December 10, 2015

CPUC, Energy Division
Attention: Tariff Unit
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By email to: EDTariffUnit@cpuc.ca.gov

Subject: **Protest of Climate Action Campaign and the Sierra Club to SDG&E Advice Letter 2822-E (SDG&E Notice of Intent and Submission of Required Compliance Plan Pursuant to Decision D.12-12-036).**

INTRODUCTION

Climate Action Campaign and the Sierra Club protest San Diego Gas and Electric's (SDG&E") Advice Letter 2822-E. In AL 2822-E, SDG&E seeks to form an independent marketing division (the "Division") to market and lobby against Community Choice Aggregation ("CCA") programs. The Commission should reject AL 2822-E for the following reasons:

1. The Division is unnecessary and counterproductive to SDG&E's stated goal of fostering a "healthy public discussion" regarding CCAs;

2. SDG&E's Compliance Plan fails to demonstrate that SDG&E has procedures in place to ensure compliance with each Code of Conduct Rule as required by Rule 22;

3. The Plan omits basic information that the Commission needs to assess the Plan's compliance with the Code of Conduct ("COC");[1]

[1] The Code of Conduct was adopted by the Commission in D.12-12-036, and is set forth in Attachment 1 to that Decision. All references to the Code of Conduct or Code of Conduct Rules refer to this document.

4. SDG&E's plan to house the Division at Sempra Headquarters does not provide for adequate physical separation as required by Rule 2;

5. The Plan fails to prevent the Division from accessing sensitive information through staff transfers;

6. The Plan fails to prevent lobbyists and marketers who have developed relationships with decision makers and the public from transferring to the Division;

7. The Plan provides for impermissible use of shared services;

8. The Plan would allow SDG&E to control the Division by placing SDG&E officers on the Division's board;

9. The Plan does not provide for adequate monitoring and enforcement of COC requirements

Taken together, these flaws present overwhelming grounds for rejecting AL 2822-E. If the Commission does not reject AL 2822-E, the Commission should open a formal proceeding to consider SDG&E's request and provide clarification regarding what constitutes compliance with SB 790 and the COC.

BACKGROUND

Climate Action Campaign ("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 assisting the City of San Diego in developing and adopting a Climate Action Plan.

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.

CAC and the Sierra Club are aware of the limited resources available to CCA supporters. CAC and the Sierra Club are also aware of the tremendous structural advantages enjoyed by utilities that oppose CCAs. In addition to their overwhelming financial resources, utilities have the advantage of long-established relationships with their customers, carefully cultivated brand images, direct access to customers through bills and related communications, established relationships with politicians and regulators, and well staffed lobbying, public relations, and marketing departments. CAC and the Sierra Club understand that, in light of these structural advantages, it is essential to create a level playing field that prevents utilities from using their structural advantages to overwhelm CCA proponents. Creating such a level playing field hinges on the Commission's diligence in enforcing the letter and the intent of Senate Bill 790 and the CCA Code of Conduct.

THE INDEPENDENT DIVISION IS UNNECESSARY AND COUNTERPRODUCTIVE TO SDG&E'S STATED GOAL

SDG&E states that its goal in forming an independent marketing division is to address an "informational vacuum" and promote a "healthy public discussion" regarding CCAs.[2] An independent division is not needed to promote a healthy public discussion regarding CCAs. If anything, such a division would be counterproductive to promoting a healthy, accurate, fact-based public discussion, as it would allow SDG&E to use its overwhelming corporate resources to drown out the voices of CCA proponents.

In reality, there is no informational vacuum, and a healthy, accurate, fact-based public discussion regarding CCAs already exists.

Under current rules, utilities are allowed to provide the public with unbiased factual information regarding CCAs.[3] The public also has access to accurate information regarding CCAs from existing CCAs and communities investigating CCA development. California law and Commission rules already require that CCAs provide energy customers with truthful, complete information about their energy choices. Public Utilities Code Section 366.2(c)(13) and Commission rules require that in the months before and after a CCA's launch, CCAs must contact customers at least four times to provide information about the CCA's service offerings and the customer's opportunities to opt-out. Commission rules require that CCAs and the incumbent utility jointly provide annual notices to customers about the content of their respective energy supply portfolios.[4] Existing CCAs already provide clear and complete information about their services at websites and in other informational materials. SDG&E does not present any evidence that these existing sources of accurate information are insufficient to foster a healthy public discussion of CCA issues.

[2] SDG&E Advice Letter 2822-E, p. 2
[3] COC Rule 1(a)(iii) and Rule 1(b)(i) require "factual answers about utility programs and tariffs" to customers, the public and government agencies.
[4] COC Rule 8.1.3, D.12-12-036, Attachment 1, page A1-3.

Forming the Division would be counterproductive to SDG&E's stated goal of promoting a healthy public discussion. Most CCA proponents in California – including Climate Action Campaign - have so far been small, underfunded community members and non-profit organizations. Their advocacy has been offset and at times overwhelmed by CCA detractors that are well funded and politically connected. The small size and limited resources of these CCA proponents stands in stark contrast to the overwhelming financial, marketing, and political resources of multi-billion dollar businesses like SDG&E and Sempra. If SDG&E is given the freedom to use unlimited corporate funds lobby and market against CCAs, its well-funded voice could drown out those of any other interests and unduly influence public policy decisions.

SDG&E FAILS TO DEMONSTRATE THAT ADEQUATE COMPLIANCE PROCEDURES ARE IN PLACE AS REQUIRED BY RULE 22

SDG&E's Compliance Plan fails to demonstrate that there are adequate procedures in place to ensure compliance with the Code of Conduct as required by Rule 22 of the COC. The Commission should thus reject AL 2822-E, as granting the relief requested therein would be inconsistent with statutory requirements; would violate Commission order; and would be unjust and unreasonable.

Rule 22 requires that a utility seeking to establish an independent marketing division file, along with its advice letter, a Compliance Plan that "demonstra[tes] to the Commission that there are adequate procedures in place that will preclude the sharing of information with its independent marketing division that is prohibited by these rules, and is in all other ways in compliance with these rules."[5] Thus, for each Code of Conduct requirement, SDG&E's plan must specifically identify *existing* procedures that it has in place, and provide sufficient detail on these procedures to demonstrate to the Commission that the procedures are sufficient to ensure compliance with the Code of Conduct.

For many COC rules, SDG&E has failed to demonstrate that it has *any* procedure in place to ensure compliance. Instead, regarding these rules SDG&E has provided only the vague, unsupported assertion that it intends to comply with the requirement in question, without identifying or describing any concrete procedure for ensuring this compliance.

For instance, regarding the Rule 4 requirement that that the any use of SDG&E's support services by the Division be fully allocated on an embedded cost basis and reported to the Commission, rather than identifying specific procedures that SDG&E has in place to ensure compliance with this rule, SDG&E merely offers the assertion that "SDG&E will follow the pricing provisions in this Rule, as well as maintain the required supporting documentation to comply with reporting requirements."

[5] COC Rule 22, D.12-12-036, Attachment 1, page A1-9

Similarly, SDG&E provides only the unsupported assertion that it intends to comply with the rule in question, rather than demonstrating that it has procedures in place to ensure compliance with the COC, in its responses to the following rules:[6]

- **Rule 3:** ("SDG&E will cooperate with these... provisions should CCA tariffs be developed within its service territory");
- **Rule 6:** ("the Division is a stand-alone affiliate and will incur all costs associated with promotional advertising... [which] will then be billed to SDG&E");
- **Rule 10:** ("SDG&E and its Division affiliate maintain separate accounting books and records");
- **Rule 14:** ("SDG&E will comply with Rule 14's requirements");
- **Rule 16:** ("SDG&E will comply with Rule 16.b's 'residency' requirements, as well as the requirement that prohibits the use of 'loaned labor' to the Division affiliate");
- **Rule 17:** ("SDG&E will comply with Rule 17's requirements");
- **Rule 18:** ("SDG&E will comply with Rule 18 and strictly enforce tariff provisions when discretion is not permitted");
- **Rule 19:** ("SDG&E will comply with Rule 19 and not make available to their consumers any mechanism for opting out of the community choice aggregation programs");
- **Rule 20:** ("SDG&E will comply with Rule 20");
- **Rule 21:** ("SDG&E will comply with Rule 21").

In several other instances, SDG&E's plan addresses COC rules by pairing the unsupported assertion that SDG&E intends to comply with the rule in question with equally vague and unsupported assertions that SDG&E intends ensure compliance through training or communications to employees. In each case, SDG&E fails to provide even basic details regarding the nature and substance of the training or communications, explain how the training or communications will be sufficient to ensure COC compliance, or demonstrate any actual policies implementing or governing the training or communications. Examples of this include SDG&E's responses to Rules 2, 7, and 8.

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[6] SDG&E's responses are found in Attachment A to AL 2822-E at pp. 5-15

THE PLAN OMITS BASIC INFORMATION NEEDED TO ASSESS SDG&E'S COMPLIANCE WITH THE COC

The Commission should reject AL 2822-E because SDG&E's Compliance Plan omits material information regarding the Division's structure and function, information that is necessary for the Commission to assess whether SDG&E's proposal is consistent with statutory requirements and the Code of Conduct.

Public Utilities Code Section 707(a)(1) and Rule 2 of the Code of Conduct[7] require that the marketing division be functionally separate from the electrical corporation's ratepayer-funded divisions. In order to determine whether SDG&E's plan complies with this functional separation requirement, the Commission requires basic information regarding the Division's intended structure and operations. This information is entirely absent from SDG&E's plan. The plan provides no detail regarding how the division will be internally structured and organized.

Although SDG&E states that the Division will be an affiliate and part of Sempra, SDG&E provides no detail regarding the placement of the division within Sempra's corporate structure and how the Division will interact with Sempra. SDG&E fails provide any information regarding the division's internal structure, functions, and operations. SDG&E further fails to provide basic information regarding the intended geographical and territorial boundaries of the Division's marketing and lobbying efforts. Without this basic information it is not possible for the Commission to make a reasonable determination that SDG&E's plan is consistent with the functional separation requirement.

THE PLAN DOES NOT PROVIDE FOR ADEQUATE PHYSICAL SEPARATION

SDG&E's proposal to house the Division at Sempra headquarters[8] does not provide for adequate physical separation between SDG&E and the Division. Approving this proposal would violate statute and Commission order. As such, the Commission should reject AL 2822-E.

Public Utilities Code Section 707(a)(1) and Rule 2 of the COC[9] require that the Division be "functionally and physically separate from the electrical corporation's ratepayer-funded divisions." Rule 11 of the COC provides specific requirements for ensuring this physical separation, stating, in relevant part:

> An electrical corporation shall not share office space, equipment, services, and systems with its independent marketing division.... Physical separation required by this rule shall be accomplished by having office space in a separate building,

[7] COC Rule 2, D.12-12-036, Attachment 1, pp. A1-2 through A1-3
[8] AL 2822-E, Attachment A, p. 10
[9] COC Rule 2, D.12-12-036, Attachment 1, pp. A1-2 through A1-3

or, in the alterative, through the use of separate elevator banks and/or security-controlled access.[10]

SDG&E's plan to house the Division at Sempra headquarters is not adequate to satisfy the Section 707(a)(1) and Rule 2 and 11 physical separation requirements. Given the high degree of operational integration and interaction between Sempra and SDG&E, housing the Division at Sempra headquarters is little different from housing the Division at SDG&E headquarters. In either case, Division employees will have a high degree of physical access – incidental or intentional – to individuals who work for SDG&E and/or have knowledge of, or involvement in, SDG&E's operations. This raises the danger of inappropriate operational comingling, significantly increases the danger of individual-to-individual transfer of sensitive information, and runs contrary to the letter and clear intent of the physical separation requirement.

In addition, SDG&E has not guaranteed that that there are no SDG&E employees or employees with shared SDG&E/Sempra job functions that work out of Sempra headquarters. If SDG&E has employees working out of Sempra Headquarters, the headquarters building would constitute an SDG&E facility, and locating the division at Sempra headquarters would clearly violate the Rule 11 prohibition against sharing office space.

Housing the Division at Sempra headquarters further raises an issue of public perception. The Commission has recognized that a major focus of both Senate Bill 790 and the COC rules is "to prevent utilities from using their structural advantages to influence customers or local governments against investigation of or participation in CCAs."[11] These structural advantages include utilities "well-developed relationship with customers in their service territories."[12] It is well known that Sempra is SDG&E's parent company, and the two are virtually synonymous in the public eye. Housing the Division at Sempra headquarters would encourage the misperception that the Division – either officially or unofficially – speaks for SDG&E rather than the Division. Such a misperception would allow the Division to unfairly leverage SDG&E and Sempra's significant structural advantages against CCAs, and would place CCA advocates like Climate Action Campaign and the Sierra Club at a distinct, and unfair, competitive disadvantage.

THE PLAN FAILS TO PREVENT DIVISION ACCESS TO SENSITIVE INFORMATION THROUGH STAFF TRANSFERS

The Commission should reject AL 2822-E because SDG&E's Compliance Plan fails to include adequate measures for preventing the Division from accessing sensitive information as required by statute and the Code of Conduct.

[10] COC Rule 11, D.12-12-036, Attachment 1, p. A1-5
[11] D.12-12-036, pp. 8-9
[12] Id.

Public Utilities Code Section 707(a)(3) and Rule 5 of the Code of Conduct[13] establish an absolute prohibition against the Division having access to competitively sensitive information. This prohibition provides no exceptions, and thus applies to all mechanisms through which competitively sensitive information may be transferred to the Division. The Commission has recognized that the transfer of employees who have had access to, or have knowledge of, sensitive information to the Division would provide the Division 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."[14]

SDG&E's Compliance Plan provides no procedures for preventing SDG&E and Sempra employees who have had access to, or have knowledge of, sensitive information from transferring to the Division. Preventing such transfers is essential to preventing the sharing of sensitive information with the division. Lesser measures – such as providing transferring employees with anti-conduit training, or adopting rules against information sharing – are insufficient to satisfy 707(a)(3) and Rule 5. Even an employee making a good faith effort to avoid sharing sensitive information may make a mistake, and it is unreasonable to assume that a Division employee with knowledge of sensitive information would be able to completely compartmentalize this knowledge and avoid allowing the knowledge to color his or her activities or decisions. This danger is especially acute with Division managers, marketers, and lobbyists, whose jobs place them in the position to make the greatest (mis)use of sensitive information.

Approving SDG&E's Advice Letter would allow the creation of a Division with access to sensitive information through employee transfers, in direct violation of Section 707(a)(3) and Rule 5. In addition, in failing to adopt any procedure for preventing such employee transfers, the Compliance Plan violates the Rule 22 requirement that the demonstrate that adequate procedures are in place to preclude the sharing of prohibited information with the Division.

THE PLAN FAILS TO PREVENT THE DIVISON FROM GAINING A STRUCTURAL ADVANTAGE THROUGH TRANSFERS OF STAFF WITH EXISTING RELATIONSHIPS WITH DECISIONMAKERS AND THE COMMUNITY

The Commission should reject AL 2822-E because SDG&E's Compliance Plan fails to prevent SDG&E employees who have developed advantageous relationships with politicians, regulators, the media, or the public through their employment at SDG&E from transferring to the Division.

The Commission has recognized 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."[15] It was in this context –

[13] COC Rule 5, D.12-12-036, Attachment 1, p. A1-5
[14] D.12-12-036, p. 14
[15] D.12-12-036, p. 14

preventing utilities form using their structural advantages, including relationships with politicians and the public – that the legislature and the Commission adopted the functional separation requirement set forth in Section 701(a)(1) and Rule 2 of the COC.[16]

The relationships that SDG&E's lobbyists have with politicians and regulators are assets. Building and maintaining these relationships is a major part of a lobbyist's job, and each relationship represents a significant investment of time and money. Similarly, a marketer's public image and relationships with members of the media are assets that are essential to the marketer's job and are developed through an investment of time and money. The relationships that SDG&E's marketers and lobbyists have developed over the course of their employment at SDG&E are assets that were procured with ratepayer money. Allowing SDG&E to transfer marketers and lobbyists whose relationships have been established through working for the utility (at ratepayer expense) would give the Division a significant unfair structural advantage over CCA proponents, and would violate the functional separation requirement.

THE PLAN PROVIDES FOR IMPERMISSIBLE SHARED SERVICES

The Commission should reject AL 2822-E because SDG&E's Compliance Plan provides for the Division's use of forbidden shared services in violation of the functional separation requirement and Rule 13 of the COC.

Pub. Util. Code Section 707(a)(1) and Rule 2 of the COC[17] require that the marketing division be functionally separate from SDG&E. Rule 13 of the COC allows the Division share some services with the utility, but expressly prohibits the sharing of personnel who are "involved in marketing and lobbying."[18] Rule 13 further prohibits the use of shared services when doing so would "create the opportunity for... unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the independent marketing division."[19]

Under SDG&E's Compliance Plan, the Division would be permitted to share regulatory affairs, lobbying, legal, communications, and public affairs services with SDG&E.[20] This directly violates the Section 707(a)(1) and Rule 2 functional separation requirement, and the Rule 13 prohibition against sharing of personnel who are "involved in marketing and lobbying." All of these services are directly relevant to the Division's substantive purpose of marketing and lobbying against CCAs. Lobbying, regulatory affairs, and legal are directly related to the Division's purpose of lobbying against CCAs with politicians and regulators.[21] Communications and public affairs are directly related to the Division's purpose of marketing against CCAs. The sharing of services that are directly related to the Division's marketing and lobbying purposes violates the plain language of

[16] COC Rule 2, D.12-12-036, Attachment 1, pp. A1-2 through A1-3
[17] COC Rule 2, D.12-12-036, Attachment 1, pp. A1-2 through A1-3
[18] COC Rule 13, D.12-12-036, Attachment 1, p. A1-6
[19] Id.
[20] AL 2822-E, Attachment A, pp. 11-12
[21] Lobbying includes Ex Parte activity at the CPUC.

Rule 13, and would result in the kind of functional integration expressly prohibited by Section 707(a)(1) and Rule 2.

Sharing these services would further violate Rule 13 by providing the Division with an unfair competitive advantage and creating significant opportunities for the cross-subsidization of the Division. Sharing lobbying services would allow the Division to subsidize its shareholder-funded efforts to lobby politicians with ratepayer-funded support. Sharing legal and regulatory affairs services would allow the Division to subsidize its efforts to lobby and influence regulators, including the Commission, with ratepayer funded services. Sharing communications and public affairs services would allow the Division to cross-subsidize its efforts to market against CCAs. Allowing any of these shared services would give the Division a significant unfair competitive advantage against CCA advocates and communities investigating CCAs, as it would provide the Division with a backdoor mechanism for augmenting its shareholder-funded lobbying and marketing efforts with ratepayer-funded services.

THE PLAN PROVIDES FOR IMPERMISSIBLE SDG&E CONTROL OVER THE DIVISION

The Commission should reject AL 2822-E because SDG&E's Compliance Plan would allow SDG&E officers to sit on the Division's board of directors. In light of this provision, approving the Plan would violate Rule 15 and would give SDG&E impermissible control over the Division's operations in violation of the Section 707(a)(1) and Rule 2[22] functional separation requirement.

Although SDG&E acknowledges the Rule 15 requirement that "employees cannot be employed by the Division affiliate and SDG&E at the same time," it claims that an exception exists which allows "SDG&E officers to be on the Board of the Division affiliate to provide the purpose and oversight governance to the Division affiliate."[23] This exception is not set forth in the Public Utilities Code, the COC, or D.12-12-036.

Allowing SDG&E officers to sit on the Division's board would violate Rule 15. By its plain language, Rule 15 prohibits employees from working for the Division and SDG&E at the same time.[24] While Rule 13 allows the Division and the utility to share "joint corporate oversight [and] governance,"[25] this exception, properly read in the context of the Section 707(a)(1) and Rule 2 functional separation requirement, merely allows the utility and the Division to both be overseen and governed by the same corporate structure. It does not allow the Utility, its employees, or its officers, to exercise oversight and governance over the Division. Allowing SDG&E to exercise any form of control over the Division by placing SDG&E officers on the Division's board is directly contrary to the functional separation requirement.

[22] COC Rule 2, D.12-12-036, Attachment 1, pp. A1-2 through A1-3
[23] AL 2822-E, Attachment A, pp. 12-13
[24] COC Rule 15, D.12-12-036, Attachment 1, p. A1-6
[25] COC Rule 13, D.12-12-036, Attachment 1, p. A1-6

THE PLAN DOES NOT PROVIDE FOR ADEQUATE MONITORING AND ENFORCEMENT OF CODE OF CONDUCT REQUIREMENTS

The Compliance Plan does not provide for adequate monitoring and enforcement of Code of Conduct requirements. Under the Plan, monitoring and enforcement will be handled by SDG&E's existing Affiliate Transaction Rule compliance staff. Because the independent division will not be a part of SDG&E, and because communications and interactions between SDG&E and the Division are highly restricted by the Code of Conduct, SDG&E's Affiliate Transaction compliance staff will have no ability to monitor and enforce the independent division's compliance with the Code of Conduct. SDG&E's plan does not include any adequate mechanism for monitoring and enforcing compliance by and within the independent division.

CONCLUSION

AL 2822-E is deeply flawed and should be rejected by the Commission. AL 2822-E is unnecessary and counterproductive to SDG&E's stated goal of promoting a "healthy public discussion" regarding CCAs. The letter is overly vague, fails to identify specific procedures for ensuring compliance with the COC rules, and fails to provide basic information. The plan fails to ensure adequate physical and functional separation between SDG&E and the Division. The plan fails to prevent the Division from accessing sensitive information. And the plan fails to provide for adequate monitoring and enforcement of COC requirements. Individually, any of these flaws would be adequate grounds for rejecting the Advice Letter. Taken together, they present an overwhelming case for rejecting AL 2822-E.

If the Commission does not reject AL 2822-E, CAC and the Sierra Club believe that the issues presented in this Protest raise sufficient questions of fact and law to justify opening a formal Commission proceeding to consider SDG&E's request, and provide clarification regarding what constitutes compliance with SB 790 and the COC.

Please direct all correspondence relating to this Protest to David Peffer, Nicole Capretz, and Evan Gillespie at the email and mailing addresses provided below.

Sincerely,

Dated: December 10, 2015

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