



July 5, 2016

Via Regular Mail and E-mail (edtariffunit@cpuc.ca.gov)

Mr. Timothy J. Sullivan
Executive Director, Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: Comments of Climate Action Campaign and Sierra Club on Draft Resolution E-4874

Dear Mr. Sullivan,

Climate Action Campaign (“CAC”) and the Sierra Club submit the following comments on Draft Resolution E-4874 (“Draft Resolution”). The Draft Resolution approves, subject to several conditions, SDG&E Advice Letter 2822-E (“Advice Letter”), in which SDG&E requests approval to create an Independent Marketing Division (“IMD”) to market and lobby against Community Choice Aggregation (“CCA”) and also seeks approval of its Compliance Plan. As set forth below, although CAC and the Sierra Club support some elements of the Draft Resolution, it does not provide the robust protection for CCAs required by Senate Bill 790 and the Commission’s CCA Code of Conduct (“COC”).

Pursuant to SB 790 and the COC, CAC and the Sierra Club ask that the Commission amend the Draft Resolution to:

1. Acknowledge that the Commission must review SDG&E’s Compliance Plan in a manner consistent with the letter and legislative intent of SB 790, and that SB 790 requires that the COC be interpreted and applied to provide CCAs with the most robust protections possible;
2. Apply SB 790 and the COC to Sempra Energy, SDG&E’s parent company, in the same manner as SDG&E. The Draft Resolution’s existing requirements on consultants should be extended to Sempra Energy;

3. Maintain language in the Draft Resolution that applies the entire scope of the Affiliate Transaction Rules, rather than just some of the rules;
4. Prohibit current SDG&E or Sempra employees with prior lobbying and marketing experience from transferring into the IMD; prohibit SDG&E employees, directors, and officers and from sitting on the IMD's board or otherwise exercising control over the IMD; and prohibit the transfer of employees who have had access to sensitive or proprietary information in the past three years;
5. Prohibit the IMD from using shared services from all departments involved in lobbying and marketing, including public affairs, legal, regulatory affairs, and communications;
6. Enhance reporting and transparency by requiring a single report on all compliance matters to be submitted on a quarterly basis and made public; requiring that the IMD include a disclaimer identifying itself as separate from SDG&E in all communications; strengthening and clarifying the compliance audit requirement; and requiring that all mandatory reports and disclosures be made public and served on CCAs;
7. Improve enforceability by clarifying that the CCA Code of Conduct's expedited complaint procedure and other rules are available to enforce COC compliance against both affiliate and non-affiliate IMDs;
8. Establish a schedule for additional review of the Compliance Plan by the parties, such as additional comments;

The Commission should not approve the Draft Resolution until it these amendments are adopted and SDG&E's Compliance Plan meets the requirements of SB 790 and the COC.

I. BACKGROUND

CAC is a San Diego, California based 501(c)(3) nonprofit dedicated to stopping climate change. CAC has been the driving force in encouraging San Diego area governmental bodies to adopt comprehensive Climate Action Plans. CAC's successes include providing strategic advice and assistance to the City of San Diego in developing and adopting a Climate Action Plan that includes CCA as a key tool in reaching greenhouse gas reduction targets.

The Sierra Club is the largest and most influential grassroots environmental organization in the country. The Sierra Club's My Generation Campaign is working to power California with 100% clean energy. The Sierra Club organizes communities across the state to demand local lean energy as a way to improve air quality, create jobs, and take action against climate change.

CAC and the Sierra Club view Community Choice Aggregation as key to building an energy future that promotes clean power while providing ratepayers with the benefit of increased choice and competition. CCAs allow for increased clean energy use, create new markets for clean energy, and increase local control, including local control over local energy efficiency programs. The development of CCAs is a key element in achieving the goals set forth in the City of San Diego's Climate Action Plan, as well as the other Climate Action Plans promoted by CAC and the Sierra Club.

II. LEGAL STANDARD

The Draft Resolution's discussion of the Commission's legal standard¹ should be amended to clarify that the Commission must interpret and apply the COC in a manner consistent with the letter and legislative intent of SB 790. The Commission adopted the COC in response to the legislative mandate set forth in SB 790,² and any interpretation or application of the COC must be consistent with the letter and intent of this controlling legislation.

The legislative purpose of SB 790 is to protect current and prospective CCAs from the overwhelming structural advantages enjoyed by utilities. In SB 790, the legislature recognized that the State of California's policy of supporting CCA formation³ and its "substantial government interest" in protecting CCAs from the utilities⁴ has been threatened by "the exercise of market power by electrical corporations [which has been] a deterrent to the consideration, development, and implementation of community choice aggregation programs."⁵ To protect CCA efforts from this inherent market power, the Legislature required that the Commission adopt a Code of Conduct to "facilitate the consideration, development, and fair implementation of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization by ratepayers."⁶

The Commission explicitly recognized this purpose in D.12-12-036, the Decision adopting the COC, stating that "one major focus of both SB 790 and [the COC] is to prevent utilities from using their structural advantages to influence customers or local governments against investigation of or participation in CCAs."⁷ These provisions make clear that the legislative purpose of SB 790 is to provide current and prospective CCAs with the most robust protections possible. The Draft Resolution's discussion of the standard of review should be amended to state that the Commission must interpret and apply the COC rules in a manner consistent with this clear legislative intent.

¹ Draft Resolution pp. 12-13

² SB 790, Section 10, adding Pub. Util. Code Section 707

³ SB 790 Section 2(a)

⁴ SB 790 Section 2(g)

⁵ SB 790 Section 2(f)

⁶ SB 790, p. 90

⁷ D.12-12-036, p. 14

III. PARENT COMPANY AND CONSULTANTS

CAC and the Sierra Club have serious concerns about the omission of Sempra, SDG&E's parent company, from SDG&E's Compliance Plan and from the Draft Resolution. Sempra and SDG&E have interests that are substantially similar or identical with respect to CCA programs and presently share lobbying and marketing functions, as well as many other shared services and resources. Accordingly, the Commission should explicitly recognize that SB 790 and the COC apply to Sempra in the same way that they apply to SDG&E. The Commission should also clarify that consultants, or other third parties hired by either Sempra or SDG&E, should be subject to the COC and the requirements ultimately imposed by the Commission. Without these added restrictions, SDG&E's Compliance Plan does not meet the functional separation requirements of COC Rule 2 or the Rule 13 shared services requirements, including those meant to prevent customer confusion.

Sempra and SDG&E operate in unison, and little to no distinction is made between the two companies in the public arena. The two companies issue joint letters, statements and other messaging on a regular basis, addressing legislative and other matters of public concern. The omission of Sempra from SDG&E's Compliance Plan and from the Draft Resolution creates the potential for Sempra to effectively do an end run around the requirements of SB 790 and the COC. Such conduct is prohibited by Rule 2, which requires that the IMD be "functionally" separate from SDG&E. Because Sempra owns SDG&E, shares the same interests as SDG&E regarding CCA programs, and shares many functions with SDG&E, including lobbying and marketing, Sempra must be held to the same standard as SDG&E. The Draft Resolution must acknowledge that SB 790 and the COC apply to Sempra just like it applies to SDG&E.

Similarly, Rule 13 imposes restrictions on shared services between the utility and the IMD. Shared services are permitted as long as they do not include lobbying and marketing, and as long as they do not:

... provide a means for the transfer of competitively sensitive information from the electrical corporation to the independent marketing division, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the independent marketing division.⁸

Shared services are discussed below in more detail. The unknown and undefined role of Sempra in SDG&E's Compliance Plan and the Draft Resolution's silence leave the door open for Sempra to do all of the things that Rule 13 expressly forbids. With access to SDG&E and the IMD, Sempra may act as a conduit for the transfer of competitively sensitive information. Sempra may use its own resources and knowledge to provide an unfair competitive advantage and subsidize the IMD. Finally, Sempra's role in public affairs may confuse customers about the source of marketing and lobbying efforts and

⁸ COC Rule 13, D.12-12-036, Attachment 1, p. A1-6

materials. SDG&E's Compliance Plan does not contain any procedures to prevent this conduct, and the Draft Resolution must be amended to include an equal treatment provision that subjects Sempra to the same standards and procedures as SDG&E.

For the same reasons, the Commission should expand the Draft Resolution's requirement that consultants and contractors hired by SDG&E and the IMD comply with the Code of Conduct and Affiliate Transaction rules⁹ to also apply to consultants and contractors hired by Sempra. A consultant should not, for example, be allowed to serve as a conduit for competitively sensitive information or leverage utility resources to create an unfair competitive advantage simply because he or she is consulting for Sempra rather than SDG&E or the IMD.

IV. AFFILIATE TRANSACTION RULES

CAC and the Sierra Club fully support the Draft Resolution's categorization of the IMD as a Rule II.B affiliate subject to all Affiliate Transaction Rules.¹⁰ Rule II.B provides that affiliates that provide services that relate to the use of electricity must comply with all Affiliate Transaction Rules.¹¹ By SDG&E's own admission, the proposed affiliate would be "engaged in communications and lobbying" on "topics that may relate to energy."¹² The IMD's entire purpose – lobbying and marketing against specific energy policies (CCA development) and providers (CCAs) – is directly related to the energy market. SDG&E's argument that the IMD should be categorized as a Rule II.C affiliate, subject to only some Affiliate Transaction Rules,¹³ relies on dated Commission authority.¹⁴ As the Draft Resolution correctly points out, the Commission's current policy is to classify affiliates as subject to all Affiliate Transaction Rules under Rule II.B.¹⁵

V. PERSONNEL

The Draft Resolution leaves open three personnel-related loopholes that would allow Sempra or SDG&E to transfer its structural advantages to the IMD, exercise impermissible control over the IMD, and transfer sensitive and proprietary information to the IMD. These loopholes are inconsistent with the robust protections for CCAs required by the letter and intent of SB 790 and the Code of Conduct. The Commission should not approve the Draft Resolution without adopting amendments to close these loopholes.

⁹ Draft Resolution, Ordering Paragraph 6, p. 18

¹⁰ Draft Resolution, Finding 1, p. 17

¹¹ Affiliate Transaction Rules, Rule II.B

¹² Draft Resolution, Appendix A, pp. 5-6, SDG&E response to Energy Division Q. 11

¹³ *Id.*

¹⁴ Resolutions E-3545 and G-3461

¹⁵ Draft Resolution, p. 14

A. Sempra and SDG&E Lobbyists and Marketers Should Not Be Permitted to Transfer to the IMD

The Commission should amend the Draft Resolution to prohibit Sempra or SDG&E employees with prior lobbying and marketing experience with either company to transferring to the IMD. Utility marketers and lobbyists have advantageous relationships with politicians, regulators, the media, and the public developed through their employment at Sempra and SDG&E. Allowing the transfer of these individuals to the IMD would allow SDG&E to transfer the structural advantages provided by these relationships to the IMD in violation of the functional separation requirement. In addition, these relationships are assets that were developed through the investment of ratepayer money. Transferring these assets to the IMD would constitute an impermissible subsidy of the IMD in violation of the requirement that the IMD be entirely shareholder funded.

Public Utilities Code Section 707(a)(1) and COC Rule 2 require that the IMD be “functionally separate” from the ratepayer funded utility. The legislature’s purpose in adopting this requirement, and in requiring the COC, was to protect CCA efforts from the utilities “inherent market power” derived from their relationships and name recognition,¹⁶ as well as their structural advantages in influencing customers and local governments.¹⁷ Allowing Sempra and SDG&E to transfer marketers and lobbyists whose relationships have been established through working for the utility (at ratepayer expense) would allow them to transfer these utility structural advantages to the IMD. This runs directly contrary to the legislature’s clear intent in adopting the functional separation requirement and requiring the COC.

The relationships that Sempra and SDG&E lobbyists have with politicians and regulators are assets, as are the relationships that marketers have with the media and the public. Building and maintaining these assets is a major part of a lobbyist or marketer’s job, and requires a significant investment of work and money. Relationships developed over the course of a lobbyist or marketer’s employment at Sempra or SDG&E are assets that were procured with ratepayer money. Allowing Sempra and SDG&E to transfer experienced marketers and lobbyists to the IMD would unavoidably result in the transfer of these valuable assets, and would allow the IMD to leverage valuable relationships that were developed on the ratepayers’ dime. The transfer of valuable, ratepayer-funded assets from Sempra and SDG&E to the IMD would constitute impermissible ratepayer funding of the IMD in violation of Public Utilities Code section 707(a)(1) and COC Rule 2 requirement that the IMD be funded entirely by shareholders. In order to ensure compliance with the functional separation and shareholder funding requirements, the Draft Resolution should be amended to prohibit marketers and lobbyists with valuable relationships from transferring to the IMD.

¹⁶ SB 790 Section 2(c)

¹⁷ D.12-12-036, p. 14

B. Sempra and SDG&E Employees, Directors, and Officers Should Be Prohibited from Serving on the IMD Board or Exercising Control over the IMD

Under SDG&E's current Compliance Plan, as approved in the Draft Resolution, Sempra and SDG&E officers¹⁸ and directors¹⁹ would be allowed to sit on the IMD's board of directors. Allowing Sempra and SDG&E officials to sit on the IMD's board or otherwise exercise any form of control over the IMD violates the section 707(a)(1) and COC Rule 2 functional separation requirement. The Commission must amend the draft resolution to clearly state that Sempra and SDG&E employees, directors, and officers are prohibited from serving on the IMD's board or otherwise exercising control over the IMD.

The presence of Sempra or SDG&E officials on the IMD's board or in another capacity that would permit them to exercise control over the IMD clearly violates the Section 707(a)(1) and COC Rule 2 functional separation requirement. That provision requires that all lobbying and marketing against CCAs occur through an IMD that is functionally separate from Sempra and SDG&E. Although this requirement should be interpreted to provide the most robust protections possible for CCAs, under *any* reasonable interpretation, the requirement prohibits Sempra and SDG&E from exercising direct or effective control over the IMD. Allowing Sempra and SDG&E officials with fiduciary duties and strong personal and financial incentives to sit on the IMD's board or otherwise exercise control over the IMD would give them actual or effective control. Having an "Independent" Marketing Division to be controlled by the utility or its parent company is exactly the kind of functional integration and comingling that the functional separation requirement was intended to prohibit.

SDG&E's assertion that Rule 13 allows SDG&E directors or officers to sit on the IMD's board is incorrect. Rule 13 allows the Division and the utility to share "joint corporate oversight [and] governance... personnel."²⁰ However, this authorization is subject to the requirement that shared services shall not:

... provide a means for the transfer of competitively sensitive information from the electrical corporation to the independent marketing division, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the independent marketing division.²¹

Both the plain language and legislative context of Rule 13 make clear that this Rule merely allows the utility and the Division to both be overseen and governed by the same

¹⁸ AL 2822-E, Attachment A, SDG&E Compliance Plan, p. 13

¹⁹ Draft Resolution, Attachment A, SDG&E Response to Question 9, p. 4

²⁰ COC Rule 13, D.12-12-036, Attachment 1, p. A1-6

²¹ *Id.*

corporate structure. In no way does it allow Sempra and SDG&E, through their employees, officers, and directors, to exercise control over the IMD. In addition to violating the functional separation requirement, such control would create the opportunity for preferential treatment of the IMD and would give the IMD an unfair competitive advantage.

C. Employees with Access to Sensitive or Proprietary Information Should be Prohibited from Transferring to the IMD

The Commission should amend Draft Resolution E-4874 to prevent the IMD from accessing sensitive and proprietary information through staff transfers by prohibiting Sempra and SDG&E employees who have had access to sensitive or proprietary information within the past three years from transferring to the IMD. Public Utilities Code Section 707(a)(3) and COC Rule 5 establish an absolute prohibition against the Division having access to competitively sensitive information. Rule 8 of the COC forbids a utility from giving its IMD access to market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports. These prohibitions provide no exceptions, and apply to all mechanisms through which sensitive and proprietary information may be transferred to the IMD.

One such mechanism for the transfer of information is employee transfers. The Commission has recognized that the transfer of employees who have had access to, or have knowledge of, sensitive information would provide the IMD with access to confidential information, and has stated that “the [COC] rules require that any movement of employees between a utility and its independent marketing division... may not result in the transfer of competitively sensitive information.”²²

SDG&E’s Compliance Plan, as approved by the current Draft Resolution, does not provide adequate procedures to prevent the transfer of sensitive or proprietary information through staff transfers. In a response to an Energy Division data request, SDG&E admitted that the only policies that it has in place to prevent the sharing of sensitive information through staff transfers are: (1) having transferring employees sign an anti-conduit statement, and (2) preventing transferring employees from taking sensitive materials with them to the IMD.²³ SDG&E has not indicated whether these policies apply to Rule 8 proprietary information, or are limited to Rule 5 sensitive information.

These measures fall far short of ensuring compliance with the absolute prohibitions against sharing sensitive information and proprietary information required by Section 707(a)(3) and COC Rules 5 and 8. Even an employee making a good faith effort to avoid sharing such information may make a mistake, and it is unreasonable to assume that a Division employee with knowledge of sensitive or proprietary information

²² D.12-12-036, p. 14

²³ Draft Resolution, Appendix A, p. 3

would be able to completely compartmentalize this knowledge and avoid allowing the knowledge to color his or her activities or decisions. The only way to satisfy the absolute prohibition against information sharing and ensure the robust protection of CCAs required by SB 790 is to prohibit staff with access to sensitive or competitive information from transferring to the IMD.

VI. SHARED SERVICES

The Commission should amend the Draft Resolution to prohibit the IMD from using Sempra and SDG&E's public affairs, legal, communications, and regulatory affairs shared services. Under SDG&E's current Compliance Plan, as approved in the Draft Resolution, the IMD would be allowed to use these shared services. The sharing of these services violates Rule 13 because: (1) public affairs, legal, regulatory affairs, and communications are "involved in marketing and lobbying"; (2) sharing these services would create the opportunity for unfair competitive advantage; and (3) sharing communications and public affairs would lead to customer confusion. In addition, sharing the regulatory affairs service would violate Rule 8 by creating an unacceptable channel for the transfer of proprietary information.

Allowing the IMD to use public affairs, legal, regulatory affairs, and communications shared services violates Rule 13's prohibition against the sharing of personnel who are "involved in marketing and lobbying."²⁴ The primary function of SDG&E's Public Affairs department is lobbying. The department "supports electric and gas distribution operations through its work with regional and local governments in issues regarding proposed regulations, permitting, and emergency preparedness and response... Public Affairs also educates officials at the county and city levels about utility issues that could impact customers."²⁵

Lobbying regulators is also an essential function of the Regulatory Affairs department:

Regulatory Affairs is the primary point of contact between SDG&E/SCG and the CPUC's Commissioners, advisors, and key staff, as well as other key California regulatory agencies, such as the CEC. The department is responsible for serving as the main liaison between the utilities and the Commission, participating in case development; [and] executing regulatory strategies.²⁶

²⁴ COC Rule 13, D.12-12-036, Attachment 1, p. A1-6

²⁵ A.14-11-003 (SDG&E 2016 GRC), SDG&E-10, Direct Testimony of Jonathan Woldemariam, p. 32, available at: https://www.sdge.com/sites/default/files/regulatory/SDG&E-10_Jonathan_Woldemariam_Testimony_0.pdf

²⁶ A.14-11-003 (SDG&E 2016 GRC), SDG&E-25, Direct Testimony of Kenneth J. Deremer, p. 6, available at: https://www.sdge.com/sites/default/files/regulatory/SDG&E-25_K_Deremer_0.pdf

The Regulatory Affairs shared service includes SDG&E’s State Governmental Affairs department, “which is responsible for providing an external advocacy function for the utilities, meaning this department participates in what would be considered lobbying type activity.”²⁷ The Regulatory Affairs shared service also includes the Legislative Analysis department. This department does work that is involved in lobbying, including “recommending positions and responses [to legislation], and developing recommended future legislative actions and policies.”²⁸

The Legal Department’s work includes representing SDG&E in regulatory proceedings at the CPUC, FERC, and CFTC.²⁹ This representation involves lobbying regulators and staff members. The Communications Department is involved in marketing. Communications “manages and coordinates external communications with the media... on the vast array of topics that involve the Company and are of interest and importance to ratepayers, the community, and employees.”³⁰

Allowing the IMD to use public affairs, legal, regulatory affairs, and communications shared services violates Rule 13’s prohibition against using shared services when doing so would create the opportunity for unfair competitive advantage. Public Affairs, Legal, and Regulatory Affairs enjoy tremendous structural advantages through their work for SDG&E and funded by SDG&E ratepayers. These advantages include access, relationships, influence, reputations, and expertise. Communications enjoys similar structural advantages with the media and public outreach.

Likewise, permitting the IMD to use public affairs and communications shared services violates Rule 13’s prohibition against using shared services when doing so would lead to customer confusion. In requiring that the Commission adopt the COC, the legislature was specifically concerned that utilities would leverage their name recognition among customers and longstanding relationships with customers to deter the development of CCAs.³¹ The Public affairs and Communications departments have developed their relationships with the media, the public, local governments, and community stakeholders through their work for SDG&E. Communications from departments so closely associated with SDG&E create an unreasonable risk of confusion and the impression that the communications are endorsed by, if not coming from, SDG&E.

Allowing the IMD to use regulatory affairs shared services violates the COC Rule 8 prohibition against providing the IMD with “access to market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports.” A key function of SDG&E’s Regulatory Affairs department is the production of proprietary, non-public analysis of CPUC and

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at p. 23

³⁰ *Id.* at p. 31

³¹ SB 790 Section 2(c),(f)

other regulatory policies, proceedings, and procedures.³² The department also produces proprietary, non-public analysis of proposed legislation and recently passed laws,³³ “oversees data collection and forecasting efforts,”³⁴ and produces “detailed analysis of utility revenues, expenses, and investments in plants and equipment.”³⁵ The Draft Resolution should be amended to prohibit the use of Regulatory Affairs shared services in order to prevent the IMD from having access to proprietary information.

VII. REPORTING AND DISCLOSURE

The Draft Resolution’s existing reporting and disclosure requirements should be consolidated and strengthened. The Draft Resolution should also be amended to require that the IMD clearly identify itself in all external communications, clarify and strengthen the compliance audit requirement, strengthen the compliance reporting requirement, and require that all compliance reports and disclosures be served on current and prospective CCAs and made publicly available.

A. A Single Comprehensive Reporting Requirement Should be Adopted

In order to remedy the inadequacy of current reporting requirements, ensure adequate monitoring and enforcement of COC rules, and improve efficiency, the Draft Resolution should be amended to adopt a single, comprehensive requirement for COC compliance reporting. Under SDG&E’s current compliance plan, the COC, and the Draft Resolution, the IMD is subject to several disparate reporting requirements:

- Rule 4 of the CCA COC requires that SDG&E submit detailed reports on: (1) the IMD’s use of shared support services from SDG&E; and (2) the cost allocations for these services. These reports are required on a quarterly basis and must be public.
- Under Ordering Paragraph 9 of the Draft Resolution, SDG&E would be required to file an annual report with the Energy Division “detailing the amount of spending and shareholder funding of the Independent Marketing Division.”³⁶
- In its Compliance Plan, SDG&E has committed to report all transfers between SDG&E, Sempra Energy, and the IMD, to the Commission in its annual Affiliate Transactions Report.³⁷

³² A.14-11-003 (SDG&E 2016 GRC), SDG&E-25, Direct Testimony of Kenneth J. Deremer, p. 6, available at: https://www.sdge.com/sites/default/files/regulatory/SDG&E-25_K_Deremer_0.pdf

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Draft Resolution, p. 18

³⁷ AL 2822-E, Attachment A, SDG&E Compliance Plan, p. 14

- In its Compliance Plan, SDG&E has committed to internally “report any CCA COC issues to the Compliance Officers and its Board of Directors as is already the case for ATR issues.”³⁸

SDG&E’s proposed requirements present three major problems. First, as currently proposed, each of these disclosure requirements is highly flawed. Regarding the Rule 4 requirement that SDG&E submit detailed quarterly reports on shared services, SDG&E’s compliance plan merely indicates that SDG&E will “maintain required supporting documentation” to comply with this requirement and neither SDG&E’s compliance plan nor the draft resolution actually states that SDG&E will provide the required quarterly reports. The Ordering Paragraph 9 annual reports on the IMD’s spending and shareholder funding are only required for the years 2016, 2017, and 2018 “unless the Commission decides to extend” the requirement.³⁹ It is unclear whether SDG&E’s proposal for reporting staff transfers would provide sufficient information to assess COC compliance, or whether this information would be available to CCAs and the public. SDG&E’s plan to report COC issues internally does not provide for the disclosure of COC violations to the Commission, CCAs, or other interested parties.

Second, taken together, these requirements do not provide adequate reporting for meaningful enforcement of SB 790 and the COC. Public Utilities Code Section 707(a) requires that the Commission adopt “enforcement procedures” sufficient to: ensure that an electrical corporation does not market against a community choice aggregation program except through an IMD that is funded exclusively by shareholders and is functionally and physically separate from ratepayer funded divisions,⁴⁰ limit the IMD’s use of support services from the electrical corporation’s ratepayer funded divisions,⁴¹ or ensure that the IMD does not have access to competitively sensitive information.⁴² The COC’s primary enforcement mechanism set forth at COC Rule 22(c), which allows CCAs to enforce compliance of SB 790 and the COC requirements through an expedited compliant procedure. For this enforcement procedure to be viable, the IMD must provide CCAs with regular and timely access to current information covering all compliance issues.

The current disclosure requirements fall far short of requiring the kind of regular comprehensive disclosures needed to ensure that SDG&E and the IMD are complying with the COC. The current reporting requirements do not require disclosure of information essential to meaningful compliance monitoring and enforcement, including, but not limited to: the IMD’s lobbying and marketing activities; measures in place to prevent the IMD from accessing sensitive or proprietary information; the IMD’s governance, including whether any SDG&E employees, officers, or directors are on the

³⁸ AL 2822-E, Attachment A, SDG&E Compliance Plan, p. 2

³⁹ Draft Resolution, Ordering Paragraph 9, p. 18

⁴⁰ Pub Util. Code Section 707(a)(1)

⁴¹ Pub. Util. Code Section 707(a)(2)

⁴² Pub. Util. Code Section 707(a)(3)

IMD's board or otherwise exercise control over the IMD; and the IMD's use of consultants, experts, and contractors who also perform work for SDG&E or Sempra.

Third, having multiple requirements requiring the reporting of different information, in different forms, at different intervals, to different parties, is unnecessarily complex and inefficient, and would result in the unnecessary waste of Commission, CCA, and ratepayer time and resources.

The Commission should amend the Draft Resolution to require that the IMD file a single, comprehensive compliance report. In order to provide sufficiently current information for meaningful enforcement and protection of vulnerable CCA efforts, the report should be required on a quarterly basis. The political and public relations issues surrounding CCA formation are highly time-sensitive, and less frequent reporting would pose an unreasonable threat to fragile CCA efforts and limit the usefulness of the Rule 22 enforcement mechanism. The report should be comprehensive, providing disclosures regarding all COC compliance issue, and the disclosures should be sufficiently detailed for the Commission and CCAs to assess whether SDG&E and the IMD are fully complying with all COC requirements. This disclosure requirement should be in place as long as the IMD is in operation.

B. The IMD Should be Required to Identify Itself as Separate from Sempra and SDG&E in All Communications

The Draft Resolution should be amended to require that the IMD clearly distinguish itself from Sempra and SDG&E in all external communications. Neither the Draft Resolution nor SDG&E's Compliance Plan currently includes this requirement. Without clear disclaimers, it is easy to see how average ratepayers and decision makers, who do not pay close attention to SDG&E's corporate structure or CPUC regulatory developments, would assume that communications from the IMD either come from, or are endorsed by, SDG&E. Such confusion would give the IMD an unfair advantage, as it would allow the IMD to leverage SDG&E's name recognition and longstanding relationships with customers to give its anti-CCA efforts additional persuasive weight. Such confusion runs directly contrary to SB 790, which recognizes the danger posed by utilities using these advantages to oppose CCA efforts.⁴³

In order to avoid customer confusion and prevent the IMD from leveraging SDG&E's name recognition and relationships with customers against CCAs, the Draft Resolution should be amended to require that IMD officials should be required to identify themselves as distinct from Sempra or SDG&E in all interactions with decision makers or the public. In addition, all written or electronic communications or materials from the IMD should include a clearly visible disclaimer stating that the materials are from the IMD and not SDG&E, and the IMD should be required to maintain a website that describes what it is and identifies the specific personnel associated with it.

⁴³ SB 790 Sections 2(c), 2(f)

C. The Audit Requirement Should be Strengthened and Clarified

CAC and the Sierra Club support the Draft Resolution's biennial compliance audit compliance requirement, but believe the Commission should clearly specify the audit's scope as covering all Compliance Plan, Code of Conduct, and SB 790 compliance issues. CAC also believes that the Draft Resolution should be amended to specify that the biannual audit, by itself, does not provide sufficiently timely disclosures to satisfy SB 790's enforcement requirements.

The Draft Resolution currently requires that, pursuant to COC Rule 24, SDG&E will be subject to biennial COC compliance audits.⁴⁴ These audits will begin in 2017, but an audit for 2015 and 2016 will also be conducted.⁴⁵ The Draft Resolution does not, however, specify the scope of the compliance audit. In order to avoid any ambiguity and ensure that the audits are consistent with the purpose of SB 790 and the COC, the Draft Resolution should clearly state the audits will cover all issues related to compliance with SB 790, the Code of Conduct, SDG&E's compliance plan, and any related rules, decisions, or requirements. The Draft Resolution should specify that the audit must cover issues that include, but are not limited to, physical separation, functional separation, the shareholder funding requirement, shared services, staff transfers, access to sensitive and proprietary information, cross-subsidization, and SDG&E control over the IMD.

In addition, the Commission should amend the Draft Resolution to clearly state that the audit requirement does not, in itself, satisfy SDG&E's duty to provide regular compliance reports. Meaningful enforcement of SB 790, the COC, and SDG&E's compliance plan requires that the Commission, CCAs, and the public be provided current and timely compliance information. While the audits play an essential role in compliance enforcement, the fact that they are performed once every two years and the delay associated with actually conducting and publishing the audit means that violations disclosed in the audit may be well over two years old. Such stale information does not satisfy current and prospective CCAs and the State of California's interest in ensuring that violations are discovered and stopped before significant harm to CCA efforts occurs.

D. All Disclosures Should Be Served on CCAs and Made Public

In order to ensure meaningful enforcement of the CCA requirements as required by SB 790 and the COC, the Draft Resolution should be amended to require that all mandatory reports and disclosures, including regular compliance reports and the biennial audit, be served on all existing and prospective CCAs in SDG&E's territory and the service list for the Commission's most recent CCA rulemaking, and be made publicly available on both SDG&E's website and the IMD's website.

⁴⁴ Draft Resolution, Ordering Paragraph 7, p. 18

⁴⁵ *Id.*

VIII. ENFORCEMENT

The Draft Resolution should be amended to clarify and strengthen existing procedures for enforcing compliance with SDG&E's Compliance Plan, the COC, and SB 790. The Resolution should be amended to clarify that the Rule 22(c) expedited complaint procedure for addressing compliance plan violations, as well as other provisions of the COC, may be used to bring complaints against SDG&E's IMD, even though the IMD is structured as an affiliate. Rule 22(c) provides that "Any CCA alleging that an electrical corporation has... violated the terms of its filed compliance plan... may file a complaint under the expedited complaint procedure authorized in Section 366.2(c)(11)." SB 790 and the COC do not provide any basis for treating an affiliate IMD any differently from a non-affiliate IMD, and clarifying that Rule 22(c) applies to both affiliate and non-affiliate IMDs is consistent with the legislature's primary purpose in passing SB 790 and requiring the COC, which is protecting fledgling efforts to establish CCAs from being overwhelmed by utilities' tremendous market power and structural advantages.

IX. ADDITIONAL REVIEW

SDG&E's Compliance Plan suffers from a host of substantial problems and shortcomings, as discussed above. To remedy these issues, the Commission should instruct SDG&E to submit a revised Compliance Plan and provide the parties with another opportunity to provide input in the form of comments. CAC and Sierra Club find that in many areas, SDG&E does not provide *any procedures*, much less adequate procedures, to comply with SB 790 and the CCA Code of Conduct. In reaching its ultimate decision, the Commission will benefit from a good faith revision to SDG&E's Compliance Plan and from additional review and input on that revision from the various parties.

X. CONCLUSION

For the reasons set forth above, the Commission should not approve the Draft Resolution without adopting the amendments proposed in these comments.

Sincerely,

Dated: July 5, 2016

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