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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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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)

APPLICATION FOR REHEARING OF THE PROTECT OUR COMMUNITIES FOUNDATION OF DECISION 15-05-051

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APPLICATION FOR REHEARING OF THE PROTECT OUR COMMUNITIES FOUNDATION OF DECISION 15-05-051

I. Introduction

As provided for in Rules 16.1 and 16.2 of the Rules of Practice and Procedure of the California Public Utilities Commission, The Protect Our Communities Foundation ("POC") seeks rehearing of Decision 15-05-051 ("D.15-05-051" or "the Decision"), which approved the application of San Diego Gas and Electric Company ("SDG&E") to sign a power purchase tolling agreement ("PPTA") for electricity produced by the Carlsbad Energy Center ("Carlsbad"). The Commission's Decision and the process the Commission used to reach this Decision violate state statutes and the Commission's own rules. Moreover, the Decision violates Governor Brown's Executive Order B-30-15, and the requirements of California's loading order.

The Commission committed legal error by relying on extra-record evidence in reaching its conclusions. Moreover, the decision-making process was subject to open and explicit bias, as demonstrated by the statements of Commissioner Michael Florio at the prehearing conference. D.15-05-051 fails to provide notice and opportunity to be heard in violation of Section 1708 by reversing the Commission's findings in D.14-03-004 that no additional volt-ampere reactive ("VAR") support is needed in Southern California. D. 15-05-051 unlawfully incorporates several decision criteria that were not part of the scoping memorandum, unlawfully delegates the Commission's authority to determine power needs to the California Independent System Operator ("CAISO"), approves a

facility that was never proposed by the applicant nor considered in the evidentiary record, and unlawfully relies on extra-record evidence to find that Carlsbad may provide a benefit that both the CAISO and the applicant deny.

In November 2014, POC submitted a Public Records Act request to the Commission seeking disclosure of communications between Commission employees and parties about the subjects of this proceeding. Over seven months later, POC has not been provided access to the requested records, in violation of state law, precluding POC from determining the extent to which D.15-05-051 relied upon extra-record communications and compromising the rights of the public and the parties to a transparent and fair decision-making process.

Decision 15-05-051 is replete with legal error and must be reheard or reversed.

II. Decision 15-05-051 Violates California's Loading Order

Decision 15-05-051 violates section 454.5 of the Pub. Util. Code.[1] According to 454.5(b)(9)(C), an electric utility "…shall *first* meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable and feasible." (emphasis added). The Commission's approval of the Carlsbad PPTA—without any consideration of energy efficiency or demand reduction resources that are available in the San Diego area —violates this statutory mandate.

Decision 15-05-051 willfully ignores the unambiguous mandate of § 454.5(b)(9)(C) and affirms the preference of SDG&E and the rest of the state's electric utilities to rely on gas-fired power plants to meet peak power needs rather than energy efficiency and demand reduction resources, as required by state law. Decision 15-05-051 justifies its departure from the statute by citing Finding of Fact 83 of D.14-03-004, which expresses nervousness over "excessive reliance" on "intermittent resources" for "local control reliability ("LCR"). Instead of performing its statutory duty to objectively review power needs in SDG&E's service territory, D.15-05-051 never analyzes or even

[1] All subsequent references in this document to California Statutes are to the Public Utilities Code.

discusses whether reliance on preferred resources would be excessive or would genuinely endanger reliability. D.15-05-051 ignores applicable law and allowed its policy to dictated by the primordial fear that somehow, someday, somewhere the lights would go out if the Carlsbad plant were not approved. Instead of independently analyzing the potential of energy efficiency, preferred resources, and demand reduction programs that do exist or could be implemented in SDG&E's service territory, it simply relies on the CAISO's analysis of future resource needs to make its determination that a new gas-fired PPA is preferable to more environmentally benign alternatives. This assertion does not meet the statutory standard that requires the Commission to identify and analyze available energy efficiency and demand reduction resources and make a record determination that those resources are not cost-effective, reliable or feasible when compared to the PRA.

Decision 15-05-051 states that SDG&E's may not be able to complete a competitive bidding process before request for offers before the reliability need for additional capacity becomes critical. The decision also discusses the risk of what it calls a "reliability gap" that might ensue if the Encina facility is closed at the end of 2017. (See D.15-05-051, pp. 11-12) and finds that SDG&E's service territory faces a potential shortage of capacity in 2018 that the Carlsbad facility would alleviate. The decision does not weigh these considerations against the cost of the plant (approximately $2.16 billion over the next 30 years[2]), the environmental damage it could cause or the relative benefits of preferred resources. In issuing D.15-05-051, the Commission has failed to account for the environmental damage a huge new source of greenhouse gas emissions will impose on the state.

III. Decision 15-05-051 Violates Executive Order B-30-15

On April 29, 2015 Governor Edmund G. Brown issued Executive Order B-30-15. It committed California to reducing greenhouse gas emissions to 1990 levels by 2020 and

to further reduce the state's emission levels to 80 percent below 1990 levels by 2050. One key provision of the Executive Order is Ordering Paragraph 2 which states: "All state agencies with jurisdiction over sources of greenhouse gas emissions shall implement measures pursuant to statutory authority, to achieve reductions of greenhouse gas emissions to meet 2020 and 2050 greenhouse gas emissions targets." In addition, Ordering Paragraph 6 charges state agencies with "…taking climate change into account in their planning and investment decisions and employ full life-cycle accounting to evaluate and compare infrastructure investments and alternatives."

The Proposed Decision ("PD") of Administrative Law Judge Yacknin honored Executive Order B-30-15 by denying approval of the PPTA by finding that the plant is unnecessary at this time.

Administrative agencies such as the Commission must comply with Executive Orders issued by California's Governor. *See Brown v. Chiang* (2011) 198 Cal.App.4th 1203. D.15-05-051 violates an Executive Order issued by the Governor by ignoring those provisions that compel the requirement that the Commission approve preferred resources over gas-fired generation. Thus, the Decision is unlawful.

IV. Decision 15-05-051 Improperly Relies on Information Not in the Record of the Proceeding and Overturns the Commission's Findings in a Prior Proceeding without Notice

A fundamental requirement of due process is that Commission decisions must be based on "...substantial evidence in light of the whole record."[3] Decision 15-05-051 violates this basic tenant of due process by relying on extra-record evidence (see p. 21). Specifically, D.15-05-051 states that the Commission became "aware" of the opportunity for adding a "clutch" to the plant's design that would allow the unit to operate in synchronous condenser mode (that is, without the burning of fuel) when the grid does not require energy production from the plant. This issue was never raised in the record of the proceeding. Therefore relying on "awareness" of an assertion about a change in plant

[3] Pub. Util. Code 1754(a)(4)

design which the Commission treats as fact constitutes legal error and violates section 1754(a)(4) which requires the Commission to make decisions based on the evidentiary record. In rendering a decision on a given application, the Commission must rely on the evidentiary record developed in the proceeding. Commission "awareness" of an extra record "clutch" design change to NRG's proposal is indefensible as a rationale for approving the Carlsbad facility.

The first reference to the clutch technology in this case arose after Commissioner Picker issued a proposed alternate decision. In their filed comments on Commissioner Picker's alternate both the CAISO and NRG--both supporters of this project--stated that the clutch technology would provide no system benefits because no additional VAR support was needed.

The Commission, in Decision 14-03-004 also found that VAR support is not needed in Southern California:

> The record in the proceeding shows that there are sufficient resources to provide VAR support in the SONGS study area without further action at this time. We do not have sufficient information available from the record at this time to determine if additional reactive power resources not modeled by the ISO could be available to reduce LCR needs. Therefore, we find that any estimate of whether or how much additional reactive power support would change LCR needs to be speculative, and will not make any adjustment to the ISO's study for this purpose. (D. 14-03-004, pp. 33-34).

In finding that one of the grounds for approving the Carlsbad plant is the possibility it might be able to provide VAR support, D.15-05-051, contradicts the Commission's own findings in D.14-03-004 that no additional VAR support is needed is Southern California. Section 1708 permits the Commission to modify past orders only after providing notice and opportunity to be heard. (See Order Instituting Rulemaking on the Commission's own Motion to Consider Modifications to the Universal Lifeline Telephone Service Program and General Order 153, 2000 Cal.PUC Lexis 388, D.00-10-028). The Commission committed legal error by modifying D.14-03-004 without providing either notice or opportunity to be heard.

V. Commissioner Florio's Comments at the Prehearing Conference Were Unlawfully Prejudicial and Suggest the Outcome of this Case had been Determined Before the Application was Filed

At the prehearing conference in this case, Assigned Commissioner Florio made the following remarks:

> I appreciate the points that have been made by some of the intervenors here, particularly about resource allocation. When I was in your shoes, I – I wanted to get a sense of where the wind was flowing and where I could most reasonably allocate my resources.
>
> I would suggest, if you have those types of concerns, that you go back and look pretty carefully at the comments on the LTPP proposed decision that were filed, particularly by SDG&E and NRG, and the changes that were made to the proposed decision following those comments.
>
> I think that would give you some sense of where the wind was blowing. **And, to be quite frank, if I were an intervenor trying to decide how to allocate scarce resources, I would not allocate them to this proceeding.** (emphasis added, Tr. pp. 63-64.)

The proposed decision ("PD") of Judge Yacknin denied approval of Carlsbad PPA because the applicants had not demonstrated a need for the plant. Under section 1754(a), the Commission has a statutory obligation to make its decisions based on record evidence, not "wind." Commissioner Florio advised the parties not to oppose the PPA application at the outset of the proceeding and before any evidence was taken. Commissioner Florio's remarks are evidence of bias, which violates the Commission's governing statutes and intervenors' due process rights, and fails to protect SDG&E's customers from the higher rate increases attributable to this unnecessary plant.

Courts have consistently emphasized the importance of unbiased tribunals. In *Carpenter v. A.T. Massey Coal Co.* (2009) 556 U.S. 868 the Supreme Court held that "It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process." (alteration in original). *See* also *Withrow v. Larkin* (1975) 421 U.S. 35, 46-47 (" a 'fair trial in a fair tribunal is a basic requirement of due process.'") (internal citations omitted.) The Supreme Court's concerns about fairness extend to administrative agencies which

adjudicate as well as courts. *See In re Murchison* (1955) 349 U.S. 133, 136. In addition, the Supreme Court in *Murchison, supra,* 349 U.S. at 136 stated that "Not only is a biased decision-maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness." In this case, the bias demonstrated by Commissioner Florio violates the Commission's governing statutes and fails to protect SDG&E's customers from the higher rates caused by approval of the Carlsbad PPA.

California courts have emphasized the importance of having an unbiased tribunal. In *Catchpole v. Brannon*, 36 Cal. App. 4th 237, 245 (1995), the Court of Appeals held that a fundamental underpinning of the concept of the due process of law is that parties have an opportunity to be fully and fairly heard before an impartial decision-maker. Moreover, the court noted that the presence of judicial partiality is most pernicious where it bears directly on the matter to be decided. In this proceeding the aforementioned "prevailing winds" that Commissioner Florio discussed in the prehearing conference in this case indicate that improper bias –in favor of a predetermined result—was pervasive in the Commission's deliberations in this case.

Litigants asserting judicial bias need not demonstrate actual bias per se. Rather "[w]here the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided …" *Hall v. Harker* (1999) 199 Cal.App.4th 836, 843. In the instant case, Commissioner Florio's prehearing comments coupled with the reality D.15-05-051 ultimately approved the project, compels the conclusion that at least one Commissioner was predisposed in considering the merits of the Carlsbad PPA. This type of bias represents legal error.

In *Saks & Co. v Beverly Hills* (1951) 107 Cal. App. 260, 264 the Court found that actual bias of an administrative body or officer violates due process. The 'average person' test of objectivity promulgated by *Hall v. Harker*, *supra,* is met by the totality of

the circumstances involved when the Commission rendered D.15-05-051. The outcome of this proceeding was determined before the Commission began deliberations in this case and improper bias tainted the review process from the outset. The Commission should vacate the decision and reopen the record to enable the parties to present evidence of bias in this decision-making process and to ensure the decision-makers involved in hearing the new case are objective, not pre-disposed to a foreordained result.

VI. Decision 15-05-051 Violates Section 1754(a)(4) by Relying on Extra-record Information from an Ex Parte Contact

D.15-05-051 relies on extra record information that was provided by the proponent of the project, NRG, to Commissioner Picker's advisor, Nicolas Chaset, during a March 13, 2015 ex parte meeting. NRG submitted two separate ex parte notices regarding this meeting, one on March 18, 2015 and a more detailed notice on March 30, 2015. The second notice acknowledges that NRG discussed with a Commissioner advisor the smaller-sized version of the plant than NRG originally proposed. It was this scaled-down version of the Carlsbad facility that was proposed in an ex parte meeting after the evidentiary record closed that D.15-05-051 then approved.

Until this second notice was submitted, intervenors such as POC had had no notice that alternative versions of NRG's original plant design were under consideration by the Commission. It is not clear from this second notice whether the "clutch" technology—on which the decision relies--was discussed, thus the source of the Commission's awareness of this technology remains a mystery. The Commission's reliance on extra record information to approve a modified version of the original project represents legal error.

Decision 15-05-051 approves a scaled-down version of the Carlsbad project that was never part of the record of this case. It was never proposed, discussed or analyzed in any way. The facility approved by D.15-05-051 is 100 MW smaller than what NRG proposed and will have a clutch to provide unneeded VAR support. These modifications will affect the number of hours the plant operates and the quantity of emissions it produces. Moreover, a smaller-sized facility will have a different effect on the state's

electric grid than would a larger plant. The 500 MW version of Carlsbad was never modeled by the CAISO, and the record of this proceeding does not provide an evaluation of how a smaller plant would affect grid operations. While a 500 MW plant would produce fewer emissions than a 600 MW plant if both were operating at full capacity, a 500 MW plant may run more hours per year than a 600 MW plant thereby possibly increasing the overall emissions from this facility. The clutch equipped 500 MW version of Carlsbad approved by D.15-05-051 is materially different from the project proposed in SDG&E's application and was not evaluated in the record of the proceeding.

Section 1754(a)(4) requires that Commission decisions be based on the record evidence in the proceeding. A decision that relies on information provided to a Commission decision maker during an ex parte contact violates the fundamental due process rights of other parties by failing to provide parties an opportunity to test the veracity of the information and its relevance to state law, Commission policy or the underlying information communicated in the ex parte contact. More importantly, a failure to rely on facts and analysis in this case undermines the Commission's ability to fulfill its obligation under section 451 to protect utility customers from inappropriate rate increases induced by the approval of unneeded facilities.

Courts have found that the use of "secret information" or "confidential reports" by administrative bodies is unlawful. In *Ohio Bell Tel. Co. v. Public Util. Comm. of Ohio* (1937) 301 U.S. 1 , the Supreme Court held that a decision cannot be based on confidential reports of independent information received by the administrative board and not known to an aggrieved party. The Supreme Court also held that reliance on extra-record confidential reports is improper because aggrieved parties have no opportunity to cross-examine witnesses to ascertain the veracity of the confidential reports. POC and other intervenors had no opportunity to review what NRG said to Mr. Chaset, or to obtain discovery of any evidence supporting their assertions concerning clutches and VAR support, nor did they have a chance to cross-examine the individual who communicated this information. In using information from an ex parte communication to influence the

outcome of this case, the Commission violated the due process rights of the intervenors in A.14-07-009. The decision must be reheard to correct this breach of intervenors' due process rights.

Recent case law supports POC's concerns with the process used by the Commission to adopt D.15-05-051. The Court of Appeals ruling in *The Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945 overturned a Commission decision that relied on uncorroborated hearsay evidence from one of the parties that appeared in this case, the CAISO. Here, too, the Commission relies (in essence) on uncorroborated hearsay in reaching its conclusion in D.15-05-051by relying on extra record information that was presented in an ex parte meeting.

Similar to the situation with *The Utility Reform Network*, *supra,* the Commission's decision in this case relied upon information that was not subject to cross examination or to other review by parties in this case. The ex parte information presented to Mr. Chaset is also precisely the type of "confidential report" or "independent information" that the U.S. Supreme Court found to be improper in *Ohio Bell, supra*.

The Commission may not ignore the record evidence presented in the proceeding. In D.15-05-051 ex parte information provided by NRG was incorporated directly into the decision even though intervenors had no opportunity to test the veracity of the information NRG submitted in private, solely to Commissioner Picker's Advisor, Mr. Chaset.

VII. The Commission Has Failed to Comply With the Public Records Act in this Proceeding

On November 10, 2014 POC submitted a request to the Commission pursuant to the Public Records Act ("PRA") (Government Code sections 6250 et seq.) seeking records of communications between Commission employees and parties to this proceeding that include reference to subjects of this application. The PRA provides that state agencies such as the Commission must disclose written records to a requesting

member of the public immediately following a request or, in unusual cases, respond to the request by saying the records cannot or will not be produced pursuant to Section 6253(c). The agency may not delay records production or refuse to provide access within a reasonable time period (Section 6253(c)) .

The Commission acknowledged receipt of POC's PRA request on November 20, 2014, stating that because of the volume of PRA requests for its review, it could not estimate when POC would receive access to the requested records or additional information about POC's November 2014 request.

More than seven months later, the Commission has not provided POC access to the requested records or justified its delay in providing that access. The Commission's failure to produce these records is a violation Section 6253(c) of the PRA, state law designed to ensure transparency in government operations. It is all the more egregious because more than three months ago, the Commission committed $5.2 million in public funds to engage private attorneys, at a cost of up to $882 per hour, to assist it in reviewing these types of PRA requests. (as reported in the Los Angeles Times, February 20, 2015 and the San Diego Union Tribune, March 26, 2015).

The records POC requested from the Commission in November 2014 are relevant to this application for rehearing because POC believes they may include information to support POC's claims that the Commission's decision-making process in this proceeding was compromised by ex parte communications, violated the parties due process rights and was prejudicial.

POC here reiterates its demand for access to documents pertaining to communications between Commission employees and parties to this proceeding. If the Commission does not reverse D.15-05-051 or grant rehearing, POC asks the Commission to suspend the effective date of D.15-05-051 until the Commission has complied with its PRA request and provided parties an opportunity to be heard on the content of the documents and their possible relevance in this case.

VIII. Decision 15-05-051 Unlawfully Ignores the Commission's Findings in the Pio Pico Decision

The law requires that the Commission perform an independent review of any utility proposal and to make its decision on behalf of the public based on the proposal's merits. Decision 15-05-051 fails to perform or to rely on such an independent review, relying instead on the CAISO's Transmission Planning Process ("TPP") study for 2013-2014.

Commissioner Sandoval's dissent properly notes that "… but Track 4 does not determine that procurement is needed to address the SONGS retirement or for any other purpose." (Sandoval dissent, p. 2). Moreover, as Commissioner Sandoval notes, (*Id.*), the Commission has already addressed the concern about the possible retirement of once-through cooling (OTC) power plants in SDG&E's service territory when it issued the Pio Pico decision in 2013, which authorized the construction of a gas-fired facility in SDG&E's service territory. As Commissioner Sandoval notes: "Since the Commission authorized the gap created by Encina's retirement in 2018 to be filled by Pio Pico, the Carlsbad Decision rests on a need already met and as issue not in the scope of the Carlsbad application." (*Id.*).

By authorizing SDG&E to contract with NRG to build Carlsbad, D.15-05-051 makes a finding of a need for this new power plant. As Commissioner Sandoval notes in her dissent, the Commission addressed any need arising from the closure of SONGS by approving the PPA for the Pio Pico Plant. Thus, the Commission's Finding of Facts 4, 8, 11 & 14 and Conclusions of Law 5 & 10 in D.15-05-051 have no evidentiary basis and cannot be relied upon to approve this PPA. Additionally the Decision violates section 1708 because the Commission cannot modify one of its earlier decisions without giving notice to parties in the prior decision. No such notice was given to parties that appeared in D.14-03-004. Instead Commissioner Picker's Alternate--which modifies a key finding of D.14-03-004--was issued without giving any notice to parties in that proceeding. The lack of notice to the parties in the Track 4

case violates applicable law which renders D.15-05-051 unlawful.

IX. The Commission Improperly Delegated Its Authority and Duties to the Independent Evaluator and the CAISO.

In approving the Carlsbad PPA, D.15-05-051 relies heavily on the analysis performed by the Independent Evaluator, and on CAISO's need and demand forecasts. Specifically, Decision 15-05-051 quotes the Report of the Independent Evaluator, Merrimack Energy Group, Inc., at pp. 32, 39, as part of its assessment of the reasonableness of the Carlsbad Plant. In that report, the Independent Evaluator states utilities should not be required to rely on a competitive process for obtaining new energy resources if two conditions exist: 1) unique options or; 2) if there is insufficient time to pursue a request for offers exceptions to this general approach should be entertained such as bilateral contracts. Decision 15-05-091 finds that both of these conditions exist in SDG&E's service territory and thus approves Carlsbad.

Additionally, in approving a modified version of the Carlsbad facility, D.15-05-051 defers—without analysis or question—to the CAISO's 2014-2016 LTPP transmission modeling and demand forecasting. CAISO concludes that the capacity Carlsbad would provide is necessary, and the Commission simply accepts CAISO's conclusion as purportedly as "irrefutable" (D.15-05-051 p. 9), even though opposing parties did, in fact, refute CAISO's analysis. The Commission does so without addressing any of the opposing arguments, continuing a historical practice of deferring to CAISO's forecasts even though its forecasts have repeatedly changed and its demand estimates have been consistently above what the grid has actually experienced in recent years.

The Commission has a consumer mandate not shared by the Independent Evaluator and the CAISO. Section 451 charges the Commission with only approving customer rates that are just and reasonable. Neither the Independent Evaluator nor the CAISO are subject to the Commission's mandate to protect ratepayers pursuant to section 451.

The Commission cannot avoid its statutory obligation to perform *independent* assessments of need for new transmission and generation projects and consider the effect of its decision on SDG&E's rates. The Commission cannot delegate its duty to *independently* assess the merits of the Carlsbad PPA by relying on the report of an entity that is a party in the proceeding. Nor can it uncritically accept the decision-making criteria of another entity in making its own decisions. The Supreme Court has expressly stated that "the powers conferred upon [the PUC] are in the nature of [a] public trust and cannot be surrendered or delegated to [others]" (*Southern California Edison Company v. Pub.Util.Com*. (2014) 227 Cal.App.4th 172, 195; see also *Northern California Power Agency v. Pub.Util.Com.* (1971) 5 Cal.3d 370, 378-379 [when "consideration of [a] question[] is an essential part of the [PUC]'s function," but the PUC "lack[s] the expertise necessary to carry out that function, the PUC "[is] required to remedy that deficiency," not simply defer to the judgment of others].)

The decision's acceptance of the CAISO's and the Independent Evaluator's analyses without performing its own objective critical scrutiny or review thus represents an abrogation of the Commission's statutory responsibilities under the Public Utilities Code. (See, e.g., *Assiniboine and Sioux Tribes of Fort Peck Indian Res.v. Bd. of Oil and Gas Cons. of Montana* (9th Cir. 1986) 792 F.2d 782, 794-796 [BLM unlawfully delegates its authority concerning applications for placement of oil and gas wells on tribal lands if it approves such applications based on the judgment of another entity without meaningful independent review]; *Save our Wetlands v. Sands* (5th Cir.1983) 711 F.2d 634, 641-643 [construing requirements imposed upon agencies under NEPA to consider environmental consequences of their actions and holding that agency does not satisfy those requirements if it "reflexively rubber-stamps" reports prepared by others); *Memorial Hosp. of Roxborough v. N.L.R.B.* (3d Cir. 1976) 545 F.2d 351, 360-361 [NLRB unlawfully abdicated its duty under the NLRA to determine appropriateness of bargaining unit by accepting Pennsylvania Labor Relations Board determination without exercising the NLRB's own mandated discretion].)

It is the Commission's duty, not the Independent Evaluator's or the CAISO's, to balance the costs of procuring more energy resources against the probability that those resources will actually be required. Unfortunately for SDG&E's customers, in recent years the Commission has approved numerous projects that have or will impose significant expenses on SDG&E's ratepayers while providing uncertain benefits. The Carlsbad facility is another example of this trend. As Commissioner Sandoval notes in her dissent, the Commission already addressed local control reliability issues in SDG&E's service territory by approving the Pio Pico Plant. SDG&E and the CAISO have a variety of far more environmentally benign alternatives to reduce demand for those rare situations where additional capacity might be required including using demand management programs, creating more effective conservation programs, requesting voluntary conservation efforts and importing power over recently constructed transmission lines. The Decision's failure to consider these alternatives to Carlsbad, and its complete deference to the opinions of the Independent Evaluator and the CAISO about the need for Carlsbad, violates the Commission's duty to protect SDG&E's customers from unreasonable rates.

Neither the CAISO nor the Independent Evaluator are subject to this statutory duty, nonetheless, the Commission has accepted their recommendations as valid despite substantial costs that the Carlsbad facility will impose on SDG&E's ratepayers. In approving Carlsbad, the Commission failed in its duty to protect SDG&E's customers in violation of section 451. Curiously, before the Commission voted to approve the project during the May 21, 2015 meeting, Commissioner Florio noted that the facility will not run very often because the power the facility produces would only be used to meet peak period demand. (See Transcript May 21, 2015 Commission Meeting Item 38). Despite acknowledging that Carlsbad will rarely need to operate the Commission approved the PPA for this plant thereby further increasing SDG&E's already high electric rates.

X. D.15-05-01I Improperly Relies on Decisionmaking Criteria that is Beyond the Scope of the Proceeding

The Commission's decisions must be made upon information and decision-making criteria that are within the scope of the proceeding. Section 1701.1(b) specifically requires the Commission to publish a scoping memorandum in the early stages of the proceeding that define the issues to be addressed in the proceeding. Commissioner Sandoval's dissent in this proceeding articulates the purpose of the scoping memorandum: "The Assigned Commissioner's Scoping Memo creates the universe of issues the proceeding is to examine, building a scaffold that supports due process and reasoned decision making." (Sandoval dissent, p. 3). In *Southern California Edison v. Pub. Util. Commission*, (2006) 140 Cal.App.4th 1085, the Court of Appeals annulled a Commission decision where the Commission failed to follow its own rules regarding when its decision relied facts and assumptions that were not articulated in the proceeding scoping memorandum.

D.15-05-051 explores and relies upon issues not anticipated in the scoping memorandum and accordingly suffers from the same procedural defect the Court found impermissible in *Southern California Edison v. Pub. Util. Commission.*

D.15-05-051 analyzes the PPTA from the standpoint of a need for local capacity reliability (LCR) that might arise to fill gaps from "once through cooling" (OTC) plant retirements. The scoping memorandum in this proceeding did not identify the need for LCR to be addressed in the proceeding, except with respect to existing or potential changes in transmission resources, as Commissioner Sandoval's dissent observes (page 1 and 2). D.15-05-051's reliance a need for LCR to fill OTC gaps as a way to justify the PPTA is legal error and violates the Commission's own procedures.

D.15-051-051 finds that Carlsbad is preferable to the Encina plant from an environmental standpoint (see page 23) and enjoys the support of the City of Carlsbad (see page 25). The scoping memorandum does not anticipate that the Commission will review the relative environmental benefits of Encina and Carlsbad, and therefore the

Commission may not rely on such comparisons to approve the PPTA. Similarly, the political support of the City of Carlsbad is not among the issues described in the Commission's scoping memorandum on this project. If it had been, the parties would have had an opportunity to show the public's support for alternatives to the construction of another gas-fired plant, and thus is an improper basis for Commission approval of the PPTA.

D.15-05-051 relies on information and decision criteria that are outside the scope of this proceeding and therefore commits legal error.

XI. Decision 15-05-051 Errs in Finding that Non Fossil Generation and Storage Alternatives Present More of a Risk to Reliability than the Modified Carlsbad Project and Improperly Fabricates a Test That Was Not Part of the Scoping Memorandum.

Decision 15-05-051 focuses on the possible retirement of the Encina facility at the end of 2017 and it notes that the Carlsbad PPTA could fill the capacity need beginning November 2017. By assuming Encina will be closed in 2017, the Commission ignored record evidence in violation of Section 1754. When asked why the Carlsbad PPA should be approved, Carlsbad's witness, Piantka, explained: "the OTC [once through cooling] policy gives the Water Board the discretion to extend the compliance guidelines [regarding once-through cooling plants must be taken out of service] based on guidance from the Statewide Advisory Committee on Cooling Water Intake Structures. Extensions of this kind have been sought by existing operators at Huntington Beach and Alamitos." Encina could seek a comparable extension. (See Powers' testimony, p. 6.)

When asked about why the Carlsbad Energy Center should be approved, Carlsbad's witness, Mr. Piantka, acknowledged that his testimony is premised on the assumption that the Encina facility would be closed at the end of 2017. (Tr. Vol. 1., pp. 183-184). Although the Commission cannot know how the State Water Resources Control Board ("Water Board") would rule on a request to extend Encina's operating

license beyond 2017, the record in this case includes a history of Board action extending the licenses of similar OTC plants in Southern California.

Decision 15-05-051's discussion of the prospects for Encina's closure ignores this record evidence. On page 18 it considers the risk posed by the possible closure of the plant at the end of 2017, however, on page 23 it states "The issue is whether the Carlsbad PPTA provides an environmental benefit relative to the continued operation of the existing Encina plant, and we find it clearly does so." D.15-05-051, p. 23. It is legal error for the Commission to—at different portions of the same decision--presume that Encina will likely cease operations at the end of 2017 and then make a finding that Carlsbad is environmentally superior to Encina , a finding which presumes Encina will continue to operate.

In approving the Carlsbad PPTA, the Commission ignored undisputed record evidence that energy storage offers superior flexibility, responsiveness and operational availability than Carlsbad.[4] Unlike new generation sources, storage options rarely face siting challenges. The Commission never analyzed the energy storage options offered in evidence when it determined that another polluting gas plant was necessary in San Diego.

Decision 15-05-051 acknowledges that section 454.5(b)(9)(C) provides "..a guiding principle for procurement,.." D.15-05-051, p. 14, but the decision cites the balancing test established in Finding of Fact 83 of D.14-03-003-004 to find the revised Carlsbad facility to be reasonable. In this same decision, however, as Commissioner Sandoval notes in her dissent, the Track 4 decision states in Finding of Fact 91 that "[p]rocurement needs may become critical as early as 2018…," but Track 4 does *not* (emphasis added) determine that procurement is needed in 2018 to address the SONGS retirement or for any other purpose. Commissioner Sandoval also observes that Track 4 makes findings about the need to replace SONGS generation but is silent on the need that might arise due to the retirement of nearby OTC plants. She goes on to note that Track 4 identified and authorized procurement for a separate bucket of need to be filled by 2022

[4] Protect Our Communities Reply Testimony, pp. 11-12

to compensate for the departure of the SONGS units. (see Sandoval dissent, p. 2). The Commission commits legal error when it ignores Finding of Fact 91 of D.14-03-004 and finds authority to authorize the Carlsbad PPA in a decision that does not discuss the effect of the possible closure of OTC units on reliability.

In approving the Carlsbad PPTA, the Commission has effectively foreclosed non-fossil alternatives despite the Governor's Executive Order and section 954.5(b)(9)(C) mandates to pursue more environmentally friendly alternatives. Instead of following these directives, D.15-05-051 authorizes only 100 MW of additional preferred resources while continuing the Commission's disturbing pattern of approving large amounts of new gas-fired generation.

XII. Conclusion

Decision 15-05-051 is unlawful. It relies on extra record evidence and improperly delegates its statutory duty to a third party. It ignores the requirements of the Governor's Executive Order and statutes mandating giving priority to preferred resources. It disregards the findings of facts of its own prior decision regarding the need for energy resources and it modified one of its own earlier decisions without giving notice to the parties in that case in violation of applicable law. It ignores record evidence about the status of the Encina Plant and relies on decision-making criteria that were not included in the scoping memo of the proceeding. POC's November 2014 PRA request regarding communications between NRG, SDG&E and Commission staff remains unanswered and thus it is unclear how these contacts may have influenced the wind that determined the fate of SDG&E's application before the evidentiary phase of this proceeding began. The Commission's approval of the Carlsbad PPTA reflects the extreme prejudice and bias expressed by the assigned Commissioner in the prehearing conference in this proceeding. For all of these reasons this decision must be reheard.

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Respectfully submitted,

/s/

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