BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902 E) 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)

RESPONSE OF CARLSBAD ENERGY CENTER LLC TO APPLICATIONS FOR REHEARING OF DECISION 15-05-051

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Pursuant to Rule 16.1(d) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), Carlsbad Energy Center LLC ("Carlsbad Energy") submits this response to the six Applications for Rehearing of Decision 15-05-051 (the "Decision") ("Applications for Rehearing") that were filed by CAlifornians for Renewable Energy, Inc. ("CARE"), Center for Biological Diversity ("CBD"), Office of Ratepayer Advocates ("ORA"), Protect Our Communities Foundation ("POC"), Sierra Club, and World Business Academy ("WBA") (collectively, the "Filing Parties").

I. INTRODUCTION

Rule 16.1(c) establishes that "[t]he purpose of an application for rehearing is to alert the Commission to legal error, so that the Commission may correct it expeditiously." Contrary to Rule 16.1(c), no Filing Party has demonstrated legal error, or shown that the Decision is "unlawful or erroneous." Rehearing is therefore not required or warranted, and all six Applications for Rehearing should be denied as quickly as possible.

The Filing Parties allege that the Commission failed to proceed in the manner required by law based on their assertions that the Decision did not follow the need determination in Decision 14-03-004, and improperly relied on the upcoming retirement of the Encina Power

Station ("Encina") as a factor supporting approval of the power purchase tolling agreement for the Carlsbad Energy Center ("PPTA"), which the Filing Parties insist is a subject that is outside the scope of this proceeding. The Filing Parties' arguments are without merit. As explained below, the Decision's approval of the PPTA is consistent with Decision 14-03-004 and the need determination adopted therein. Decision 14-03-004 authorized San Diego Gas and Electric Company ("SDG&E") to procure up to 800 megawatts ("MW") of local capacity resources due to the retirement of the San Onofre Nuclear Generating Station ("SONGS"), and found that procurement needs may become critical as early as 2018. The Decision reasonably interprets Decision 14-03-004 as concluding that the need could arise as early as 2018 upon Encina's retirement. The record in this proceeding supports the Decision's findings, and confirms that significant replacement capacity is needed to ensure reliability in 2018 after Encina retires. The Decision also reasonably interprets Decision 14-03-004 as finding that supplies are sufficient only while Encina is still operating.

The Decision also properly addressed issues in this scope of this proceeding. The Decision's approval of the PPTA to meet reliability needs after Encina retires was properly decided as part of the Commission's consideration of whether the PPTA is a reasonable means to meet a portion of the need authorized in Decision 14-03-004. That question was framed as Issue 3 in the Assigned Commissioner's Scoping Memo and Ruling ("Scoping Memo") and is stated on page 4 of the Decision. The Filing Parties cannot credibly assert that the scope of this proceeding did not include the question of whether the Carlsbad Energy Center is needed by 2018 to avoid reliability issues after Encina retires. The retirement of Encina and the role of the PPTA in providing timely SONGS replacement capacity was emphasized in SDG&E application in this proceeding ("Application") and in SDG&E's supporting testimony as a key factor driving SDG&E's decision to negotiate a bilateral contract and seek approval in advance of any request for offers ("RFO") process. Encina's pending retirement, and the resulting need for SONGS

replacement capacity by 2018, were discussed in the Application and supporting testimony, at the prehearing conference, in other parties' testimony, during hearings, in briefs, in the multiple rounds of comments on proposed decisions, and at the all party meeting on May 19, 2015.

The Filing Parties also assert that the Decision's findings regarding the reasonableness of the PPTA are not supported by substantial evidence in light of the whole record, but this assertion also lacks merit. The record in this proceeding supports the Decision's finding that the terms and conditions of the PPTA are reasonable. The record also supports the Decision's finding that the Carlsbad Energy Center provides renewable integration benefits. Further, contrary to the Filing Parties' arguments, the Decision does not rely on the potential for adding clutch technology as a reason to approve the PPTA, but instead only directs SDG&E to evaluate the feasibility of clutch technology. This is within the Commission's authority and does not constitute legal error. The Decision also does not rely on extra record information from an ex parte communication, but instead properly finds that the PPTA should be approved based on the evidence in the record.

The Filing Parties' other allegations are also without merit. The California Environmental Quality Act ("CEQA") does not require the Commission to conduct an environmental review before approving the PPTA. The Decision correctly recognizes this based on CEQA, the CEQA Guidelines and longstanding precedent. There also is no evidence that the Decision was the product of bias. Finally, Sierra Club has not met its burden to demonstrate that oral argument is needed. Oral argument is not warranted, and Sierra Club's request should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY

In Decision 14-03-004 issued in Track 4 of the 2012 long-term procurement proceeding, the Commission authorized SDG&E to procure between 500 and 800 MW of new resources to

meet local capacity requirements ("LCR") in SDG&E's service area.[1] The Commission authorized this 500 to 800 MW of procurement to address the combined effect of the permanent retirement of the 2,246 MW at SONGS in June 2013, and retirement of existing units using once-through cooling technology ("OTC").[2] In Decision 14-03-004, the Commission expressly found that local reliability needs "could become critical as early as 2018."[3] This timing corresponds to the loss of 965 MW at Encina at the end of 2017. Encina uses OTC and is subject to the State Water Resources Control Board Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("OTC Regulation"). The OTC Regulation requires Encina to demonstrate compliance with stringent water use standards by December 31, 2017, and Encina's only compliance path is to retire all OTC units on or before the deadline.[4]

In Decision 14-03-004, the Commission found a need for significant new conventional generating capacity due to the permanent retirement of SONGS in June 2013, and therefore authorized SDG&E to procure up to 600 MW from any source that meets the LCR need, and required procurement of the remaining 200 MW from preferred resources and energy storage.[5] The Commission directed SDG&E to begin its authorized procurement "as soon as possible"[6] recognizing that the SONGS capacity would no longer be available after June 2013 and that

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1 Decision 14-03-004, p. 2 and Ordering Paragraph 2.

2 *Id,* Findings of Fact 2, 4, 6 ("Starting in 2015, around 4,900 MW of OTC plants in the local transmission constrained areas of the LA Basin local area may retire over the next several years, as well as other OTC plants in the San Diego local areas, because of State Water Resources Control Board regulations."), 7 ("The ISO modeled retirement of OTC plants in the SONGS study area, along with the retirement of SONGS, to produce an analysis of need for the area."), 81 and 92.

3 *Id.,* Finding of Fact 91.

4 Exhibit 3 (Carlsbad Energy/Piantka), p. 4 lines 22-23 and p. 8 lines 1-20.

5 Decision 14-03-004, pp. 110-114, Findings of Fact 82 and 87, and Ordering Paragraph 2.

6 *Id.,* p. 113 and Conclusion of Law 48.

reliability needs may become critical "as early as 2018,"[7] and stated that SDG&E "must expeditiously pursue procurement of any gas-fired generation expected to take several years to develop."[8] To this end, the Commission authorized SDG&E to enter into bilateral contracts to ensure that new capacity will be online in time to preserve reliability.[9] This was in response to SDG&E's request for bilateral procurement authority, which was essential because "moving forward on an expedited basis with a bilateral contract to address a portion of LCR need would support the policy goals of the State related to timely retirement of OTC facilities and would promote system reliability – the sooner new local resources are added to the portfolio, the lower the reliability risk."[10] Due to long lead times for gas-fired generation, the Track 4 Decision also allowed SDG&E to submit the conventional resources portion of its procurement plan for review in advance of submission of its preferred resources procurement plan.[11]

As authorized in Decision 14-03-004, SDG&E submitted a separate conventional resources procurement plan, which the Energy Division approved on July 18, 2014.[12] Adhering to the Commission's order to act quickly to address reliability needs in a timely manner, SDG&E negotiated a bilateral agreement with the only conventional plant that can be built in time to replace Encina when it retires at the end of 2017.

SDG&E filed its Application on July 21, 2014 requesting approval of a PPTA with Carlsbad Energy to ensure reliability starting in 2018. Under the PPTA, SDG&E will procure the output of the Carlsbad Energy Center, a state-of-the-art generating facility utilizing General

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7 *Id.*, pp. 11, 113, and Finding of Fact 91.

8 *Id.*, p. 113.

9 *Id.*, pp 4, 95-96, 112-13, Finding of Fact 90, and Ordering Paragraph 3.

10 *Id.*, pp. 95-96.

11 *Id.*, p. 113.

12 Application, p. 2.

Electric LMS 100 ("LMS 100") natural gas-fired combustion turbines.[13] As proposed in the Application, the PPTA contemplated procurement of capacity from six LMS 100 units, and would have filled 600 MW of the LCR need that the Commission authorized for procurement from any resource, including conventional generation.[14] The Decision's approval of the PPTA imposed a condition that procurement under the PPTA be reduced to 500 MW, reflecting a reduction from six LMS 100 units to five LMS 100 units, as explained below.

In its Application and supporting testimony, SDG&E explicitly identified the need to replace Encina by 2018 as a critical factor underlying the decision to negotiate the PPTA, and requested expedited approval to allow construction of the Carlsbad Energy Center to be completed in time to meet a late 2017 online date.[15] SDG&E's testimony submitted with the Application stated: "Given the long lead time associated with the development of gas-fired generation and the impending OTC deadline that will impact Encina, SDG&E has elected to submit a bilateral agreement in advance of an all-source RFO process."[16] SDG&E's testimony explained that Carlsbad Energy Center is the only project of sufficient size and technology that can be built and operating in time to meet reliability needs in 2018.[17]

Protests and responses to the Application were filed on August 21, 2014. A prehearing conference was held on September 3, 2014. At the prehearing conference, Administrative Law Judge ("ALJ") Yacknin described the issues that would be in the scope of this proceeding, which were later memorialized in the Scoping Memo on September 12, 2014. With respect to Issue 3 in the Scoping Memo ("Is the Carlsbad PPTA a reasonable means to meet the 600 MW of

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13 *Id.,* pp. 3-4.

14 *Id.*, pp. 1, 4.

15 *Id.*, pp. 4, 5.

16 Exhibit 1 (SDG&E/Baerman), p. 3 lines 6-8.

17 *Id.*, p. 7 line 20 through p. 8 line 1.

identified LCR need that D.14-03-004 determined may be met by conventional resources?"),[18] the ALJ explained that this issue would include analysis of "factors raised by San Diego Gas and Electric in its prepared testimony such as whether the project's the best fit as a matter of size, operations as compared to the original project, and other project alternatives," and "whether this project is the only available gas-fired resource capable of meeting need and the online date that this project offers."[19]

On October 15, 2014, CAISO, CARE, Carlsbad Energy, Pio Pico Energy Center LLC ("Pio Pico"), and WBA served prepared testimony. The CAISO's testimony confirmed that procurement of a resource comparable in size to the Carlsbad Energy Center that can be operating by 2018 is critical to ensure reliability needs are met after Encina retires.[20] Carlsbad Energy's testimony explained that the Carlsbad Energy Center is at a late stage in what will be a total ten-year development process (assuming commercial operation by the end of 2017).[21] Carlsbad Energy's testimony demonstrated that the Carlsbad Energy Center is well advanced in the development and permitting process, with many significant milestones already met or well under way in the major categories of development, including site control, permitting and environmental review, local support, electrical interconnection, and engineering, procurement and construction contracts.[22] This reinforced SDG&E's testimony showing that the Carlsbad Energy Center is the only resource of sufficient size and technology within SDG&E's service territory that is far enough along in the development process to achieve commercial operation in time to meet the reliability need that arises after Encina retires at the end of 2017.[23] Carlsbad

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18 Decision, p. 4.

19 Reporter's Transcript, Prehearing Conference, p. 16 lines 9-18.

20 Exhibit 4 (CAISO/Sparks), p. 6 lines 27-28.

21 Exhibit 2 (Carlsbad Energy/Valentino), p. 8 lines 8-12.

22 *Id.,* p. 3 line 23 through p. 7 line 23.

23 Exhibit 1 (SDG&E/Baerman), p. 7 line 20 through p. 8 line 1.

Energy also sponsored testimony demonstrating that Encina will retire by December 31, 2017, which is the deadline for compliance with the OTC Regulation, and that retirement is Encina's only path for OTC compliance.[24] On October 29, 2014, CAISO, CARE, Carlsbad Energy, POC, and SDG&E served rebuttal testimony.

ALJ Yacknin presided over evidentiary hearings held on November 12 and 13, 2014. During the hearings, the Filing Parties conducted cross examination of witnesses for SDG&E, the CAISO, and Carlsbad Energy, focusing heavily on the testimony showing that procurement under the PPTA is needed to address reliability needs in 2018 after Encina retires, and on questions about whether reliability needs arising in 2018 could be met instead by seeking an extension of Encina's mandatory deadline for compliance with the OTC Regulation and forcing Encina to continue operating.[25] During the hearings, ALJ Yacknin instructed SDG&E to provide a late-filed exhibit, identified as Late-Filed Exhibit 20, containing a preliminary summary of the offers received in SDG&E's 2014 RFO.[26]

Opening briefs were filed December 10, 2014, and reply briefs were filed December 22, 2014. SDG&E submitted Late-Filed Exhibit 20 on January 13, 2015. Parties filed comments on Late-Filed Exhibit 20 on January 20, 2015 and January 26, 2015.

On March 6, 2015, ALJ Yacknin issued a proposed decision finding that the terms and conditions of the PPTA were reasonable, but recommending denial of the PPTA without prejudice to await the results of SDG&E's 2014 RFO to see if preferred resources and energy storage might be available in sufficient quantities to supply more than the 200 MW minimum

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[24] Exhibit 3 (Carlsbad Energy/Piantka).

[25] *See e.g.,* Reporter's Transcript, Volume 1 (SDG&E/Baerman, cross examination by Sierra Club), p. 21, lines 24-28 ("Q So it's SDG&E's position that all 600 megawatts of fossil fuel capacity is needed by 2018 because of the closure of Encina? A Right."); Reporter's Transcript, Volume 2 (CAISO/Sparks, cross examination by Sierra Club), p. 292 lines 15-24 (asking about an extension of the OTC deadline).

[26] Reporter's Transcript, Volume 1 (SDG&E/Baerman), p. 114 lines 11-20, and p. 121 lines 16-19.

procurement amount required in Decision 14-03-004 ("Proposed Decision"). Under the Commission's Rule 14.3, comments on the Proposed Decision were due March 26, 2015. Carlsbad Energy elected to file its comments on the Proposed Decision early. On March 20, 2015, Carlsbad filed its comments on the Proposed Decision explaining why the Commission should not wait for the RFO results to approve the PPTA. In its comments, Carlsbad publicly presented an alternative proposal for approving the Application and requiring modification of the PPTA to apply to five generating units of the Carlsbad Energy Center to meet 500 MW of LCR need, with the sixth unit to be included automatically under the PPTA to meet an incremental 100 MW of LCR need if the RFO will not produce more than 200 MW of feasibly available and cost effective preferred resources and energy storage capable of meeting reliability needs[27] On March 26, 2015, SDG&E, the CAISO and the Filing Parties filed their comments on the Proposed Decision. Reply comments were filed on April 1, 2015.

On April 6, 2015, President Picker issued an alternate proposed decision approving the PPTA with the conditions that: (1) the PPTA is amended to reduce procurement from 600 MW to 500 MW, and is otherwise subject to the same per-unit price, and other terms and conditions; and (2) all of the 100 MW in residual procurement authority resulting from amendment of the PPTA must consist of preferred resources or energy storage ("Alternate Proposed Decision"). Parties filed comments and reply comments on the Alternate Proposed Decision on April 27, 2015 and May 4, 2015.

At its business meeting on May 7, 2015, the Commissioners engaged in a public discussion regarding the Alternate Proposed Decision and the Proposed Decision. The Commissioners agreed to hold the matter to allow more time for consideration, until the next business meeting on May 21, 2015.

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[27] Opening Comments of Carlsbad Energy Center LLC on the Proposed Decision of Administrative Law Judge Yacknin (March 20, 2015), pp. 2 and 12-15.

On May 8, 2015 notice was issued scheduling an all party meeting for May 19, 2015, and stating that a quorum of Commissioners and/or their staff may attend. The meeting also was noticed in the Commission's Daily Calendar. Parties were asked to address four questions pursuant to an agenda distributed on May 14, 2015. The all party meeting was held on May 19, 2015 with all five Commissioners in attendance. The parties responded to the four questions presented in the agenda, and answered additional questions posed by Commissioners.

At its business meeting on May 21, 2015, the Commissioners again engaged in a public discussion of the Alternate Proposed Decision. The Commissioners voted to adopt the Alternate Proposed Decision by a 4-1 vote. Commissioner Sandoval expressed her disagreement with the majority and stated that she would file a dissent. The Decision was mailed on May 29, 2015 with Commissioner Sandoval's dissent included as an attachment.

Ordering Paragraph 1(b) in the Decision states that within thirty days of the Decision, SDG&E shall submit, via a Tier 1 Advice Letter, an amended 500 MW PPTA consistent with the requirements of Ordering Paragraph 1. SDG&E and Carlsbad Energy agreed to modify the PPTA in accordance with Ordering Paragraph 1, and on June 22, 2015 SDG&E submitted Advice Letter 2757-E presenting the executed PPTA as so modified.

III. STANDARD OF REVIEW

Public Utilities Code ("PU Code") Section 1757(a) establishes the standard for determining whether the Decision is unlawful or erroneous, and specifies that review by a court shall not extend further than to determine, on the basis of the entire record, whether any of the following occurred:

(1) The Commission acted without, or in excess of, its powers or jurisdiction;

(2) The Commission has not proceeded in the manner required by law;

(3) The Decision is not supported by the findings;

(4) The findings in the Decision are not supported by substantial evidence in light of the whole record;

(5) The Decision was procured by fraud or was an abuse of discretion; or

(6) The Decision violates any right of the petitioner under the Constitution of the United States or the California Constitution.

The majority of the Filing Parties' claims allege legal error based on the standards in PU Code Section 1757(a)(2) (the Commission has not proceeded in the manner required by law), and Section 1757(a)(4) (the findings in the Decision are not supported by substantial evidence in light of the whole record). In assessing whether the Commission proceeded in the manner required by law, courts apply "a strong presumption of the validity of the [C]ommission's decisions."[28] The Commission's interpretation of its own rules and regulations "is entitled to consideration and respect by the courts."[29] A reviewing court will not interfere with the Commission's choice of procedures "absent a manifest abuse of discretion or an unreasonable interpretation of the statutes governing its procedures."[30] In addition, if the court concludes that the Commission has failed to proceed in the manner required by law, the court "will annul its decision only if that failure was prejudicial."[31]

In assessing whether the findings in the Decision are supported by substantial evidence in light of the whole record, "[t]he court must consider all relevant evidence in the record," but "[i]t is for the agency to weigh the preponderance of conflicting evidence."[32] "Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could

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[28] *Utility Reform Network v. Public Utilities Comm'n.*, 223 Cal. App. 4th 945, 958 (2014); *Utility Consumers' Action Network v. Public Utilities Comm'n.*, 187 Cal.App.4th 688, 697 (2010).

[29] *Southern California Edison Co. v. Public Utilities Comm'n.*, 85 Cal.App.4th 1086, 1096 (2000).

[30] *Pacific Bell v. Public Utilities Comm'n.*, 79 Cal.App.4th 269, 283 (2000).

[31] *Utility Reform Network v. Public Utilities Comm'n.*, 223 Cal. App. 4th 945, 958 (2014), citing *Southern California Edison Co. v. Public Utilities Comm'n.*, 140 Cal.App.4th 1085, 1106 (2006).

[32] *Clean Energy Fuels Corp. v. Public Utilities Comm'n,* 227 Cal.App.4th 641, 649 (2014).

not reach the conclusion reached by the agency."[33] "[T]he findings of fact by the [Commission] are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence."[34] "When conflicting evidence is presented from which conflicting inferences can be drawn, the [Commission's] findings are final."[35]

IV. THE DECISION WAS ADOPTED IN THE MANNER REQUIRED BY LAW.

A. The Decision is Consistent with Decision 14-03-004 and the Need Determination Adopted Therein.

Sierra Club, ORA, CARE and POC allege that the Decision does not adhere to, and improperly modifies, the Commission's need determination in Decision 14-03-004.[36] Sierra Club argues that the Decision's reliance on the retirement of Encina to justify approval of the PPTA is not permitted under the Decision 14-03-04 need authorization.[37] Sierra Club also argues that the Decision improperly "reevaluates" the LCR need determination in Decision 14-03-004, while "injecting new rationales and conclusions of law that are inconsistent with the underlying need authorization."[38]

In asserting that the Commission did not follow the need determination in Decision 14-03-004, the Filing Parties fabricate a restrictive correlation in an attempt to distinguish "need arising from the retirement of SONGS that must be filled by 2022," from

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[33] *Id.,* citing *SFPP, L.P. v. Public Utilities Comn'n.*, 217 Cal.App.4th 784, 794 (2013).

[34] *Id.*

[35] *Id.,* at 649-650, citing *Toward Utility Rate Normalization v. Public Utilities Comm'n.*, 22 Cal.3d 529, 537–538 (1978).

[36] Sierra Club Application for Rehearing, pp. 8-10; ORA Application for Rehearing, pp. 6-9; CARE Application for Rehearing, pp. 4-5; POC Application for Rehearing, pp. 12-13. WBA states that it wishes to be associated with the Applications for Rehearing of Sierra Club and CARE. WBA Application for Rehearing, p. 1.

[37] Sierra Club Application for Rehearing, p. 8.

[38] *Id.*

"need arising from the retirement of Encina that must be filled by 2018." They argue that the need determination in Decision 14-03-004 was strictly limited to the former, and insist that Decision 14-03-004 therefore precludes the Commission from approving the PPTA to avoid reliability problems existing in 2018 after Encina retires.[39] Their argument relies heavily on the Commission's approval of the Pio Pico contract in Decision 14-02-016, which the Filing Parties cite as evidence that Encina's retirement was not a factor underlying the need determination in Decision 14-03-004.[40] The Filing Parties essentially apply their restrictive correlation to suggest that the only approved need that can be filled by SDG&E in this proceeding is a need arising ***by 2022*** that exists ***solely*** as a result of the loss of SONGS. The Filing Parties' arguments are wrong, as explained below.

1. Decision 14-03-004 authorized SDG&E to procure up to 800 MW of LCR resources and found that needs may become critical by 2018.

Decision 14-03-004 authorized SDG&E to procure between 500 and 800 MW of new resources to meet LCR needs in SDG&E's service area.[41] This procurement was authorized to add resources that would help "offset the retirement of the 2,200 MW SONGS facility and nearly 5,900 MW of once-through cooling plants."[42] Contrary to the Filing Parties' arguments, Decision 14-03-004 found that procurement needs "may become critical as early as 2018, and certainly by 2020."[43] Decision 14-03-004 affirms that "'[i]t is necessary that a significant amount of this procurement level be met through conventional gas-fired resources in order to ensure LCR needs will be met.'"[44] The Commission therefore authorized SDG&E to procure as

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39 *See e.g.,* Sierra Club Application for Rehearing, pp. 8-10; WBA Application for Rehearing, pp. 3-4.

40 *See e.g.,* Sierra Club Application for Rehearing, p. 9.

41 Decision 14-03-004, p. 2 and Ordering Paragraph 2.

42 *Id.*, pp. 2-3; *see also* Findings of Fact 2, 4, 6, 7, 81 and 92.

43 *Id.*, p. 113 and Finding of Fact 91.

44 *Id.*, Finding of Fact 82.

much as 600 MW of the identified LCR need from conventional gas-fired resources, with the remaining 200 MW to be met with preferred resources.[45] Decision 14-03-004 also directed SDG&E to begin its authorized procurement "as soon as possible"[46] and stated that SDG&E "must expeditiously pursue procurement of any gas-fired generation expected to take several years to develop."[47] This was necessary to account for "long lead-time resources requiring several years of effort, and potential reliability issues surfacing starting in 2018."[48]

The Decision's approval of the PPTA to fill 500 MW of the authorized need does not violate Decision 14-03-004. Procurement under the PPTA falls within (and short of) the 600 MW that Decision 14-03-004 allowed to be met with conventional generation. Approval of the PPTA is consistent with the authority granted to SDG&E to utilize bilateral contracts to ensure that long-lead time resources are built in time to meet reliability needs. The Decision's approval of the PPTA to meet reliability needs in 2018 also is consistent with the procurement authorization in Decision 14-03-004, which required procurement "by 2022" but found that procurement needs "may become critical as early as 2018 and certainly by 2020."[49] Decision 14-03-004 thus did not require SDG&E to delay procurement until 2022, but instead expressly required SDG&E to "expeditiously pursue procurement of any gas-fired generation expected to take several years to develop,"[50] due to "long lead-time resources requiring several years of effort, and potential reliability issues surfacing starting in 2018."[51] The Decision's

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45 *Id.*, pp. 110-114, Findings of Fact 82 and 87, and Ordering Paragraph 2.

46 *Id.,* p. 113 and Conclusion of Law 48.

47 *Id.*, p. 113.

48 *Id.*, p. 11.

49 *Id.*, Finding of Fact 91.

50 *Id.*, p. 113.

51 *Id.*, p. 11.

approval of the PPTA to meet reliability needs in 2018 adheres to the Commission's need determination and procurement authorization in Decision 14-03-004.

2. The Decision reasonably interprets Decision 14-03-004 as concluding that the need could arise as early as 2018 upon Encina's retirement.

As noted above, the Filing Parties insist that the Commission's need determinations must have considered (and could only consider) the loss of Encina and SONGS independently and separately, and that once the Pio Pico contract was approved, the loss of Encina was addressed forever regardless of changed circumstances. Thus, they argue that the Commission cannot consider the timing of Encina's retirement (at the end of 2017) as a factor justifying approval of the only resource that can be built and operating by 2018, because that need was filled by Pio Pico and therefore could not have formed any basis for the need determination in Decision 14-03-004.

This restrictive correlation is wrong. In reality, the need determination adopted in Decision 14-03-004 reflected reliability needs resulting from the ***combined*** effect of the loss of SONGS and the loss of significant amounts of OTC capacity. Decision 14-03-004 shows that the need determination was not based narrowly on determining how much local capacity was needed to replace SONGS, but instead considered how much local capacity was needed to replace both SONGS and Encina. This was explained in Decision 14-03-004 as follows:

> **In this Track 4 proceeding, the ISO modeled retirement of OTC plants in the SONGS study area, along with the retirement of SONGS, to produce an analysis of need for the area.** The ISO essentially used the same models as in Track 1 to determine LCR needs for 2022 (including the expected retirement of OTC plants), but modified its modeling to reflect the loss of SONGS. **Thus, the ISO did not narrowly attempt to identify how much local capacity will be needed to replace SONGS, but**

modeled overall LCR needs in the SONGS service territory through 2022.[52]

Decision 14-03-004 thus refutes the Filing Parties' arguments that all potential reliability issues associated with Encina's retirement at the end of 2017 were deemed to be fully addressed through the Pio Pico contract. To the contrary, Decision 14-03-004 states that: "After assuming the Pio Pico plant, SDG&E shows a need for at least 728 [MW] in its territory."[53] Further, in Decision 14-03-004, the Commission confirmed that OTC plants are assumed to retire, but also agreed with ORA that "it may be possible to extend OTC deadlines if it is necessary to ensure reliability."[54] Contrary to the Filing Parties' assertions, Decision 14-03-004 does not state that reliability needs arising from Encina's retirement have been fully addressed with Pio Pico.

The Filing Parties also ignore the Commission's statement on page 113 of Decision 14-03-004 directing SDG&E to begin procurement as soon as possible, and to expeditiously pursue procurement of any gas-fired generation expected to take several years to develop. This was in direct response to SDG&E's position that "moving forward on an expedited basis with a bilateral contract to address a portion of LCR need would support the policy goals of the State related to timely retirement of OTC facilities and would promote system reliability – the sooner new local resources are added to the portfolio, the lower the reliability risk."[55] This shows that the Commission recognized a need for incremental, expedited procurement to meet LCR need arising due to the combined loss of SONGS and the OTC units in SDG&E's service area – namely Encina. Had Pio Pico met all of the need related to the retirement of both SONGS and Encina, Decision 14-03-004 would not have authorized further procurement through bilateral contracts to meet needs arising as early as 2018.

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52 *Id.*, pp. 23-24 (citations omitted) (emphasis added).

53 *Id.*, p. 85.

54 *Id.*, p. 86.

55 *Id.* at 95-96.

The Decision properly recognizes that Encina's retirement is a factor underlying and driving the need determination and the timing of replacement capacity to meet such need in Decision 14-03-004. The Decision notes that the Commission approved the Pio Pico contract in Decision 14-02-016, which filled a need determination that was based on an assessment of impacts from the retirement of Encina and other OTC units but "with the assumption that SONGS would remain in operation."[56] The Decision then explains:

> When the Commission subsequently reviewed SDG&E's (and SCE's) incremental local capacity needs for the planning horizon 2012 to 2022 stemming from the retirement of SONGS, it directed SDG&E to procure its authorized additional resources by 2022, but did not make any specific findings of need for the intervening years. **Nonetheless, SONGS has already shut down and Encina is scheduled to shut down at the end of 2017, so it is reasonable that some intermediate need will exist, albeit perhaps at less than the full 800 MW authorized, prior to 2022**. SDG&E, the CAISO, and Carlsbad Energy Center point to the statement in D.14-03-004 that "[p]rocurement needs may become critical as early as 2018…" as evidence that the Commission recognized an urgent need to procure new resources that overcomes the default RFO option. (D.14-03-004 at 113 and Finding of Fact 91.) But the decision also states that "[b]oth SCE and SDG&E have sufficient supplies to meet projected demands in the SONGS service area through at least 2018, even with the unexpected early retirement of SONGS." (D.14-03-004, Finding of Fact 5.) **These statements can be reconciled by recognizing that Encina's retirement in 2018 is the key factor in moving from a situation of sufficient supplies to one where reliability needs may become critical**.[57]

These findings in the Decision are a reasonable interpretation of the need determination in Decision 14-03-004 as including a determination that reliability needs could arise in 2018 due to Encina's retirement.[58] That rationale supports the Decision's Conclusion of Law 5, which

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56 Decision, p. 16.

57 *Id.,* p. 16 (emphasis added).

58 *Clean Energy Fuels Corp. v. Public Utilities Comm'n*., 227 Cal.App.4th 641, 656 (2014), citing *Southern Cal. Edison,* 85 Cal.App.4th at p. 1096 ("We must defer to the PUC's interpretation of its [prior] decision because its interpretation is reasonable based on the language quoted above.").

states that "D.14-03-004 acknowledged that SDG&E's LCR need could arise as early as 2018 upon the retirement of the Encina OTC units." The Decision thus interprets Decision 14-03-004 and upholds its findings and conclusions. The Decision does not modify or alter Decision 14-03-004. The Filing Parties' assertions regarding failure to comply with PU Code Section 1708 are therefore unfounded.[59]

3. The CAISO's testimony confirms that significant replacement capacity is needed to ensure reliability in 2018 after Encina retires.

The Decision's interpretation of the need determination in Decision 14-03-004 is further supported by the record in this proceeding. The CAISO's witness Robert Sparks testified that reliability problems will occur in 2018 unless new capacity is added at or near the Encina site. The CAISO's testimony demonstrates that approximately 558 MW of new generating capacity is needed to ensure reliability needs are met in 2018 after Encina retires.[60] The CAISO's modeling shows that this 558 MW is needed in addition to the 308 MW at Pio Pico, and is still not sufficient to meet all remaining LCR need.[61]

Mr. Sparks testified that in the 2013-2014 Transmission Planning Process ("TPP") studies, which were the basis for the need determination in Decision 14-03-004, the CAISO modeled the addition of a 558 MW combined cycle gas plant located in the Carlsbad area.[62] This combined cycle configuration reflects the plant design originally proposed for the Carlsbad Energy Center and approved in the California Energy Commission license. Mr. Sparks

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59 *See e.g.,* ORA Application for Rehearing, p. 9 (alleging that the Decision violates PU Code Section 1708 which states that "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it.") As explained above, the Decision does not "rescind, alter, or amend" Decision 14-03-004.

60 Exhibit 4 (CAISO/Sparks), p. 6 lines 27-28.

61 *Id.*, p. 3 lines 4 through p. 6 line 11.

62 *Id.,* p. 3 lines 20-24.

confirmed that the simple cycle project contemplated in the PPTA provides similar, and in some cases superior, operational benefits in terms of capacity and flexibility.[63] The CAISO testimony states unequivocally that: "The 600 MW of new resource capacity is needed before summer 2018 along with the transmission projects in [the TPP study] to ensure LCR needs are met."[64] No party presented evidence contradicting the CAISO's findings. In its comments on the Alternate Proposed Decision, the CAISO confirmed that reducing procurement under the PPTA to 500 MW would still satisfy the minimum requirements needed to ensure reliability after Encina retires.[65]

The CAISO study results also confirm that construction of the Pio Pico project will not eliminate the need for new resources in 2018 after Encina retires and accounting for the permanent retirement of SONGS in 2013.[66] As explained above, the need determination adopted in Track 1 of the LTPP (which included the Pio Pico capacity) was based on the assumption that SONGS would continue operating.[67] After the Track 1 procurement authorization and after execution of the Pio Pico agreement, the CAISO conducted its study for Track 4 of the LTPP and modeled the combined effects of retirement of SONGS and retirement of all of the Encina OTC units.[68] That modeling was the basis for Decision 14-03-004.[69] The CAISO specifically

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63 *Id.,* p. 7 lines 17-20.

64 *Id.,* p. 6 lines 27-28.

65 Comments of California Independent System Operator Corporation on Alternate Proposed Decision (April 27, 2015), p. 2 ("Commission approval of a modified 500 MW PPTA would maintain the locational, temporal and technological benefits associated with the Carlsbad Energy Center project while establishing a path to simultaneously maintain long-term reliability and comply with the State's once-through-cooling regulations.").

66 Exhibit 4 (CAISO/Sparks), pp. 3-5 (showing that the CAISO modeled the 308 MW Pio Pico facility and confirming at p. 5, lines 2 through 5, that transmission upgrades "do not obviate the need for the procurement of authorized Track 1 and Track 4 resources," and "transmission upgrades are needed in addition to the MW of procurement the Commission authorized for SCE and SDG&E in Tracks 1 and 4.").

67 Decision 13-02-015, p. 7, footnote 6 (confirming that the Track 1 analysis did not consider retirement of SONGS).

68 Decision 14-03-004, p. 23, Finding of Fact 7.

assumed in both its Track 4 study and its TPP study that 308 MW would be installed at the Pio Pico location in 2018.[70] The CAISO study also assumed, however, that there would be an additional 558 MW at Carlsbad,[71] and the CAISO's testimony confirms that substantial new generation is needed at or near Carlsbad to meet reliability needs after Encina retires.[72]

The CAISO's rebuttal testimony also explained that an incremental addition of 100 MW at the Pio Pico location prior to summer 2018, which would be in addition to the 308 MW already assumed to exist at that location in the TPP study, would not be sufficient to satisfy the LCR need after Encina retires and in fact may have negative reliability consequences.[73] The CAISO study results thus show that replacement capacity is needed in or near Carlsbad to meet reliability needs in 2018, taking into account the retirement of SONGS and Encina and taking into account the addition of Pio Pico.[74]

The CAISO's modeling of the system after the loss of SONGS shows that Encina's retirement is an extremely impactful event from a reliability perspective – more impactful than was the case while SONGS remained in service. The modeling shows that without SONGS, having generation at or near the Encina site is critically important, and that having generation to replace SONGS at that site by summer 2018 is also critically important. Mr. Sparks confirmed this when he testified that "the loss of SONGS resulted in a fairly dramatic deliverability problem," and "Encina helps plug some of that gap."[75] Encina's retirement at the end of 2017

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69 *Id.,* p. 23.

70 Exhibit 4 (CAISO/Sparks), pp. 3-5.

71 *Id.*, p. 3 lines 20-25.

72 *Id.*, p. 6 lines 27-28.

73 Exhibit 10 (CAISO/Sparks), p. 2 lines 1-27.

74 Exhibit 4 (CAISO/Sparks), p. 6 lines 27-28.

75 Reporter's Transcript, Volume 2 (CAISO/Sparks), p. 364 lines 2-4.

thus is a key factor in the need determination. This is reflected in Decision 14-03-004's finding that "Procurement needs may become critical as early as 2018."[76]

In sum, the CAISO's modeling results show that a resource equivalent to a 558 MW gas-fired plant is needed in the Carlsbad area by 2018 to avoid thermal overloads and voltage stability problems after Encina retires, and is still not sufficient to meet all remaining local reliability need.[77] Rather than presenting intervening events or new information, the CAISO's testimony in this proceeding confirms the meaning of the studies underlying Decision 14-03-004, and confirms that significant replacement generation is needed in the Carlsbad area due to the permanent retirement of SONGS and that the timing of the need for SONGS replacement capacity is tied to the Encina retirement.

4. The Decision reasonably interprets Decision 14-03-004 as finding that supplies are sufficient only while Encina is still operating.

The Filing Parties argue that the Decision errs in its reconciliation of the findings in Decision 14-03-004 that "[p]rocurement needs may become critical as early as 2018…" (Decision 14-03-004 at 113 and Finding of Fact 91) and "[b]oth SCE and SDG&E have sufficient supplies to meet projected demands in the SONGS service area through at least 2018, even with the unexpected early retirement of SONGS." (Decision 14-03-004, Finding of Fact 5.) As noted above, the Decision concluded that "[t]hese statements can be reconciled by recognizing that Encina's retirement in 2018 is the key factor in moving from a situation of sufficient supplies to one where reliability needs may become critical."

The Decision's reconciliation of the two findings is reasonable. The statement in Finding of Fact 5 in Decision 14-03-004 that supplies are "sufficient" through 2018 without SONGS is

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[76] This is stated in Finding of Fact 91 and on page 113. There is also a reference to reliability needs surfacing in 2018 on page 11.

[77] Exhibit 4 (CAISO/Sparks), pp. 3-6.

properly interpreted to mean that existing resources, which include Encina, are sufficient to preserve reliability without SONGS. This is evidenced by the fact that SONGS retired in 2013 without triggering an immediate reliability crisis. But once Encina retires, supplies are no longer sufficient in 2018 unless replacement generation is added. The CAISO's testimony confirms this interpretation, as explained above.

The statement in Finding of Fact 5 in Decision 14-03-004 first appears on page 23, in the context of the Commission's description of supplies that are available "over the medium term" which is "a period greater than the one year considered in RA proceedings, but shorter than the 10-year view in LTPP proceedings." In that paragraph on page 23, Decision 14-03-004 refers to SCE's procurement of capacity from an existing plant to fill the gap left by SONGS over the medium term, and states that the contract is in place for the period from October 2013 to May 2018. The reference to that contract indicates that supplies from existing resources are sufficient to meet demand without SONGS. In the very next paragraph on page 23, Decision 14-03-004 addresses the upcoming OTC retirements, and states that the CAISO modeled the combined impacts of OTC retirements and the loss of SONGS. The finding in Decision 14-03-004 that there are sufficient supplies through at least 2018, and the findings that procurement needs may become critical as early as 2018, are reconciled as showing that existing supplies are sufficient after the retirement of SONGS alone, but not sufficient to address local reliability needs created by the combined loss of both SONGS and Encina. The Decision correctly adopted this interpretation. The CAISO's testimony in this proceeding also confirms that interpretation, as explained above.

5. The Decision reasonably relied on and restated Decision 14-03-004's Finding of Fact 83.

Sierra Club misrepresents Finding of Fact 83 in Decision 14-03-004 (affirmed in the Decision), which cautions that procurement of preferred resources "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." Sierra Club argues that this finding was meant only to support the Commission's conclusion "declining to revisit the significant fossil fuel procurement that had already been authorized for both SDG&E and SCE to address OTC retirements (at least 1,000 MW for SCE and 300 MW for SDG&E.)"[78] This is not accurate.

Decision 14-03-004 authorized SDG&E to meet a significant portion of its incremental 800 MW of LCR need "through conventional gas-fired resources in order to ensure LCR needs will be met."[79] Finding of Fact 83 appears immediately after this finding in Decision 14-03-004, and confirms that future procurement must include gas-fired generation.

The Decision upholds the Commission's findings in Decision 14-03-004 and weighs "the risk of a reliability gap and/or delay in the Encina OTC retirement (and its potential ratepayer costs) against the possibility that SDG&E might be able to procure more than the minimum amount of an additional 200 MW of preferred resources and storage through its current RFO."[80] The Decision concludes: "On balance, we find that the public interest in awaiting the results of SDG&E's RFO is outweighed by reliability, safety and cost risk."[81] This is consistent with Decision 14-03-004's emphasis on the importance of preserving reliability, and conclusion that reliability should not be compromised through excessive reliance on intermittent and unproven resources.

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78 Sierra Club Application for Rehearing, p. 12.

79 Decision 14-03-004, Findings of Fact 81 and 82.

80 Decision, p. 18.

81 *Id.* The Decision also increases the mandatory level of procurement of preferred resources and storage from 200 MW to 300 MW and finds that the outcome "will address near-term reliability concerns, while advancing the state's clean energy goals by allowing SDG&E to pursue 100 MW of preferred resources and energy storage in addition to the 200 MW required in [D.14-03-004]." *Id.* at 18-19.

B. The Decision Properly Addressed Issues in the Scope of the Proceeding.

The Filing Parties all rely heavily on Commissioner Sandoval's dissent, which asserts that "[s]ince 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 an issue not in the scope of the Carlsbad application."[82] They argue that "[t]he Scoping Memo does not raise the question of whether the need finding in D.14-03-004 should be revised or if Carlsbad is now needed by 2018 to avoid a reliability gap or delay in Encina's retirement."[83]

As an initial matter, the Filing Parties cannot credibly assert that the scope of this proceeding did not include the question of whether the Carlsbad Energy Center is needed by 2018 to avoid reliability problems after Encina retires. The retirement of Encina and the role of the PPTA in providing timely replacement capacity was framed in the Application and SDG&E's supporting testimony as a key factor underlying SDG&E's decision to negotiate a bilateral contract and seek approval in advance of any RFO process. Encina's pending retirement, and the resulting need for replacement capacity by 2018, were discussed in the Application and supporting testimony, at the prehearing conference, in testimony, during hearings, in briefs, in the multiple rounds of comments on the Proposed Decision and Alternate Proposed Decision, and at the all party meeting on May 19, 2015. The Filing Parties' assertions in their Applications for Rehearing that Encina's retirement was not "in scope" in this case are disingenuous, especially when viewed alongside their cross examination questions and litigation positions in this proceeding.[84] The Filing Parties appear to make these assertions to capitalize on

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82 Sierra Club Application for Rehearing, p. 10; ORA Application for Rehearing, pp. 9-10; CARE Application for Rehearing, pp. 4-5; POC Application for Rehearing, pp. 12-13, 16-17; WBA Application for Rehearing, pp. 2-4.

83 *See e.g.,* Sierra Club Application for Rehearing, p. 10.

84 *See e.g.,* Reporter's Transcript, Volume 1 (SDG&E/Baerman, cross examination by Sierra Club), p. 21 lines 24-28 ("Q So it's SDG&E's position that all 600 megawatts of fossil fuel capacity is needed by 2018 because of the closure of Encina? A Right."); Reporter's Transcript, Volume 2 (CAISO/Sparks, cross examination by Sierra Club), p. 277 line 22 through p. 178 line 8 (confirming in response to cross examination by Sierra Club that "600 MW of new replacement capacity is needed before summer 2018

the statements in Commissioner Sandoval's dissent, which also does not recognize the extensive record addressing Encina's retirement and the timing issues it presents for procurement.

Furthermore, the Decision properly decided issues that were within the scope of the proceeding. PU Code Section 1701.1(b) states that in each proceeding in which it is determined that a hearing is needed, the assigned commissioner "shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable timetable for resolution." The Commission's Rule 7.3(a) similarly provides that "[a]t or after the prehearing conference (if one is held), the assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed."

These requirements were complied with in this proceeding. At the prehearing conference on September 3, 2014, ALJ Yacknin identified a number of issues that were determined to be within the scope of the proceeding.[85] On September 12, 2014, the Scoping Memo was released, which memorialized the issues discussed at the prehearing conference, and identified them as "the issues to be determined" in this proceeding. The list of issues appears on pages 3 and 4 of the Decision.

The Decision addresses the reliability impacts associated with Encina's retirement as part of its consideration of whether the PPTA is "a reasonable means to meet the 600 megawatt (MW) of identified LCR that D.14-03-004 determined may be met by conventional resources," which was identified at the prehearing conference and in the Scoping Memo as Issue 3. During

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along with transmission projects" listed in the CAISO's testimony); Sierra Club/CEJA Opening Brief at 2,7-10; POC Opening Brief at 2; ORA Opening Brief at 4-5.

[85] Reporter's Transcript, Prehearing Conference, pp. 16-27.

the prehearing conference, the ALJ explained that Issue 3 would include a number of sub-issues, including the following:

> It also includes factors raised by San Diego Gas and Electric in its prepared testimony such as whether the project's the best fit as a matter of size, operations as compared to the original project, and other project alternatives, whether only available -- whether it is -- **whether this project is the only available gas-fired resource capable of meeting need and the online date that this project offers**.[86]

The ALJ later clarified again that Issue 3 included consideration of SDG&E's arguments regarding the timing considerations underlying the bilateral PPTA, which stemmed from Encina's upcoming retirement and the resulting reliability issues:

> MR. HAWIGER: Thank you, your Honor. This may be subsumed in your general issue about the reasonableness of Carlsbad. But I would offer that a separate issue may be whether Decision 14-03-004 expressed any requirement or preference for a resource that would be on-line by January 2018. The company's application appears to justify this contract based on the fact that it can come on-line by 2018 and therefore crowd out the possibility of renewable preferred resources exceeding the 200-megawatt minimum. And I believe that justification I do not believe is founded in Decision 12-03-004.
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> ALJ YACKNIN: Okay. And I barely mentioned that, but I did mention the on-line date as an issue under reasonableness. And I would propose to Commissioner Florio that the drafting of this issue of reasonableness of this project, timing, operation, size, that the articulation be interpreted relatively broadly to capture all of these aspects, so. But thank you for that. I think that's an important point, too.[87]

An exchange between counsel for SDG&E and counsel for Sierra Club during the prehearing conference also shows that the need for the PPTA to resolve reliability problems in 2018 after Encina retires was a topic that would be litigated in this proceeding:

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[86] *Id.,* p. 16 lines 9-18.

[87] *Id.,* p. 27 line 13 through p. 28 line 9.

> MR. NELSON: Just to -- hopefully, a closing remark. I think the schedule is all about meeting the state's once-through cooling deadline. That's the reality. And so the project needs to be on line Q4 of 2017.[88]
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> MR. VESPA: Your Honor, Matt Vespa from Sierra Club. Just to that particular point, that's a factual dispute around need in 2018 which was raised earlier. And we have concerns with assertions that SDG&E made in its application about the purported need in 2018. As we said in our protest, their San Onofre testimony in Track 4 only asserted need in 2022. They never raised this issue for San Onofre replacement. Pio Pico was authorized to replace that and so on and so forth. We'll deal with that down the line, but there's a lot of dispute about what was just said.[89]

Thus, it was clear from the very beginning of this proceeding that consideration of the bilateral PPTA would include consideration of the rationale presented in SDG&E's Application and supporting testimony, namely that the PPTA was needed to meet reliability needs in 2018 arising due to Encina's retirement.

The Filing Parties' argument about scope also confuses "issues" that are within the scope of the proceeding with evidence that supports the Commission's findings on such issues. The Scoping Memo identified the reasonableness of the PPTA as an issue to be addressed in this proceeding. However, it is not a requirement that the Scoping Memo must delineate the facts or evidence that will be presented to support the Commission's decision on that issue. Indeed, this would not be possible or advisable at the Scoping Memo stage of the proceeding given that the Scoping Memo is issued before the evidentiary record is fully developed. The Scoping Memo thus was not required to identify Encina's retirement and the resulting timing concerns as factors that could be relied on to support the Decision's approval of the PPTA. It was further unnecessary to identify those factors in the Scoping Memo given that SDG&E's Application and testimony emphasized Encina's OTC compliance deadline as the key consideration underlying

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88 *Id.,* p. 61 lines 14-19.

89 *Id.,* p. 62 line 16 through p. 63 line 1.

SDG&E's decision to negotiate the PPTA and bring it before the Commission for approval. Thus, Encina's retirement and the resulting implications for the timing of procurement were already presented to the Commission and the Filing Parties by the time the Scoping Memo was issued. These factors were not merely within the scope, they literally defined the proceeding.

Finally, even if the Decision had decided an issue that was not identified in the Scoping Memo (which was not the case, as explained above), it was not prejudicial to the Filing Parties because they extensively litigated the question of whether approval of the PPTA was necessary to meet reliability needs in 2018 after Encina retires. If a court concludes that "the Commission has failed to proceed in the manner required by law," the court "will annul its decision only if that failure was prejudicial."[90] The Filing Parties had an extensive opportunity to litigate and oppose, and did litigate and oppose, SDG&E's Application and its position that approval of the PPTA is needed to ensure that reliability needs are met in 2018 after Encina retires. No prejudice occurred in this case.

C. The Decision's Approval of the PPTA Does Not Violate the Loading Order.

The Filing Parties assert that the Decision violates the Loading Order, Decision 14-03-004, and PU Code Section 454.5 because it authorizes procurement from a natural gas-fired generating facility before knowing the results of SDG&E's 2014 RFO which solicited preferred resources and energy storage to satisfy part of the procurement authorization in Decision 14-03-004.[91] These assertions are without merit. The Decision's approval of the PPTA does not violate the Loading Order or Decision 14-03-004. To the contrary, approval of the only resource of sufficient size that can be completed in time to meet reliability needs after

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[90] *Utility Reform Network v. Public Utilities Comm'n.*, 223 Cal. App. 4th 945, 958 (2014), citing *Southern California Edison Co. v. Public Utilities Comm'n.*, 140 Cal.App.4th 1085, 1106 (2006).

[91] Sierra Club Application for Rehearing, pp. 10-12; POC Application for Rehearing, p. 2; CBD Application for Rehearing, p. 2.

Encina retires is entirely consistent with Decision 14-03-004 and the Commission's responsibility to protect reliability.

Decision 14-03-004 emphasized the importance of preserving reliability, expressly authorized SDG&E to meet a significant portion of its LCR need through conventional generation, and concluded that reliability should not be compromised through excessive procurement of preferred resources. Decision 14-03-004 adopted the following Findings of Fact:

- "Authorizing SDG&E to procure between 500 and 800 MW in its portion of the SONGS service area is within the range of prudent procurement," and "It is necessary that a significant amount of this procurement level be met through conventional gas-fired resources in order to ensure LCR needs will be met" (Findings of Fact 81 and 82);
- "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" (Finding of Fact 83); and
- "Procurement needs may become critical as early as 2018, and certainly by 2020" (Finding of Fact 91).

Decision 14-03-004 also adopted the following Conclusions of Law requiring a gradual increase in preferred resources and energy storage to ensure a continued high level of reliability, and giving SDG&E flexibility to procure gas-fired resources to meet LCR need:

- "It is prudent to promote preferred resources to the greatest extent feasible, subject to ensuring a continued high level of reliability" (Conclusion of Law 37);
- "A prudent approach to reliability entails a gradual increase in the level of preferred resources and energy storage into the resource mix" (Conclusion of Law 38);
- "Consistent with D.13-02-015, it is reasonable to provide a level of flexibility to SCE and to ensure procurement consistent with ISO reliability standards by expanding the range of procurement specified in D.13-02-015 for gas-fired resources, preferred resources and energy storage," and "A similar range of procurement flexibility should be provided to SDG&E as to SCE" (Conclusions of Law 39 and 40); and
- "SDG&E should be authorized some flexibility to procure gas-fired, preferred and energy storage resources to meet reliability needs" (Conclusion of Law 43).

In Decision 14-03-004, the Commission stated that "a primary responsibility of the Commission is to ensure safety and reliability in the electrical system," and "California law repeatedly emphasizes the importance of maintaining the reliability of the electric grid," citing the following examples from the California Public Utilities Code:

- "Reliable electric service is of utmost importance to the safety, health, and welfare of the state's citizenry and economy." (§ 330(g))
- "It is important that sufficient supplies of electric generation will be available to maintain the reliable service to the citizens and businesses of the state." (§ 330(h))
- "Reliable electric service is of paramount importance to the safety, health, and comfort of the people of California." (§ 334)
- The CAISO "shall ensure efficient use and reliable operation of the transmission grid" (§ 345) and shall "ensure the reliability of electric service and the health and safety of the public." (§ 345.5(b))
- The Commission "shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational." (§ 362(a))[92]

After citing these statutory mandates for ensuring reliability, Decision 14-03-004 recognized that the Commission also has a statutory mandate to implement procurement-related policies to protect the environment, including through application of the Loading Order. In the section describing how the authorized LCR need should be filled, the Commission found that:

> In D.13-02-015, Finding of Fact 30 stated: "It is necessary that a significant amount of this procurement level be met through conventional gas-fired resources in order to ensure LCR needs will be met." There is nothing in the record of Track 4 of this proceeding that would require a change to this Finding. While we strongly intend to continue pursuing preferred resources to the greatest extent possible, we must always ensure that grid operations are not potentially compromised by excessive reliance on intermittent resources and resources with uncertain ability to meet LCR needs.[93]

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92 Decision 14-03-004, pp. 12-13.

93 *Id.,* p. 90.

Decision 14-03-004 recognized that SDG&E expects to procure 407 MW of preferred resources "through specific proceedings dedicated to these resources,"[94] and determined that SDG&E should be required to procure additional preferred resources and energy storage on top of these amounts. The Commission applied the Loading Order to require SDG&E to fill its authorized LCR need using a minimum of 200 MW of preferred resources and energy storage.[95] The Commission concluded as a matter of law that: "Requiring SDG&E to procure at least 200 MW from preferred resources or energy storage is consistent with the authority granted to SCE herein and consistent with the Loading Order."[96] This shows that the Commission factored compliance with the Loading Order into the minimum procurement level required for SDG&E, and concluded that procurement of 200 MW of preferred resources and energy storage, which was added to the 407 MW of preferred resources being procured through separate proceedings, satisfies the Loading Order.

Although Decision 14-03-004 allowed SDG&E to exceed the minimum 200 MW of preferred resources and energy storage, it did not require it. To the contrary, as reflected in the Findings of Fact and Conclusions of Law cited above, the Commission expressly affirmed that it is necessary that a significant amount of the procurement level be met with conventional gas-fired resources, and concluded that the Loading Order must be balanced to avoid excessive reliance on intermittent resources with uncertain ability to meet LCR needs.[97] Decision 14-03-004 therefore gave SDG&E flexibility to procure a significant amount of conventional generation. As shown by these findings, the Commission determined that the

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94 *Id.,* p. 96.

95 *Id.,* p. 96.

96 *Id.,* Conclusion of Law 44.

97 *Id.,* p. 90.

capabilities of gas-fired generation – such as dispatchability and flexible operating characteristics – are required to ensure a continued high level of reliability.

The Decision properly balanced the Commission's dual responsibility to preserve reliability and promote the environmental policies of the Loading Order. The Decision follows the requirements of Decision 14-03-004 and finds:

> Compliance with the Loading Order is a guiding principle for procurement, but as the Track 4 decision states, the procurement of preferred resources 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." (Id. at Finding of Fact 83.) Indeed, Public Utilities Code Section 454.5(b)(9)(C) mandates that procured preferred resources are "cost effective, reliable and feasible."[98]

The Decision further explained its rationale for approval of the PPTA, and how the modification required in the Decision helped advance the policies of the Loading Order:

> Thus, a better statement of the fundamental issue before us is whether the benefit of a competitive procurement process and its potential for procuring additional preferred resources beyond the minimum required by D.14-03-004 outweighs the risk of delaying Encina's timely retirement and/or creating a reliability gap upon its retirement. We conclude that it does not, based on the reliability concerns raised in this proceeding.
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> However, the tension between system reliability and procuring additional preferred resources is mitigated if the approval of the Carlsbad PPTA is conditioned upon a reduction of the capacity from 600 MW to 500 MW, with the residual 100 MW procurement authority limited to preferred resources. This reduction coupled with the additional 100 MW available to only preferred resources would address system reliability concerns while still achieving the State's policies regarding retirement of OTC facilities, competitive procurement, and the loading order.[99]

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98 Decision, p. 14.

99 *Id.*, pp. 14-15.

The record also supports the Decision's approval of the PPTA to support reliability. SDG&E's testimony shows that SDG&E considered preferred resources, and concluded that they lack critical characteristics required to accommodate increasing amounts of intermittent renewable generation, namely operational flexibility.[100] In contrast, fully dispatchable conventional resources are "near-ideal" for meeting SDG&E's dual periods of demand – between 4:00 PM and 5:00 PM, and between 8:00 PM and 10:00 PM – because "they can ramp up and down, follow load and be started multiple times within a single day."[101] Thus, the record shows that preferred resources are not feasibly available to meet the reliability need arising in 2018, and further shows that Carlsbad Energy Center is the only resource that meets the reliability need and can be operating by the end of 2017 when Encina retires.

Finally, contrary to the assertions of POC, the Decision also does not violate PU Code Section 454.5(b)(9)(C). PU Code Section 454.5(b)(9)(C) states that a utility's procurement plan must include a showing that the utility will first meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible. The Decision does not approve SDG&E's procurement plan, but instead approves a resource that meets a portion of the need for new generating capacity that was authorized in Decision 14-03-004. The Commission has authority, and indeed a responsibility, to ensure that reliability is preserved. The Decision properly recognized this in its affirmation of Finding of Fact 83 from Decision 14-03-004 that "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."

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100 Exhibit 1 (SDG&E/Baerman), p. 6 lines 12-15.

101 *Id.*, p. 5 lines 15-16.

V. THE DECISION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Record Supports the Decision's Finding that the Terms and Conditions of the PPTA are Reasonable.

Sierra Club and CARE argue that the Decision's approval of the PPTA is not supported by substantial evidence.[102] This is not correct. The Decision appropriately relies on the Independent Evaluator's report as evidence demonstrating that the PPTA is reasonable.[103]] SDG&E and the Independent Evaluator assessed the reasonableness of the PPTA relative to other conventional generation options by comparing the PPTA to the amended power purchase tolling agreement for the Pio Pico facility ("Pio Pico Amended PPTA"), which is SDG&E's most recently approved conventional agreement.[104] As Mr. Baerman explained: "when the overall value of the Carlsbad Energy Center PPTA is compared to the overall value of the Pio Pico Amended PPTA . . . the Carlsbad Energy Center PPTA compares favorably."[105] The Pio Pico facility utilizes the same technology as the Carlsbad Energy Center. Mr. Baerman confirmed that the Pio Pico Amended PPTA "represents a reasonable market test of the competitiveness of the pricing for Carlsbad Energy Center."[106] The Independent Evaluator confirmed this, and also concluded that the PPTA is reasonable based on costs for comparable generating units in the ISO New England, capacity costs in the New York ISO, and the CEC's May 2014 draft staff report entitled "Estimated Cost of New Renewable and Fossil Generation in California."[107]

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102 Sierra Club Application for Rehearing, p. 13; CARE Application for Rehearing, pp. 6-7.

103 Decision, p. 25.

104 Exhibit 1 (SDG&E/Baerman), p. 10 lines 5-8.

105 *Id.*, p. 10 lines 8-10.

106 *Id.,* p. 10 lines 13-14.

107 Decision, p. 15; Exhibit 1 (SDG&E/Baerman), Appendix D, pp. 30-32.

Sierra Club challenges the Independent Evaluator's conclusion that the PPTA compares favorably with the Pio Pico Amended PPTA, and wrongly insists that the PPTA does not compare favorably with the Pio Pico contract based on a comparison of "levelized cost."[108] SDG&E's witness testified that "the appropriate 'apples to apples' comparison of the two PPTAs is to compare the levelized costs of the two PPTAs taking into account the capacity payments, fixed O&M, startup costs and escalation," and explained that "SDG&E conducted this analysis and found that on a levelized cost basis ($/kw-yr), the Carlsbad PPTA is priced comparably to the Pio Pico PPTA."[109] Mr. Baerman reconfirmed this under cross examination, explaining: "On a levelized cost dollar per kW year they're practically neck and neck."[110] Because the Decision requires the PPTA price to remain the same for a five unit facility, the "$/kw-yr" cost will not change. The PPTA (whether for six units or five) thus is priced comparably to Pio Pico.

Sierra Club also repeats its prior argument against the PPTA using Carlsbad Energy's statement that it could not commit to hold the price constant for any further reduction in the size of the project,[111] but Sierra Club's arguments do not address the reasonableness of the 500 MW PPTA that the Decision approves. Carlsbad Energy stated its willingness to contract for five units at the same price that is specified in the PPTA for six units. The Decision approves the PPTA with this modification. The product provided under the PPTA is capacity – which will be available for dispatch to produce energy and ancillary services – and the price is expressed in dollars per unit of capacity, or $ per kW-year. As stated in the Decision, the Independent Evaluator found that the $ per kW-year price in the PPTA was reasonable for a 600 MW contract, including by comparison to the 300 MW Pio Pico contract.[112] The PPTA as revised in

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108 Sierra Club Application for Rehearing, p. 15.

109 Exhibit 9 (SDG&E/Baerman), p. 9 lines 15-18.

110 Reporter's Transcript, Volume 1 (SDG&E/Baerman), p. 65 lines 11-15.

111 Sierra Club Comments on APD at 6-7; ORA Comments on APD at 7-8.

112 Decision , pp. 25-26.

the Decision has the exact same $ per kW-year price for each year of the contract delivery period, which is the exact same price table that the Independent Evaluator determined to be reasonable. The size of the project does not change the analysis because the per unit cost of capacity to ratepayers will be the same under the modified PPTA. As a result, the price in the modified PPTA is reasonable for the reasons articulated in the Independent Evaluator's report.

B. The Record Supports the Decision's Finding that the Carlsbad Energy Center Provides Renewable Integration Benefits.

Sierra Club also argues that the Decision's Finding of Fact 14 (that the Carlsbad Energy Center would provide renewable resources integration benefits due to its flexible dispatchability) is not supported by substantial evidence because POC's witness testified that the system does not need more flexible capacity.[113] Sierra Club's argument misconstrues Finding of Fact 14. Additional capacity – flexible or inflexible – is needed to meet the LCR need in SDG&E's service area. SDG&E explained why that need should be met with flexible resources that can be operating in the manner needed for effective integration of renewable resources.[114] The POC testimony cited by Sierra Club discusses the Commission's evaluation of available flexible resources in 2014 and 2015 for purposes of meeting resource adequacy obligations, and an assessment of the future need for flexible resources in addition to procurement already authorized to meet LCR needs.[115] However, the findings regarding the need for additional flexible capacity beyond the authorized LCR resources do not mean that the LCR resources should not be flexible. To the contrary, as noted above, SDG&E's testimony shows that there is a need for flexible resources to help integrate and back up intermittent renewable generation, and that capacity procured to meet LCR needs must provide flexible operating characteristics.[116]

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113 Sierra Club Application for Rehearing, p. 15.

114 Exhibit 1 (SDG&E/Baerman), p. 5 lines 15-18.

115 Exhibit 14 (POC/Powers), pp. 11-12.

116 Exhibit 1 (SDG&E/Baerman), p. 5 line 15 through p. 6 line 2.

The CAISO also prepared studies and testimony showing the benefits of replacing OTC generation with flexible generation with the following characteristics: (1) quick response to changes in load and renewable resource intermittency; (2) the ability to provide ancillary services; (3) inertia or governor control to respond to changes in frequency and provide system stability; and (4) faster starting to respond to changes more quickly, rather than having to be online prior to the change in condition.[117] The Carlsbad Energy Center has these characteristics.[118] Finally, as testified by Mr. Sparks, having the Carlsbad Energy Center in-service before the summer of 2018 will help mitigate the degradation of deliverability of renewable generation in the Imperial zone expected to be in-service at that time.[119] The Decision's Finding of Fact 14 thus is supported by substantial evidence.

C. The Decision Does Not Rely on the Potential for Adding Clutch Technology as a Reason to Approve the PPTA.

ORA argues that the Decision's requirement for SDG&E to evaluate clutch is "outside the scope of the proceeding," and is "not supported by the findings of fact."[120] POC also objects to the Decision's statements regarding clutch technology, and asserts that the Decision unlawfully relies on "extra-record evidence."[121]

ORA and POC misrepresent that Decision's requirements and findings regarding clutch technology. The Decision does not cite or rely on the potential benefits of clutch technology as grounds for approving the PPTA. POC's assertion to the contrary is simply wrong.[122] The Decision merely notes that the addition of a clutch to a generator could offer incremental benefits

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117 Exhibit 4 (CAISO/Sparks), p. 7 lines 20-26.

118 *Id.*, p. 7 lines 26-27.

119 *Id.*, p. 8 lines 9-11.

120 ORA Application for Rehearing, pp. 11-12.

121 POC Application for Rehearing, pp. 4-5.

122 *See* POC Application for Rehearing, p. 5.

because it "would allow the unit to operate in synchronous condenser mode (without the burning of fuel) when positive MW output is not required," and then directs SDG&E "to evaluate the feasibility and cost-effectiveness of this clutch technology."[123] Importantly, the Decision does not require this potential modification to be included in the PPTA for the Carlsbad Energy Center. Carlsbad Energy's comments on the Alternate Proposed Decision also confirmed that it is not possible to change the project design of the Carlsbad Energy Center to include clutches between the turbines and the generator units, while preserving the price, schedule and other terms and conditions in the PPTA. Carlsbad Energy explained:

> The clutch feature is not contemplated in the PPTA, or in the turbine procurement and engineering, procurement and construction contracts that have been finalized in order to build and complete the Carlsbad Energy Center by the end of 2017. The addition of clutches would require procurement of additional equipment, as well as modification of the contracts listed above, which would affect price and schedule. Even if there were time to implement these changes, there may not be sufficient space at the Carlsbad Energy Center project site to accommodate the addition of clutches. In any case, to the extent that the addition of clutches is technically feasible, which has not yet been determined, any such additions would need to occur, if at all, through a modification to the Carlsbad Energy Center after it is constructed and through a separate contractual arrangement.[124]

The Decision's requirement for SDG&E to "evaluate the feasibility and cost-effectiveness" of clutch technology is within the Commission's authority and does not constitute legal error or violate any party's due process rights.[125] The requirement is merely to conduct an evaluation. The claims of ORA and POC are without merit.

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123 Decision, pp. 21-22.

124 Opening Comments of Carlsbad Energy Center LLC on the Alternate Proposed Decision of Commissioner Picker (April 27, 2015), pp. 2-3.

125 California Constitution, Article XII, §§ 1-6; PU Code Section 701 (conferring on the Commission expansive authority to "do all things, whether specifically designed in [the Public Utilities Act] or addition thereto, which are necessary and convenient in the supervision and regulation of" utilities in

D. The Decision Does Not Rely on Extra Record Information From an Ex Parte Communication.

POC alleges that the Decision "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."[126] POC alleges that NRG proposed in that meeting to reduce the size of the PPTA from six units to five units. POC also alleges that the Decision relies on information conveyed in that meeting to approve a smaller PPTA, and that a smaller project "was never proposed, discussed or analyzed in any way."[127]

POC misrepresents the record and the sequence of events in this proceeding. When the Proposed Decision was issued, Carlsbad Energy elected to file its comments on March 20, 2015, which was six days before the due date under the Commission's Rules. In those comments, Carlsbad Energy announced publicly that it would be willing to amend the PPTA to reduce procurement from six units to five units, without changing the price or other terms and conditions, if the Commission were to approve the PPTA in a decision issued in May.[128] Carlsbad Energy made this proposal to reduce procurement under the PPTA in its public comments that were filed and served on all parties in this proceeding, not in any ex parte communication. Carlsbad Energy stated that it was filing its comments and the accompanying proposal early, to give parties the opportunity to address the proposal in their opening comments on the Proposed Decision and to identify any concerns. In addition, Carlsbad Energy's ex parte communication with Mr. Chaset was permissible under the Commission's procedural rules, and

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California.) The Commission's authority has been liberally construed. *Consumers Lobby Against Monopolies v. Public Utilities Comm'n.,* 25 Cal.3d 891, 905 (1979).

126 POC Application for Rehearing, p. 8.

127 *Id.*

128 Opening Comments of Carlsbad Energy Center LLC on the Proposed Decision of Administrative Law Judge Yacknin (March 20, 2015), pp. 2 and 12-15.

Carlsbad Energy complied with the requirements for providing notice of ex parte communications.[129]

Contrary to POC's assertions, the Decision relies on the record in this proceeding to conclude that the PPTA is a reasonable means to fill 500 MW of the need authorized in Decision 14-03-004, and to require a reduction in procurement under the PPTA. The Decision approves the PPTA as proposed with the condition that the amount of procurement is reduced in size from 600 MW to 500 MW without change to the price, schedule and other terms and conditions. It is within the Commission's authority require this modification and to approve the PPTA as so modified.[130] Carlsbad Energy's public statement that it would be willing to agree to modify the PPTA on those terms merely advised the Commission that such a requirement would be acceptable to the PPTA counterparty, which is an entity not subject to the Commission's regulatory oversight over utilities.

Finally, the possibility of a reduction in the size of the PPTA was addressed in this proceeding. The Independent Evaluator's report raised this as a possibility.[131] SDG&E's witness also was cross examined on the possibility of phasing or reducing procurement under the PPTA.[132]

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129 *See* Notice of Ex Parte Communication of Carlsbad Energy Center LLC (March 18, 2015); Supplemental Notice of Ex Parte Communication of Carlsbad Energy Center LLC (March 30, 2015).

130 *See* footnote 125 above.

131 Exhibit 1 (SDG&E/Baerman), Appendix D, pp. 37 and 39 (stating that procurement of 400 to 600 MW from the Carlsbad Energy Center would be a reasonable outcome).

132 Reporter's Transcript, Volume 1 (SDG&E/Baerman, cross examination by Sierra Club), p. 33 line 10 through p. 36 line 3.

VI. THE FILING PARTIES' OTHER ALLEGATIONS ARE WITHOUT MERIT.

A. CEQA Does Not Require the Commission to Conduct an Environmental Review Before Approving the PPTA.

CBD repeats its litigation position that the Commission must conduct an environmental review under CEQA before approving the PPTA.[133] CARE also asserts that the Commission is required to conduct an environmental review of the Carlsbad Energy Center, but does not cite any legal authority. The arguments of CBD and CARE are without merit. The Decision correctly concludes that Commission review of purchase power contracts does not trigger CEQA, and explains that a contract for purchase power by a regulated utility is not a "project" under CEQA.[134]

The Decision's conclusions are consistent with CEQA, the CEQA Guidelines, and applicable precedent. CEQA applies only to discretionary "projects" proposed to be carried out or approved by public agencies.[135] CEQA defines a "project" as an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) an activity directly undertaken by any public agency; (b) an activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; or (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.[136] Under this test, if the whole of the activity undertaken, supported, or authorized by a public agency does not have the potential to result in a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, it is not a "project" for purposes of

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133 CBD Application for Rehearing, pp. 2-19; CARE Application for Rehearing, p. 8.

134 Decision, p. 29.

135 California Public Resources Code ("PR Code") Section 21080(a).

136 PR Code Section 21065.

CEQA. Courts have confirmed that action by a public agency to endorse or express support for a proposal is, standing alone, insufficient to trigger application of CEQA; the agency must approve the project by issuing a permit or other authorization required for development of the project to occur.[137]

It is well established that the Commission's approval of rate recovery for a power purchase agreement is not a "project" for purposes of CEQA. The Commission has reached this conclusion consistently for decades. In 1986, the Commission concluded that CEQA review was not required for approval of the request of Pacific Gas and Electric Company ("PG&E") for cost recovery of a power purchase agreement for the output of the Dinkey Creek Hydroelectric Project, and explained that:

> The present application does not involve the granting of a lease, permit, license, certificate or other entitlement for use. PG&E is requesting approval of a power purchase agreement. PG&E is neither the builder nor the owner of the proposed Dinkey Creek Project. PG&E seeks only to obtain assurance that it will recover through its rates the payments made under the agreement. Such a ratemaking order is not a "project" under CEQA. This issue has been raised before the Commission and the California Supreme Court on several occasions. All Commission orders concluding that CEQA does not apply to a ratemaking proceeding have been upheld. (E.g., *Samuel C. Palmer, III v. Public Utilities Commission* SF# 23980, writ denied 5/10/79.)[138]

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137 *Parchester Village Neighborhood Council v. City of Richmond,* 182 Cal.4th 305, 313 (2010). In addition, a discretionary agency action does not trigger CEQA review if it is not "necessary to the carrying out of some private project involving a physical change in the environment." *Simi Valley Recreation & Park District v. Local Agency Formation Commission*, 51 Cal.App.3d 648, 664 (1975). Further, CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead, to trigger CEQA compliance requirements, the discretion exercised must be of a certain kind; it must provide the agency with the ability and authority to mitigate environmental damage to some degree. *Leach v. City of San Diego*, 220 Cal.App.3d 389, 394 (1990).

138 Decision 86-10-044, 1986 Cal PUC LEXIS 642, 22 CPUC2d 114 (October 16, 1986).

The Commission has consistently confirmed that CEQA does not require the Commission to conduct an environmental review when reviewing and authorizing rate recovery for utility power purchase agreements.[139]

The same conclusion applies here. The action in the Decision is authorization for SDG&E to meet its LCR need through the PPTA and recover costs incurred under the PPTA through rates, and approval of other ratemaking treatment. Similar to PG&E in the case of the Dinkey Creek Project, SDG&E is not the builder or the owner of the Carlsbad Energy Center, and the action to be taken in this proceeding is limited to ratemaking.

The Carlsbad Energy Center will be built by Carlsbad Energy, an entity that is not subject to the Commission's general jurisdiction. The Commission does not have authority to approve, deny, or condition construction of a power plant by a non-utility independent power producer such as Carlsbad Energy. The CEC, not the Commission, is the state agency with discretionary (and exclusive) authority over the construction of the Carlsbad Energy Center, a thermal power plant with a capacity in excess of 50 MW. The Warren-Alquist Act, codified in the California Public Resources Code, specifies that the CEC has "exclusive power" to certify all such thermal power plants, and confirms that the issuance of a CEC license "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency."[140]

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[139] *See e.g.*, Resolution E-4686 (confirming that review of "the CA Flats PPA is not a 'project' pursuant to CEQA"); Resolution E-4522 ("The Commission reiterates that while it acknowledges that environmental issues with Rio Mesa 2 have the potential to pose significant risks, the Commission will not pre-judge the projects in light of these issues. The Commission also notes that environmental permitting for the PPAs is the jurisdiction of the California Energy Commission."); Resolution E-4467 ("Commission review of a PPA is not review of a "project," but a review of the costs SDG&E's ratepayers will incur pursuant to the proposed PPA. Further, any project, as defined by CEQA, is subject to all applicable environmental laws."); Resolution E-4439 ("As previously noted by this Commission, the Commission's review of PPAs is confined to approval of costs pursuant to a PPA. Further, Commission approval of the PPA does not exempt the project from compliance with all applicable environmental laws nor does it limit the review of project alternatives should future environmental reviews of the development projects require such analysis.").

[140] PR Code Section 25500.

Commission approval of the Application thus does not allow construction of the Carlsbad Energy Center to proceed. Conversely, if the Commission had denied the Application, the Carlsbad Energy Center could still be built under the original CEC license, or under the amended license after the CEC approves it.[141] This further demonstrates that approval of the PPTA is not a project for purposes of CEQA.

B. There is No Evidence of Bias.

POC alleges that Commissioners were biased in favor of the PPTA, citing statements by Commissioner Florio at the prehearing conference, and further alleges that this bias deprived parties of their due process rights.[142] POC's allegations are without merit. This proceeding was litigated and considered with extensive public participation through testimony, evidentiary hearings, multiple rounds of comments on proposed decisions, an all party meeting where oral argument occurred before all five Commissioners, and open public discussion by all five Commissioners at two separate business meetings. The issues, evidence, and potential outcome were debated extensively and publicly. Moreover, the outcome was far from assured, as demonstrated by the issuance of conflicting proposed decisions. The record and procedural history of this proceeding demonstrate that the Decision was the result of a full and robust public process with extensive input from all interested parties. POC's allegations of bias are without merit.

VII. ORAL ARGUMENT IS NOT WARRANTED.

The Commission should not grant Sierra Club's request for oral argument.[143] The Commission's Rule 16.3 specifies that a request for oral argument "should explain how oral

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[141] *See* CEQA Guidelines, 14 Cal. Code Regs. Section 15381 (responsible agencies include only "public agencies other than the Lead Agency which have discretionary approval power over the project"), and Section 15040(b) (CEQA does not grant new powers to the Commission independent of the powers granted by other laws).

[142] POC Application for Rehearing, pp. 6-8.

[143] Sierra Club Application for Rehearing, pp. 15-16.

argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission." Sierra Club has not met this standard. Sierra Club asserts that oral argument is needed due to the Decision's "material deviation from D.14-03-004." As explained above, however, the Decision followed and correctly applied the Commission's prior findings regarding LCR needs in approving the PPTA. Even if this proceeding raises issues of major significance, Sierra Club has not met its burden under Rule 16.3 to demonstrate how oral argument will "materially assist the Commission in resolving the application." The Application and the underlying record have been litigated extensively, and oral argument before the full Commission already occurred at the all party meeting on May 19, 2015. A second oral argument would not add any information not already discussed and considered at length and in detail in this proceeding.

VIII. CONCLUSION

As explained above, no Filing Party has demonstrated legal error, or shown that the Decision is unlawful or erroneous. Rehearing is therefore not required or warranted, and all six Applications for Rehearing should be denied as quickly as possible.

July 14, 2015

Respectfully submitted,

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