



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

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Appeal of San Diego Community Power
from Citation No. E-4195-0098 issued
February 3, 2021, by Consumer Protection
and Enforcement Division

K. 21-03-XXX

**NOTICE OF APPEAL OF SAN DIEGO COMMUNITY POWER
FROM CITATION NO. E-4195-0098**

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March 5, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. FACTUAL SUMMARY AND BACKGROUND 2

 A. San Diego Community Power..... 2

 B. Resource Adequacy Market 3

 C. SDCP’s Resource Adequacy Procurement 6

 1. SDCP’s Requests for Offers..... 7

 2. SDCP’s Bilateral Negotiations with SDG&E and Participation in
 SDG&E’s Request for Offer Process 8

 3. SDCP’s Informal Efforts to Obtain RA 8

 D. SDCP’s Local Resource Adequacy Waiver 9

 E. SDCP’s Year Ahead 2021 RA Showing and Citation No. E-4195-0098 9

III. ARGUMENT 11

 A. SDCP Undertook an Exhaustive Effort to Procure RA, but the Product Was Not
 Available in the Market Due to Factors Outside SDCP’s Control 11

 B. Assessing the Total Penalty Amount of \$388,288 Is Contrary to Commission Policy and
 the Public Interest 12

 C. The Commission Should Exercise Its Discretion Under Public Utilities Code section 380
 and Assess No Penalty 14

 D. Alternatively, if the Commission Decides that a Penalty Must Be Assessed, It Should
 Exercise Its Discretion and Assess a Penalty of No More than \$10,000..... 15

IV. PROCEDURAL REQUEST 16

V. CONCLUSION 17

TABLE OF AUTHORITIES

California Public Utilities Commission Rulemaking

R. 16-02-007	3
R. 17-09-020	5
R. 19-11-009	5, 14
R. 20-05-003	3

California Public Utilities Commission Decisions

D. 05-10-042	14, 15
D. 06-06-064	6, 15
D. 11-06-022	3, 15, 16
D. 15-04-024	12
D. 19-06-026	3, 6
D. 19-11-016	4
D. 98-12-075	12

Statutes and Regulations

Cal Pub Utilities Code § 380	1, 14
Cal Pub Utilities Code § 380(e)	14
Cal Pub Utilities Code § 380(h)	14

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**NOTICE OF APPEAL OF SAN DIEGO COMMUNITY POWER
FROM CITATION NO. E-4195-0098**

Pursuant to Resolutions E-4195 and ALJ-377, San Diego Community Power (“SDCP”) files this notice of appeal from Citation No. E-4195-0098, issued by the California Public Utilities Commission’s (“Commission”) Consumer Protection and Enforcement Division on February 3, 2021, for a deficiency in SDCP’s September 2021 Year Ahead (“YA”) System Resource Adequacy (“RA”) requirements. SDCP acknowledges that under Commission rules, it is deficient in meeting its YA System Resource Adequacy requirements. However, in this case, the deficiency is not a function of process, cost or other factors within SDCP’s control. Instead, the deficiency is a direct result of factors outside SDCP’s control that have constrained the amount of available resources in a historically tight RA market. As further explained below, SDCP went beyond reasonable efforts to meet its RA obligations. The program began a robust procurement effort to secure RA resources early on in its existence and was willing to pay far above the market price and the penalty price of \$8.88/kW-month, but there was simply no available resource to buy. Despite its best efforts, it was impossible for SDCP to meet the System RA requirement. Accordingly, SDCP respectfully requests that the Commission exercise its discretion under Public Utilities Code section 380 and assess no penalty. SDCP also requests a hearing to present evidence in support of its recommendation, and to have this matter referred

to the Commission’s Alternative Dispute Resolution (“ADR”) process in order to resolve the matter.

I. FACTUAL SUMMARY AND BACKGROUND

A. San Diego Community Power

SDCP is a new CCA program serving customers in the City of San Diego, City of Encinitas, City of La Mesa, City of Chula Vista, and the City of Imperial Beach beginning this month. SDCP was formed when the five member cities formed a Joint Powers Authority effective October 1, 2019.¹ SDCP submitted an Implementation Plan and Statement of Intent to the Commission on December 23, 2019 and began serving customer load in March 2021.

Reducing greenhouse gas (“GHG”) emissions was the driving factor in the formation of SDCP, and the program’s origins can be traced back to the Climate Action Plans (“CAP”) of its member cities. The City of San Diego, for example, adopted a CAP in 2015 that sets a goal for 100% renewable energy city-wide by 2035, and other member cities have adopted similar goals in their respective CAPs.² The member cities intend to advance their respective climate goals in

¹ See *Joint Powers Agreement*, San Diego Regional Community Choice Energy Authority, October 1, 2019, available at https://www.sandiego.gov/sites/default/files/sdrceca_jpa_agreement_signed_0.pdf.

² See *Climate Action Plan*, City of San Diego, December 2015, at 35, available at

https://www.sandiego.gov/sites/default/files/final_july_2016_cap.pdf;

City of Encinitas, January 2018, at 3-2, available at

https://encinitasca.gov/Portals/0/City%20Documents/Documents/City%20Manager/Climate%20Action/Encinitas_Climate%20Action%20Plan_Final_01-17-18.pdf?ver=2018-01-24-114612-100;

City of La Mesa, March 13, 2018, at 45, available at

https://www.cityoflamesa.us/DocumentCenter/View/11008/LMCAP_CC03132018?bidId=;

City of Chula Vista, September 2017, at 20, available at

<https://www.chulavistaca.gov/home/showdocument?id=15586>;

City of Imperial Beach, July 17, 2019, at 31, available at

https://www.imperialbeachca.gov/vertical/Sites/%7B6283CA4C-E2BD-4DFA-A7F7-8D4ECD543E0F%7D/uploads/Approved_CAP_071719_MF_1234_Climate_Action_Plan_Reso_2019-8054.pdf.

collaboration, by jointly operating SDCP and providing renewable and GHG-free emissions free energy to residents, businesses and government agencies.

B. Resource Adequacy Market

The RA market grows more constrained with each passing year, making it increasingly difficult for load-serving entities (“LSEs”) to meet reliability requirements, as the Commission’s past decisions and reports fully acknowledge. As many have observed, the three types of RA products – system, local and flex – are closely intertwined, and constraints for one type of RA product can serve as constraints for the other types.³ In Decision (“D.”) 19-06-026, for example, the Commission updated the local RA trigger price in response to the tightening of the local RA market.⁴ The decision notes that local waiver requests increased from just 3 requests between 2006 and 2017, to 11 requests in both 2018 and 2019.⁵ Following the issuance of that decision, the number of local waiver requests continued to increase to 20 requests in both 2020 and 2021.⁶ This trend demonstrates that market constraints make it extremely difficult or impossible for a growing number of LSEs to meet compliance obligations, when compared to prior years.⁷

The increasingly tight RA market has also been addressed in the Integrated Resource Plan (“IRP”) proceedings, Rulemaking (“R.”) 16-02-007 and its successor, R. 20-05-003. In a June 2019 Ruling initiating the procurement track of the IRP proceeding, the Commission

³ See, e.g., *California Community Choice Association Petition for Modification of Decision 19-06-026*, R. 17-09-020, Oct. 30, 2019; *CalCCA Comments on the Proposed Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Local Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R. 19-11-009, June 11, 2020; *CalCCA’s Late-Filed Track 2 Proposal, March 18, 2020*; *CalCCA Track 3.B Proposals*, R. 19-11-009, August 7, 2020.

⁴ D. 19-06-026 at 13; Finding of Fact 4.

⁵ *Id.* at 13.

⁶ California Public Utilities Commission, Local Waivers Issued, available at <https://www.cpuc.ca.gov/General.aspx?id=6442465461>, last accessed March 1, 2021.

⁷ See D. 11-06-022 at Finding of Fact 23 (“The [local] RA waiver trigger had been applied for only three times (and granted twice) since the 2007 compliance year. This fact shows that LSEs do not appear to be subject to market power in such a way as to make compliance with RA obligations impossible.”).

addressed tightening of the bilateral RA market and a decline in the robustness of competitive solicitations.⁸ Shortly after, the Commission issued D. 19-11-016, expressing concern over a tightening market and recognizing the need for additional capacity to address potential system RA shortages beginning in 2021.⁹

Furthermore, analysis from both Energy Division and the California Independent System Operator (“CAISO”) further confirm tightening market conditions. The Commission’s Energy Division conducted a September 2019 analysis¹⁰ of RA filings from the 2019 year-ahead filing through the September month-ahead filing, and concluded that the RA market was tight, and could be expected to “continue to tighten.”¹¹ A subsequent report,¹² adding data from the remainder of 2019 month ahead filings and the 2020 year ahead filing, subsequently confirmed that the RA market remained tight.¹³ Specifically, that report notes the system appeared particularly tight in the month of September, where an additional 6,189 MW of capacity was needed out of 11, 286 MW of remaining resources.¹⁴ Most recently, CAISO reviewed and evaluated the aggregate 2021 annual RA plans of LSEs and identified a system RA shortage in September of 1,348 MW.¹⁵

The trend toward tight supply in the statewide RA market is disproportionately greater in the Local RA market in San Diego, which is highly constrained. CAISO estimated that the San

⁸ *Assigned Commissioner and Administrative Law Judge’s Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues*, R.16-02-007, June 20, 2019 at 6.

⁹ D. 19-11-016, *Decision Requiring Electric System Reliability Procurement For 2021-2023*, R. 16-02-007, November 13, 2019 at 21; Finding of Fact 3.

¹⁰ Energy Division, *The State of the Resource Adequacy Market*, September 2019.

¹¹ *Id.* at 20.

¹² Energy Division, *The State of the Resource Adequacy Market – Revised*, January 13, 2020.

¹³ *Id.* at 40.

¹⁴ *Id.* at 39.

¹⁵ CAISO, *Evaluation Report of Load Serving Entities’ Compliance with 2021 Resource Adequacy Requirements*, November 12, 2020.

Diego-Imperial Valley (“SD-IV”) LCR area would be deficient in 2021.¹⁶ The Commission’s report shows the 2021 year ahead local deficiency for the SD-IV area hovering between 240 MW and 293 MW throughout the year, which is nearly double that of the area with the second largest local deficiency.¹⁷ These reports confirm what the Commission has readily acknowledged: RA market constraints, including a lack of available resources make it exceedingly difficult, if not impossible in some instances, for a growing number of LSEs to meet their compliance obligations.

Parties to the RA proceedings, R. 17-09-020 and R. 19-11-009, including the California Community Choice Association (“CalCCA”) and Southern California Edison (“SCE”), have observed growing market constraints in the context of RA market power, and they have advocated for the expansion of the local RA waiver program to system and flexible RA compliance, and the creation of a waiver system for all three types of RA product.¹⁸ CalCCA has argued that a system waiver is “critical” in the face of recent rule changes that may result in further tightening of an already-constrained system RA supply and cause a net deficit in summer months ranging from 531 MW to 5,387 MW in September 2021.¹⁹ In support of expanding the local RA waiver process to system and flexible RA penalties, SCE has offered the following explanation:

¹⁶ CAISO, 2020 Local Capacity Technical Study Final Report and Study Results, May 1, 2019 at 167.

¹⁷ RA Market Report at 36.

¹⁸ See e.g., *California Community Choice Association Petition for Modification of Decision 19-06-026*, R. 17-09-020, Oct. 30, 2019; *CalCCA Comments on the Proposed Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Local Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R. 19-11-009, June 11, 2020; *CalCCA’s Late-Filed Track 2 Proposal, March 18, 2020*; *CalCCA Track 3.B Proposals*, R. 19-11-009, August 7, 2020.

¹⁹ *CalCCA Comments on the Proposed Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Local Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R. 19-11-009, June 11, 2020 at 3. (Highlighting the impact of rule changes concerning the Effective Load Carrying Capability (“ELCC”) for solar and wind resources, the qualifying capacity (“QC”) for hydroelectric resources, and RA import rules).

Given the strong linkage among RA products, in particular, between Local RA and System RA, market power issues affecting one product could impact the rest of the RA products. A waiver for Local RA alone, if there is market power for System RA resources, will be insufficient to prevent the exploitation of market power. While LSEs can point to trigger prices for a Local RA waiver, there is no mechanism, let alone a trigger, for System RA. Thus, LSEs would be protected from a non-competitive price for the Local RA attribute of the resource, but would be subjected to a penalty for the very same resource with respect to System RA requirements in a situation in which the resource is pivotal. Since all Local RA resources are System RA resources, they play a critical role in meeting the Local and System attributes of a LSE's RA requirement.²⁰

Although the Commission has so far declined to adopt a waiver process for system and flexible RA, it has recognized that such expansion may be necessary “for circumstances beyond the control of an individual LSE” in the future.²¹

C. SDCP's Resource Adequacy Procurement

Like many other LSEs, SDCP actively planned to purchase Local RA that would also satisfy its System RA obligations, and as a result, SDCP's effort to procure Local RA reflects a simultaneous effort to obtain System RA. During its 2020 startup activities, SDCP anticipated that it would be difficult to obtain local resource adequacy in the relevant local RA area, known as the SD-IV local area, after having verbally discussed local RA market status with various market participants and having observed that the local utility, San Diego Gas & Electric (“SDG&E”) had sought and obtained waivers for local RA in each of the past three years.²²

²⁰ CalCCA Track 2 Comments at 7; citing Comments of SCE on the Track 3 Proposals and March 12-13, 2019 Workshop, March 22, 2019, at 1-2.

²¹ D. 19-06-026, *Decision Adopting Local Capacity Obligations for 2020-2022, Adopting Flexible Capacity Obligations or 2020, and Refining the Resource Adequacy Program*, R. 17-09-020, July 5, 2020 at 18. See also D. 20-06-031, *Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Flexible Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R. 19-11-009, June 30, 2020 at 65 (“[T]here remain significant, unresolved issues that require further consideration before allowing such waivers, including potential leaning by LSEs and market power issues. Such market power issues.”)

²² See California Public Utilities Commission, Local Waivers Issued 2018, 2019, 2020, available at <https://www.cpuc.ca.gov/General.aspx?id=6442465461>.

SDCP also understood that some local RA held by SDG&E would likely become available due to surplus within SDG&E's portfolio, once load serving responsibility transferred from SDG&E to SDCP, and that obtaining local RA from SDG&E would be a necessary element of its procurement approach. SDCP's strategy was to engage with SDG&E while simultaneously initiating independent local RA procurement efforts from other suppliers in the market. SDCP's requests for offer ("RFO") processes and details about SDCP's solicitation efforts are described in more detail below. Additional details and confidential information will be included in a declaration that SDCP plans to offer in support of its appeal at the hearing in this matter.

1. SDCP's Requests for Offers

Throughout 2020, SDCP conducted extensive RA procurement activities and outreach, which included administering three separate RFO solicitations, which were posted on SDCP's public website.²³ SDCP issued the first of three local RA RFOs in May 2020 – two months before the Commission provided SDCP with notice of its initial 2021-2023 local RA requirements. Each of the three solicitations were distributed to over 600 email contacts, representing nearly 400 asset owners, power marketers, brokers, demand response providers, LSEs, and other potential sellers of RA.

Despite issuing three separate RFO solicitations to a network of nearly 400 potential sellers, SDCP only received viable bids during the first RFO issued May 18, 2020.²⁴ Of the two offers rejected during the first RFO, one bid proposed capacity deliveries from 2023-2032, which did not fit within the defined RFO parameters, and the other proposed very small volumes (initially 1 MW, then 2 MW) from distributed resources that were not yet qualified to meet RA

²³ See SDG&E, 2020-2021 Local Resource Adequacy Solicitation, August 8, 2019, available at <https://www.sdge.com/2020-2021rarfp>.

²⁴ See SDCP AL 1-E, *Request of San Diego Community Power for Waiver of 2021 Local Procurement Obligations* ("SDCP 2021 Local Waiver Request"), November 1, 2020, at 5.

obligations. Following the second RFO, issued on September 3, 2020, SDCP received offers that either did not include any RA volumes for the year in which SDCP still required local RA capacity, or were for very small volumes for only part of the year at very high prices, well in excess of the \$51/kW-year (or \$4.25/kW-month) trigger price for a local waiver.²⁵ No offers were submitted in response to the third RFO issued on October 14, 2020.

2. SDCP's Bilateral Negotiations with SDG&E and Participation in SDG&E's Request for Offer Process

A natural place for SDCP to look for RA resources was to the LSE that already had a large portfolio of RA resources, namely SDG&E. SDCP acted early in an effort to maximize its ability to obtain local RA that might be available in the market, while simultaneously attempting to engage with SDG&E to explore bilateral negotiations for the transfer of RA from the incumbent utility's RA portfolio to SDCP. SDCP initiated discussions with SDG&E regarding RA procurement in March 2020, but unfortunately, these efforts were unsuccessful, and SDCP was unable to enter bilateral negotiations with SDG&E.²⁶ However, SDCP was able to procure a portion of its obligation by engaging in the incumbent utility's June 15, 2020 RFO for 2021-2023 RA.

3. SDCP's Informal Efforts to Obtain RA

In addition to the efforts described above, SDCP undertook regular and repeated engagement with active RA brokers and made numerous verbal bilateral inquires with potential RA sellers. These inquiries with various leading brokers of RA in California generated only one offer for a small volume of Local RA that would have cost SDCP more than double the RA

²⁵ *Id.*

²⁶ *Id.*

waiver trigger price.²⁷ Though SDCP has been willing to contract at rates above the trigger price throughout the procurement process, this extremely high-priced offer for a small volume was deemed unreasonable and rejected as excessive.

D. SDCP's Local Resource Adequacy Waiver

Due to the current state of the RA market and an overall scarcity of available resources, SDCP was unable to meet a portion of its year-ahead 2021 local RA requirements. SDCP filed Advice Letter 1-E on November 2, 2020, demonstrating that it had successfully procured 94% of its YA Local RA obligation, but despite best efforts, it was unable to locate the necessary procurement ahead of the November 2, 2020 year-ahead filing deadline.²⁸ Notably, all of SDCP's procured local capacity at the time, comprising over 94% of its three-year forward obligation, was purchased at rates that exceeded the trigger price, \$51/kW-year (or \$4.25/kW-month) trigger price established in D. 19-06-026. The Energy Division granted the waiver request, finding that SDCP's actions to procure local RA resources were reasonable "considering the capacity available to meet SDCP's local RA obligation," and that "SDCP pursued all commercially reasonable efforts" to acquire the necessary resources.²⁹

E. SDCP's Year Ahead 2021 RA Showing and Citation No. E-4195-0098

SDCP filed its YA 2021 RA showing on November 2, 2020.³⁰ SDCP has a September 2021 YA System RA requirement of 526 MW and was confirmed for 453.7 MW.³¹ The Commission's Energy Division ran an internal validation of the RA showing on December 3,

²⁷ *Id.*

²⁸ See SDCP 2021 Local Waiver Request.

²⁹ See SDCP Year Ahead Local Waiver Approval Letter, December 30, 2020, <https://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442467265>.

³⁰ SDCP Year Ahead Resource Adequacy Filing for September 2021 ("SDCP YA RA Filing for September 2021"), November 2, 2020.

³¹ Citation No. E-4195-0098 at 3.

2020, and then, on January 4, 2021, the Energy Division sent SDCP a deficiency notice, indicating a need for 72.3 MW of System RA (526.00 MW less 453.70 MW) to meet requirements for September 2021.³² SDCP was also instructed to come into compliance by January 11, 2021. SDCP sent a revised filing on that date, January 11, 2021, showing that it had procured an additional 29.7 MW of System RA for September 2021.³³

Subsequently, on February 3, 2021, the Consumer Protection and Enforcement Division issued Citation No. E-4195-0098. The citation states that SDCP is in violation for both a cured deficiency and an uncured deficiency.³⁴ “1. System RA deficiency cured within five business days from the date of notification by ED for September 2021; and 2. System RA deficiency remedied after five business days from the date of notification by ED or not remedied at all for September 2021.” In addition, the citation states that SDCP is being cited \$10,000 for the cured deficiency of 29.7 MW of System RA, and \$378, 288 for the uncured 42.6 MW System RA deficiency.³⁵ The total penalty is \$388, 288.

II. BASIS FOR APPEAL

SDCP appeals from Citation No. E-4195-0098 on the following grounds:

1. SDCP in good faith undertook all reasonable efforts to secure Year Ahead System RA for the month of September 2021, but it was not possible to meet the Commission’s requirements because, due to circumstances outside SDCP’s control, there were no available resources in the market during the relevant time period.

³² *Id.* at 2.

³³ SDCP Revised Year Ahead Resource Adequacy Filing for September 2021 (“SDCP Revised YA RA Filing for September 2021”), January 11, 2021.

³⁴ Citation No. E-4195-0098 at 2.

³⁵ *Id.*

2. Assessing the total penalty of \$388, 288 is contrary to Commission policy and the public interest.
3. The Commission should exercise its discretion under Public Utilities Code section 380 and assess no penalty.
4. Alternatively, if the Commission decides that a penalty must be assessed, it should exercise its discretion and assess a penalty of no more than \$10,000 for a cured deficiency since there were no additional resources available in the market at the time.

III. ARGUMENT

A. SDCP Undertook an Exhaustive Effort to Procure RA, but the Product Was Not Available in the Market Due to Factors Outside SDCP's Control

SDCP undertook an exhaustive effort to procure Local and System RA, but the product was simply not available in the market prior to January 11, 2021, when SDCP filed its revised 2021 Year Ahead showing for September 2021. As described above, SDCP conducted three separate RFO solicitations in 2020, reaching out to over 600 contacts, representing nearly 400 asset owners, power marketers, brokers, demand response providers, load serving entities, and other potential sellers of RA. SDCP engaged with SDG&E to request bilateral negotiations for the transfer and sale of RA to SDCP, and when that did not work, the program participated in SDG&E's 2021-2023 RA RFO conducted during the months of June through September 2020. Throughout last year, SDCP also continued to pursue RA transactions through informal contacts with brokers. Furthermore, SDCP was willing to pay above the system penalty price of \$8.88/kW-month in summer months, and will provide additional and confidential details in a forthcoming declaration that will be submitted at the hearing in this matter.

Despite these efforts, SDCP was unable to procure adequate resources to meet the YA System RA requirements and was deficient in the amount of 42.6 MW. The various factors driving scarcity in the RA market, such as the exercise of market power and rule changes, to name a few, are not within the direct control of SDCP. As described above, the Commission and CAISO have observed and documented the lack of available resources in the market and acknowledged some of these factors are contributing to the problem.

B. Assessing the Total Penalty Amount of \$388,288 Is Contrary to Commission Policy and the Public Interest

Assessing the full amount of the penalty being considered in this matter, \$388,288, is contrary to prior Commission decisions and the public interest, and is unwarranted under the circumstances. The Commission considers several factors when determining a penalty to be imposed for a regulatory violation:

- (1) the severity of the offense;
- (2) the conduct of the utility before, during, and after the offense;
- (3) the financial resources of the LSE;
- (4) the amount of the fine in relation to prior Commission decisions; and
- (5) the totality of the circumstances in furtherance of the public interest.³⁶

The Commission focuses on the severity of the offense and the conduct of the utility in setting a fine that is proportionate to the violation and “effectively deter[s] further violations by [the] perpetrator or others ...”³⁷

³⁶ See D. 15-04-024 at 39-40.

³⁷ See D. 98-12-075 at 21.

SDCP does not dispute that it was short in its System RA YA ahead showing for September 2021 in the amount of 42.6 MW. As described in detail above, SDCP undertook exhaustive efforts to secure RA and meet its obligation, including conducting three RFOs in 2020, reaching out to SDG&E to discuss bilateral transactions, participating in SDG&E's RA RFO, and making regular inquiries with other brokers and sellers.

Notably, SDCP's conduct demonstrates that it continued efforts to procure System RA to meet the Commission's requirements even after its initial YA filing on November 2, 2020. The initial amount of the deficiency, 72.3 MW, was reduced substantially by SDCP's procurement of an additional 29.7 MW of System RA for September 2021.³⁸ The Commission was notified in a revised filing on January 11, 2021, showing that SDCP had procured additional System RA to reduce the deficiency for September 2021. Unfortunately, no additional System RA was available at that time.

Since SDCP is a new CCA program that is just beginning to serve customers and generate revenue, SDCP had limited financial resources during the time period that it was seeking to procure System RA. However, that is not a factor in this appeal. SDCP is not claiming that the cost of System RA was excessive, or that the program was financially constrained in its procurement efforts. Rather, the primary basis for this appeal is the lack of available resources in the market. For different reasons, the amount of the fine relative to prior Commission enforcement decisions is also not a factor in this appeal. System RA penalties are set at fixed volumetric levels and vary by the amount of the deficiency.³⁹ The penalty amount in this matter is no greater or no less than other penalties for the same deficiency amount.

³⁸ SDCP Revised YA RA Filing for September 2021.

³⁹ *See 2021 RA Handbook* at 42.

The totality of the circumstances in furtherance of the public interest, however, is another factor that weighs in favor of SDCP. The purpose of the RA program penalty system is to encourage compliance with the program and its requirements.⁴⁰ Assessment of the full penalty of \$388,288 does not serve the public interest because, in the unique circumstances of this case, it does not advance the purpose of the penalty system. SDCP was aware of the penalties, but unable to procure System RA for September 2021 due to lack of available resources in the market. No fine, large or small, can encourage (or otherwise incentivize) a load-serving-entity to procure a resource that is not available in the market. Rules and the individual decisions of buyers and sellers, among other things, contribute to market conditions, and the Commission should look there, as it rightly has been,⁴¹ to encourage maximum compliance with RA program.

C. The Commission Should Exercise Its Discretion Under Public Utilities Code section 380 and Assess No Penalty

Public Utilities Code section 380 affords the Commission with broad discretion over the RA program and related penalties. The Commission is authorized to determine “the most efficient and equitable means” for achieving the program’s goals,⁴² and to use its enforcement power to ensure compliance.⁴³ With this mandate, the Commission established the RA program’s procurement obligations as a means for achieving the program’s goal of minimized reliance on CAISO backstop procurement, and adopted the RA penalty regime to induce LSE compliance

⁴⁰See D. 05-10-042 at 48 (“[A] regulatory program that imposes significant procurement obligations upon LSEs cannot be expected to succeed unless those LSEs have reason to believe there are consequences for noncompliance that outweigh the costs of compliance.”).

⁴¹ *Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Forward Resource Adequacy Procurement Obligations*, R. 19-11-009, November 7, 2019.

⁴² Public Utilities Code §380(e).

⁴³ Public Utilities Code §380(h).

with those obligations.⁴⁴ In this case, however, the penalty cannot induce SDCP's compliance and will not advance the program's goal, since there was no resource to be purchased. The Commission has reasonable grounds for exercising its discretion not to assess the penalty or the full amount of the penalty.⁴⁵

Penalizing SDCP for conditions wholly outside of its control would be inefficient, inequitable, and hinder progress towards program goals. SDCP's procurement efforts went beyond reasonable efforts, as evidenced by its willingness to procure above the trigger price and attempts to cure the deficiency. No penalty amount could have deterred SDCP from failing to accomplish an impossible goal, i.e., to procure capacity that does not exist. Assessing a penalty in this case would not align with the Commission's administration of the RA citation program in accordance with section 380. Instead, a penalty would effectively disincentivize good behavior that furthers the program's important goals under normal market conditions, while external factors promote continued reliance on backstop procurement. Given its broad authority over the RA program and its enforcement, the Commission should assess no penalty against SDCP.

D. Alternatively, if the Commission Decides that a Penalty Must Be Assessed, It Should Exercise Its Discretion and Assess a Penalty of No More than \$10,000

Due to the specific circumstances of this case and described in this notice of appeal, even if the Commission finds that a penalty should be assessed, which it should not, the assessed

⁴⁴ See, e.g., Public Utilities Code §380(h)(7); D. 05-10-042 at 93-94 (finding the system RA penalty regime "appropriate to induce compliance with the RA obligation."); D. 06-06-064 at 66 ("Since a major purpose of the program is to move away from significant reliance on CAISO backstop procurement, we do not intend to pursue any action, or tolerate inaction, that condones or promotes continued reliance on backstop procurement when capacity can be purchased by LSEs.").

⁴⁵ See, e.g., Resolution E-415, Appendix A at 8 ("The issuance of a citation for a specific violation is not mandatory. . ."); D. 11-06-022 at 24 ("We also reiterate that, in enforcing compliance with RA filing requirements. . . the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, or other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.").

penalty should be limited to \$10,000 for SDCP's cured deficiency.⁴⁶ The Commission in D.11-06-022 authorized a \$10,000 fine for deficiencies over 10 MW in System or Local RA filings that are cured within 5 business days after notification by Energy Division staff.⁴⁷ The citation provides that SDCP is being cited \$10,000 for 29.7 MW of System RA that was cured within five business days from the Energy Division's notification, and \$378, 288 for the uncured 42.6 MW System RA deficiency.⁴⁸ Should the Commission issue a penalty, the total amount of the penalty should be \$10,000. The additional penalty of \$378, 288 should not be assessed.

While SDCP was unable to procure the full amount of its System RA YA requirement by the initial filing deadline of November 2, 2020, for the reasons described above, SDCP was able to procure additional resources and reduce its deficiency from 72.3 MW to 42.6 MW within the time prescribed for a cured deficiency. Nevertheless, SDCP was unable to procure the remaining resources because they were unavailable in the market. SDCP should not be penalized for being unable to procure the remainder of its System RA obligation for September 2021 and cure the remaining deficiency because market conditions were driven by factors outside of its control.

IV. PROCEDURAL REQUEST

Given the unique circumstances in this matter, SDCP requests that the Commission assess no penalty, or if a penalty is assessed, the penalty should be limited to \$10,000 for a cured deficiency. To introduce evidence in support of its position and explain its arguments, SDCP requests that an evidentiary hearing be scheduled. Finally, SDCP requests that this matter be submitted to the Commission's ADR process in order to arrive at a resolution that serves the interests of SDCP and the Commission.

⁴⁶ Citation No. E-4195-0098 at 3.

⁴⁷ D. 11-06-022 at Ordering Paragraph ("OP") 6.

⁴⁸ Citation No. E-4195-0098 at 3.

V. CONCLUSION

For the reasons stated above, SDCP requests that the Commission exercise its discretion and assess no penalty for Citation No. E-4195-0098. Alternatively, if the Commission decides that a penalty is warranted, SDCP requests that the penalty be limited to \$10,000 for a cured deficiency, as additional resources were simply unavailable in the market during the relevant time period. In addition, SDCP requests an evidentiary hearing and requests that this matter be submitted to the Commission's ADR process for resolution.

Respectfully submitted,

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