid into solicitations at well below the known bid prices, and declined available RA resources that it deemed were too expensive. SDCP has therefore failed to meet its burden to prove that it was “impossible” to procure September 2021 system RA resources to meet its obligations.

### **3. Application of the Five-Factor Test Warrants Affirming the Citation and the Penalty**

We next consider whether SDCP has otherwise satisfied its burden to demonstrate that the citation should not issue or that the amount of the penalty is inappropriate.

In D.98-12-075, the Commission identified five factors to consider in assessing the appropriate level of a fine: (1) the severity of the offense, (2) the entity’s conduct, (3) the entity’s financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest. We address each factor in turn.

#### **3.1. Severity of the Offense**

In D.98-12-075, the Commission stated that this factor includes several considerations:

Economic harm reflects the amount of expense which was imposed upon the victims, as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. In comparison, violations which caused actual physical harm to people or property are generally considered the most severe, with violations that threatened such harm closely following.<sup>23</sup>

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<sup>21</sup> Exhibit CPED-2C, Testimony of S. Wu, at 5 (citing Attachment 9, October 21-28, 2020, E-mail Exchange between SDCP and Tullett Prebon).

<sup>22</sup> *Id.*

<sup>23</sup> D.98-12-075 at 54.

The Commission further observed:

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm may not be to consumers but rather to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities: [citing Pub. Util. Code Section 702].<sup>24</sup>

The Commission noted that “[s]uch compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.”<sup>25</sup>

Based on the evidence, we find that SDCP deliberately failed to procure sufficient system RA capacity to meet the Commission’s RA requirements. SDCP does not argue that it inadvertently failed to procure sufficient RA capacity.

As we stated in Resolution ALJ-424, “the RA program was established in the wake of the 2000 Western energy crisis and was designed to ensure that LSEs secure sufficient electrical capacity to maintain grid reliability.”<sup>26</sup> SDCP’s deliberate failure to procure sufficient RA capacity, as required of an LSE participating in the RA program, threatened the reliability of the electrical grid. As the Commission has previously held, “the deliberate failure to meet RA requirements is accorded a high level of severity.”<sup>27</sup>

Moreover, SDCP’s deliberate violations harmed the integrity of the Commission’s regulatory processes. In establishing the RA penalty program, the Commission underscored the importance of holding LSEs that participate in the RA program accountable for non-compliance: “A regulatory program that imposes significant procurement obligations upon LSEs cannot be expected to succeed unless those LSEs have reason to believe there are consequences for noncompliance that outweigh the

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<sup>24</sup> *Id.* at 55.

<sup>25</sup> *Id.*

<sup>26</sup> Resolution ALJ-424, *Resolves the Appeal K.21-08-001 of Citation E-4195-100 by Commercial Energy*, at 8.

<sup>27</sup> *Id.* See also Resolution ALJ-406, *Resolves K.20-04-005, the Appeal of City of San Jose, an administrator of San Jose Clean Energy*, at 5.



costs of compliance.”<sup>28</sup> Thus, we find that disregarding a Commission directive is accorded a high level of severity.<sup>29</sup>

SDCP argues that because its deficiency was “small relative to its overall requirement,” the violation should be treated as a “minor” offense.<sup>30</sup> However, the RA penalty structure, as SDCP acknowledges, applies a volumetric formula based on the amount of the deficiency to determine the penalty amount.<sup>31</sup> Therefore, the formula already accounts for a “small” deficiency and applies a corresponding penalty.

### **3.2. The Entity’s Conduct**

As stated in D.98-12-075, this factor “recognizes the important role of the public utility’s conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation.”<sup>32</sup> In considering a utility’s actions to prevent a violation, the Commission states that “[p]rudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives” and that the Commission “will consider the utility’s past record of compliance with Commission directives.”<sup>33</sup> In considering a utility’s actions to detect a violation, the Commission states that “[d]eliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor.”<sup>34</sup>

SDCP argues that its deficiencies were “not a result of SDCP’s conduct” but due to lack of availability of system RA and a last-minute contract cancellation.<sup>35</sup> The Commission disagrees. As discussed in Section 2, SDCP failed to demonstrate that RA resources were not available for procurement during the relevant time period. Rather, the evidence shows that SDCP chose not to participate in certain available procurement opportunities, such as bidding in SCE’s solicitation, and that SDCP repeatedly submitted offers that were well below known market bid prices, resulting in rejected bids. As such, we find that SDCP did not take all reasonable steps to ensure compliance with Commission directives.

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<sup>28</sup> D.05-10-042 at 93.

<sup>29</sup> See D.98-12-075 at 56; Resolution ALJ-406 at 5; Resolution ALJ-424 at 8.

<sup>30</sup> SDCP Opening Brief at 18.

<sup>31</sup> *Id.*

<sup>32</sup> D.98-12-075 at 56.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 57.

<sup>35</sup> SDCP Opening Brief at 7.

The Commission has previously determined that where appellant's "failure to meet its regulatory requirements was deliberate, as opposed to inadvertent," this is considered an aggravating factor.<sup>36</sup> As such, SDCP's deliberate failure to meet its RA obligations is an aggravating factor.

Under this factor, we consider a utility's "past record of compliance with Commission directives."<sup>37</sup> SDCP acknowledges that in addition to the instant citation, it received a citation from CPED for deficiencies for its 2021 year-ahead RA obligations.<sup>38</sup> CPED contends that this reflects a "pattern" of "deliberately falling short of its compliance obligations and then blaming market conditions."<sup>39</sup> SDCP disputes CPED's contention and asserts that the same market conditions prevented SDCP from meeting its year-ahead and month-ahead obligations for the same time period.<sup>40</sup>

We note that year-ahead and month-ahead RA obligations are distinct requirements and penalties for year-ahead and month-ahead violations are assessed separately. SDCP's year-ahead RA filing required only 90 percent of its RA obligation and was due on October 31, 2020. By contrast, SDCP's month-ahead RA filing required 100 percent of its RA obligation and was due on July 15, 2021 (over eight months later). Although SDCP received citations for both its year-ahead and month-ahead RA filings, SDCP's year-ahead RA citation does not inform this factor this time, as it is currently pending on appeal.

We observe, however, that since the issuance of the instant citation, SDCP received another citation in the RA program on April 8, 2022 from CPED.<sup>41</sup> However, CPED did not submit any information about this citation and as such, that citation does not inform this factor.

### **3.3. Financial Resources**

Under this factor, D.98-12-075 states that "[e]ffective deterrence also requires that the Commission recognize the financial resources of the public utility in setting a fine which balances the need for deterrence with the constitutional limitations on excessive

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<sup>36</sup> Resolution ALJ-424 at 8; Resolution ALJ-406 at 5.

<sup>37</sup> See D.98-12-075 at 56.

<sup>38</sup> SDCP Opening Brief at 9.

<sup>39</sup> CPED Opening Brief at 12.

<sup>40</sup> SDCP Reply Brief, October 11, 2022, at 8.

<sup>41</sup> Commission's Recent Citations Issued via Energy Division Citation Programs, available at: [UEB Citations-Fines-Restitutions -- Active.xlsx \(ca.gov\)](#)

finer.”<sup>42</sup> The Commission “intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.”<sup>43</sup>

SDCP argues that it “did not willfully decline to purchase system RA because it lacked financial resources.”<sup>44</sup> CPED counters that this factor considers the financial resources of the LSE in relation to its ability to pay the fine, not the LSE’s financial ability to procure RA.<sup>45</sup> We agree with CPED that whether an LSE had the financial resources to purchase RA does not inform our consideration of this factor. Rather, D.98-12-075 states that this factor considers “the financial resources of the public utility in setting a fine.”

As SDCP does not argue that it lacks the financial resources to pay the penalty, this factor is neither a mitigating nor aggravating factor in our analysis.

### **3.4. Role of Precedent**

D.98-12-075 provides that: “In future decisions which impose sanctions, the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.”<sup>46</sup>

SDCP states that prior Commission decisions are not relevant because the schedule of penalties is based on the amount of deficiency.<sup>47</sup> The Commission disagrees. In several recent Commission resolutions addressing RA citation appeals, the Commission determined that: (1) the appellant deliberately failed to procure sufficient RA capacity to meet its obligations, and (2) upheld the citation and penalty based on the penalty schedule tied to the size of the deficiency.<sup>48</sup> SDCP has provided no Commission precedent that adjusted an RA citation penalty downward or upward, or otherwise deviated from the RA penalty schedule.

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<sup>42</sup> See D.98-12-075 at 56.

<sup>43</sup> *Id.*

<sup>44</sup> SDCP Opening Brief at 21.

<sup>45</sup> CPED Opening Brief at 12.

<sup>46</sup> D.98-12-075 at 60.

<sup>47</sup> SDCP Opening Brief at 21.

<sup>48</sup> See Resolution ALJ-424; Resolution ALJ-406; Resolution ALJ-356, *Resolving Citation Appeal K.18-05-018 and affirming the penalty assessed against Pilot Power Group, Inc.*; Resolution ALJ-298, *Affirming the Penalty Assessed Against 3 Phase Renewables*; Resolution ALJ-382, *Resolves the Appeal K.19-03-024 of Citation E-4195-0052 by San Jose Clean Energy*.

In addition, several Commission resolutions have made clear that market conditions do not excuse non-compliance with the RA requirements. SDCP's argument that it was unable to procure RA resources because resources could not be found in the market has been repeatedly denied by the Commission as a basis for mitigating or excusing an LSE's failure to comply with its RA requirements.<sup>49</sup> In Resolution ALJ-406, which affirmed San Jose Clean Energy's citation for RA deficiencies, the Commission stated:

[N]one of these [cited] decisions endorse the principle that commercial impracticability due to market conditions alone excuses compliance with RA requirements. Rather, the decisions uniformly emphasize that, while the Commission will act to protect ratepayers from the failure of the market due to market power, tight market conditions alone are not reason to excuse compliance with RA compliance.<sup>50</sup>

Similarly, in Resolution ALJ-424, affirming Commercial Energy's citation for RA deficiencies, the Commission stated that "LSEs are not excused from providing service due to market conditions."<sup>51</sup> We stated that the "the cost of operating as an LSE as required by law is not a mitigating factor for failure to meet those [RA] requirements. Pub. Util. Code § 380(c) and the RA program require that, in order to operate as an LSE, the entity must meet its procurement obligations."<sup>52</sup> Further, in Resolution ALJ-298, affirming 3 Phase Renewables' citation for RA deficiencies, the Commission held that "[f]ines under Resolution E-4195 need not take market conditions into account."<sup>53</sup>

Based on the Commission precedent addressing RA citation appeals, this factor favors affirming the citation penalty based on the penalty schedule tied to the size of the deficiency.

### **3.5. Totality of the Circumstances**

D.98-12-075 provides that:

Setting a fine at a level which effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including

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<sup>49</sup> SDCP Opening Brief at 17.

<sup>50</sup> Resolution ALJ-406 at 3.

<sup>51</sup> Resolution ALJ-424 at 16 (quoting Resolution ALJ-382 at 5).

<sup>52</sup> *Id.*

<sup>53</sup> Resolution ALJ-298 at COL 3.

any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.<sup>54</sup>

SDCP claims that “no penalty amount could effectively deter noncompliance since it was impossible for SDCP to procure the necessary resources at any price.”<sup>55</sup> However, as discussed in Section 2, SDCP failed to satisfy its burden to prove that it was impossible to procure the necessary RA resources at any price. Despite the prospect of the penalty amount, SDCP was not incentivized to attempt to procure available RA resources and to bid into third-party solicitations at market-competitive prices. If anything, SDCP’s actions suggest that the RA penalty amounts are not sufficiently high to incentivize an LSE to comply with the RA requirements.

SDCP also argues that the penalty should be eliminated because SDCP detrimentally relied on a contract with Bonneville Power Administration (BPA) that was cancelled at the last minute by BPA due to a lack of water resources.<sup>56</sup> SDCP cites to the doctrine of promissory estoppel to ostensibly argue that it would be unjust for the Commission to penalize SDCP for the failure of BPA to fulfill its contractual obligations.<sup>57</sup> CPED responds that a promissory estoppel argument would be appropriate if SDCP was bringing an action against BPA. SDCP’s argument is without merit. A bilateral contract dispute between two private parties has no bearing on the Commission’s enforcement of an LSE’s RA obligations.

SDCP further argues that the penalty should be reduced because in D.19-11-016, the Commission stated that a modified cost allocation mechanism (MCAM) would be developed through a workshop process.<sup>58</sup> SDCP argues that the MCAM was not adopted for new departing load until D.22-05-015, and that if it had been adopted earlier, SDCP estimates that it would have been able to procure additional capacity.

This argument is without merit. SDCP failed to meet its RA requirements on July 15, 2021, and D.22-05-015 was issued ten months later on May 23, 2022. Each LSE participating in the RA program is required to comply with its RA obligations, pursuant to Pub. Util. Code § 380. SDCP’s failure to meet its RA obligations is not excused or mitigated simply because SDCP believes the Commission should have taken an action one year prior.

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<sup>54</sup> D.98-12-075 at 59.

<sup>55</sup> SDCP Opening Brief at 21.

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 26.

Based on the totality of the circumstances, including the previous four factors, we find no mitigating factors and several aggravating factors. Despite the aggravating factors, the Commission finds that the established RA penalty schedule should apply to SDCP's deficiency amount. As such, SDCP's assessed citation shall not be excused and the penalty shall not be reduced.

### **CONCLUSION**

Based on the five-factor test in D.98-12-075, SDCP failed to meet its burden to rebut CPED's demonstration that the violations occurred and SDCP failed to meet its burden of persuasion that the citation penalty should be reduced or excused. The citation appeal is hereby denied.

### **COMMENTS**

Pub. Util. Code § 311(g)(1) requires that a draft resolution be served on all parties and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of today's resolution was distributed for comment to the service list.

### **FINDINGS OF FACT**

1. On October 4, 2021, CPED issued Citation E-4195-0107 to SDCP. A penalty of \$581,817.60 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified.
2. On November 3, 2021, SDCP filed a Notice of Appeal of Citation E-4195-0107.
3. Citation E-4195-0107 correctly identifies SDCP's deficiencies in procurement of its September 2021 month-ahead system RA obligations.
4. Citation E-4195-0107 correctly calculates the penalties pursuant to the penalty schedule adopted in Resolution E-4195, as modified.

### **CONCLUSIONS OF LAW**

1. SDCP has not met its burden of rebutting CPED's demonstration that the violation occurred and failed to meet its burden of persuasion that the citation penalty should be reduced or excused.
2. Based on review of the evidence and testimony, the citation and penalty amount were appropriately issued.
3. The citation should be affirmed.
- 4.

Therefore, **IT IS ORDERED** that:

1. Citation E-4195-0107 is affirmed.
2. San Diego Community Power shall pay a fine of \$581,817.60 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102 within 30 days of the effective date of this resolution.
3. K.21-11-001 is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, the following Commissioners voting favorably thereon:

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Rachel Peterson  
Executive Director





**N O T I C E**

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Resolution ALJ-432 ALJ/DBB/sgu

\*\*\*\*\* PARTIES \*\*\*\*\*

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

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**K2111001 LIST**

David Gibbs  
Legal Division  
320 West 4th Street Suite 500  
Los Angeles CA 90013  
(213) 576-7031  
dgs@cpuc.ca.gov  
For: Consumer Protection and Enforcement Division (CPED)

Ty Tosdal  
Counsel  
TOSDAL, APC  
777 SOUTH HIGHWAY 101 STE. 215  
SOLANA BEACH CA 92075  
(858) 252-6416  
Ty@TosdalAPC.com  
For: San Diego Community Power

---

\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\*

\*\*\*\*\* INFORMATION ONLY \*\*\*\*\*

Scott Blaising  
Attorney At Law  
BRAUN & BLAISING, P.C.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(916) 682-9702  
blaising@braunlegal.com

Katie Eng  
BRAUN BLAISING & WYNNE  
555 CAPITOL MALL, SUITE 570  
SACRAMENTO CA 95814  
(916) 326-5812  
eng@braunlegal.com

Josh Stoops  
Attorney  
BRAUN BLAISING & WYNNE, P.C.  
555 CAPITOL MALL, STE 570  
SACRAMENTO CA 95814  
(916) 326-5812  
Stoops@BraunLegal.com

Regulatory Clerk  
BRAUN BLAISING & WYNNE, PC (BB&W)  
555 CAPITOL MALL, STE 570  
SACRAMENTO CA 95814  
regulatory@braunlegal.com

Narissa Jimenez-Petchum  
CALIFORNIA PUBLIC UTILITIES  
EMAIL ONLY  
EMAIL ONLY CA 00000  
Narissa.Jimenez-Petchumrus@cpuc.ca.gov

Debbie Chiv  
Administrative Law Judge Division  
RM. 5011  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-4415  
dbb@cpuc.ca.gov

Christopher Clay  
Legal Division  
RM. 4300  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1123  
cec@cpuc.ca.gov

Andrew B. Brown  
Attorney  
ELLISON SCHNEIDER HARRIS & DONLAN LLP  
2600 CAPITOL AVENUE, SUITE 400  
SACRAMENTO CA 95816  
(916) 447-2166  
abb@eslawfirm.com

Charlyn A. Hook  
Legal Division  
RM. 5123  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3050  
chh@cpuc.ca.gov

Ke Hao Ouyang  
Consumer Protection and Enforcement Division  
AREA 2-E  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1235  
kho@cpuc.ca.gov

Christa Lim  
Regulatory Affairs (West)  
SHELL ENERGY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(858) 241-4107  
christa.lim@shell.com

Resolution ALJ-432 ALJ/DBB/sgu

Rebecca Meiers-De Pastino  
Sr. Attorney  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVENUE  
ROSEMEAD CA 91770  
(626) 302-6016  
Rebecca.Meiers.DePastino@SCE.com

Erin Hudak  
TOSDAL APC  
845 15TH STREET, SUITE 103  
SAN DIEGO CA 92101  
(714) 580-8113  
erin@tosdalapc.com

Kalia Mitchell-Silbaugh  
Legal Assistant  
TOSDAL APC  
845 15TH STREET, SUITE 103  
SAN DIEGO CA 92101  
(707) 868-8304  
kali@tosdalapc.com

Stephanie Wu  
Consumer Protection and Enforcement Division  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 696-7309  
sw3@cpuc.ca.gov

Matthew Yergovich  
Legal Division  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1271  
myh@cpuc.ca.gov

Daniel Zarchy  
EMAIL ONLY  
EMAIL ONLY CA 00000  
dzarchy@gmail.com