BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.	Rulemaking 07-05-025 (Filed May 24, 2007)

BRIEF OF COMMERCIAL ENERGY OF CALIFORNIA
ON PHASE III ISSUES

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For Commercial Energy of
California

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BEFORE THE PUBLIC UTILITIES COMMISSION
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Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.	Rulemaking 07-05-025 (Filed May 24, 2007)

BRIEF OF COMMERCIAL ENERGY OF CALIFORNIA
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Pursuant to Administrative Law Judge Pulsifer's ruling during evidentiary hearings regarding the schedule for briefs, made on March 30, 2011, and the *Assigned Commissioner's Ruling Adopting Amended Scoping Memo and Schedule* ("Scoping Ruling"), issued November 22, 2010, Commercial Energy of California ("Commercial Energy") hereby submits this brief on the Phase III issues of this proceeding, including: (i) necessary changes to the methodology for determining the Power Charge Indifference Adjustment ("PCIA") and (ii) parallel modifications to the Transitional Bundled Service ("TBS") rate components and calculation; (iii) Direct Access ("DA") switching rules; and (iv) Electric Service Provider ("ESP") financial security requirements.

Commercial Energy will address these issues in the order set forth in the common briefing outline served upon all parties to this proceeding. However, Commercial Energy will not have comments on all sections of the outline. Neither agreement nor disagreement is implied for proposals or recommendations on topics not specifically addressed by Commercial Energy.

I. INTRODUCTION

Commercial Energy agrees with the Joint Parties[1] and the Direct Access Parties ("DAP")[2] as to their proposed modifications to the Market Price Benchmark (used to calculate the PCIA) and the TBS rate. Commercial Energy further agrees with DAP's proposal to place all customers who return to utility service without 6 months notice (whether voluntarily or involuntarily) on the TBS rate for 6 months, and not impose on ESPs excessive and burdensome bonding or financial security requirements.[3] San Diego Gas and Electric Company ("SDG&E") agrees that mass involuntarily returned customers should be placed on the TBS rate, but believes that the period for placing returned customers on the TBS rate should be 12 months rather than 6 months. SDG&E also agrees that placing such returned customers on the TBS rate avoids the need for imposing costly bond or financial security requirements on ESPs.[4]

In contrast, Pacific Gas and Electric Company ("PG&E") and Southern California Edison ("SCE") have proposed to automatically place customers involuntarily returned "*en masse*" to utility service on the utilities' Bundled Portfolio Service ("BPS"), rather than placing them on the TBS rate.[5] In addition, PG&E and SCE have proposed placing bonding or financial security requirements on all ESPs for the purpose of approximating and holding ESPs responsible for the utilities' costs associated with serving mass involuntarily returned customers at the BPS rate,[6] even if such costs are never actually incurred.[7]

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[1] The Joint Parties include: the Alliance for Retail Energy Markets, the Direct Access Customer Coalition, the City and County of San Francisco, the Marin Energy Authority, the Energy Users Forum, BlueStar Energy, the San Joaquin Valley Power Authority and the California Municipal Utilities Association.
[2] The Direct Access Parties include: the Alliance for Retail Energy Markets, the Direct Access Customer Coalition, BlueStar Energy and Pilot Power.
[3] Ex. 200, p. 4, lines 17-26.
[4] Ex. 500, p. JS-7, line 20 to p. JS-8, line 15.
[5] Ex. 401, p. 11, lines 22-25; Ex. 300, p. 14, lines 6-10.
[6] Ex. 401, p. 11, lines 22-25; Ex. 300, p. 64, line 3 to p. 65, line 19.
[7] SCE, Singh, Tr. Vol. 2, p. 248, line 13 to p. 249, line 3.

Commercial Energy's brief will focus on the appropriateness and effectiveness of placing all customers who return to utility service without 6 months notice on the TBS rate for 6 months. Commercial Energy believes that this one step will solve the myriad of regulatory issues related to switching rules in this case, while also shielding ESPs and their customers from unnecessary bonding or financial security requirements. Specifically, Commercial Energy believes that placing all involuntarily returned customers on the TBS rate for 6 months is appropriate because:

- Under SB 695, only nonresidential (mainly commercial and industrial) customers are eligible for new DA service. Commercial and industrial customers can and do manage the risks associated with an involuntary return to utility service through the contracts with their ESPs. Commercial and industrial customers have expressed the desire to manage and address the risk of being involuntarily returned to utility service through these contracts, rather than through costly Commission-imposed bonding or financial security requirements.

- The Commission has the discretion to determine that there are little or no reentry fees necessary to avoid imposing costs on other customers of the electrical corporation, pursuant to Public Utilities Code Section 394.25(e).

- Placing all customers who return to utility service without 6 months notice on the TBS rate for a 6 months period will avoid virtually all risk of shifting costs to utility bundled customers. Assuming that the TBS rate is modified as proposed in this proceeding, the TBS rate will likely fully compensate the utilities for their procurement costs associated with providing service to returning customers.

- The utilities already possess flexible procurement portfolios that must accommodate swings in load or price caused by weather or economic factors that are comparable to or greater than the potential shifts in load due to customers migrating to and from DA. Thus, a prudent utility should not incur any increased costs so long as it has the ability to place returning customers on the TBS rate for six months.

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- The only costs that will not be covered by the TBS rate are minor administrative costs, which are already recovered via tariffed fees, and do not justify placing security or bonding obligations on ESPs and their DA customers.

- SCE's proposal to automatically place mass involuntarily returned customers on BPS without the safe harbor period currently available to other returning customers is unreasonable and unfairly seeks to discourage customers from taking DA service.

- Placing customers who return to utility service without 6 months notice on the TBS rate for 6 months renders the costly security or bonding requirements proposed by PG&E and SCE unnecessary.

Moreover, even if the Commission does not agree to placing customers who return to utility service without 6 months notice on the TBS rate for 6 months, the security requirements proposed by SCE and PG&E should still be rejected based on prudent public policy concerns, namely:

- The proposed security requirement is so potentially costly that it represents a substantial financial barrier to the growth of DA and will result in the pass through of unnecessary costs to either the ESP and/or Direct Access customers.

- The proposed security methodology is incomplete and unsupported, and based on a "worse case" scenario that is highly unlikely and unrealistic.

II. THE METHOD FOR DETERMINING DEPARTING LOAD PCIA AND CTC FOR ALL CUSTOMERS SUBJECT TO SUCH CHARGES

A. Recommended Changes to the Market Price Benchmark (MPB), Indifference Calculation and PCIA

Commercial Energy supports the proposed changes to the Market Price Benchmark ("MPB") set forth in the testimony of the Joint Parties. Specifically, the Joint Parties propose to:

- Use a Green Benchmark to reflect the value of Renewables Portfolio Standard ("RPS") compliant supplies, based on the RPS content of each vintaged total portfolio.

- Determine the Green Benchmark for a given year based on the forecasted weighted-average cost for that year of IOU RPS-compliant resources that are in their first and second year of deliveries. The Green Benchmark would be the same for all three IOUs.

- Modify the current "flat" weighted-average of cost of commodity power to reflect a weighted-average cost based on the IOU's forecasted bundled system load shape.

- Modify the current fixed capacity adders to market-based capacity adders that are based upon the CAISO's capacity procurement mechanism ("ICPM") price and the net qualifying capacity ("NQC") for each vintaged Total Portfolio.

- Include an adder to reflect the cost of congestion between the NP15/SP15 trading points and the IOUs' Load Aggregation Points.

With regard to the determination of costs to be included in vintaged Total Portfolio Costs, the Joint Parties propose to:

- Exclude all load-based CAISO charges and costs from Total Portfolio Costs.

- Treat the cost of short-term purchases and sales consistently across all three IOUs.[8]

Commercial Energy specifically opposes the utilities' proposals regarding the valuation of renewable resources. The key guiding principle in calculating the PCIA is bundled customer indifference. However, the proposal to use Department of Energy reported voluntary energy purchases has nothing to do with the utilities' actual costs of energy supply for any given procurement year. Therefore, it breaches this fundamental principle of bundled customer indifference and should be rejected.[9] Furthermore, Commercial Energy agrees with the Joint Parties that the proposal to use renewable energy credit market indices to establish the renewable component of the MBP is premature[10] and should not be used in lieu of actual system costs that are known and knowable at a systemwide level to all market participants.

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[8] Ex. 100, p. 4, lines 1-20.
[9] Ex. 101, pg. 2, line 16 to p. 4, line 8. *Also see*, Ex. 801, pgs. 4-5.
[10] Ex. 101, p. 6, line 11 to p. 8, line 25. *Also see*, Ex. 801, p. 3.

1. Proposals to Reflect in the MPB the Value of Renewable Resources – Portability of RPS Costs and Attributes

As noted above, Commercial Energy agrees with the Joint Parties that the annual costs of RPS acquired by the utilities must be shouldered by ESPs through the PCIA charge. However, bearing the cost while not receiving the benefit is inherently unfair. The monopsony power of the three utilities in the procurement of renewable power built within the state of California crowds out private investment meant to serve DA customers. In addition to not being able to tie long term RPS investments in the rural areas of the state to the grid through newly built utility-owned transmission lines, ESPs are subject to regulatory and legislative uncertainty as to the ultimate scale of DA that will be permitted in California. Therefore, Commercial Energy agrees with the testimony of Jan Reid[11] and the comments of The Utility Reform Network[12] contending that in addition to bearing the costs borne by the utilities to meet their RPS goals, ESPs should have the option to use the RPS attributes to meet their RPS obligations.

Under such a program, the ESP would be provided a fixed cost for the RPS proportional to the load it serves, and if the ESP elects to take the portability option it must take an assignment of the RPS resources and their benefits prior to the first day of service to the customer. This mechanism would help avoid utility stranded costs if a utility exceeds its RPS minimum due to load migration, weather or the economy. The California Large Energy Consumers Association and the California Manufacturers and Technology Association ("CLECA/CMTA") witness Ms. Barkovich agreed in principle with this concept of portability.[13]

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[11] Ex. 700, p. 13, lines 1-12.
[12] R.07-05-025, *Post-Workshop Comments of The Utility Reform Network*, p. 4 (January 14, 2011).
[13] CLECA/CMTA, Barkovich, Tr. Vol. 3, p. 577, lines 5-14.

While Commercial Energy concurs with Ms. Barkovich that the record in this case does not include enough details regarding the implementation of RPS portability to adopt the proposal in this phase of the case, this is an important and valuable strategy for reconciling the Commission's goal of promoting renewable resources whith facilitating DA for commercial and industrial customers. Accordingly, the Commission should require that portability be examined in future phases of this or successor proceedings.

2. Proposals to reflect in the MPB the value of shaping resources to the load

3. Proposals to revise the value for capacity in the MPB

4. Proposals to account for load-based CAISO costs

5. Proposals to account for short term purchases

B. Other Proposals for Achieving Bundled Customer Indifference

C. Implementation of Proposed Changes

Commercial Energy believes that the proposed changes to the PCIA should be implemented in a manner consistent with the recent *Administrative Law Judge's Ruling Regarding Motion of Joint Parties* ("Ruling") concerning the treatment of 2011 PCIA rates, which was issued in this proceeding on April 14, 2011. The Ruling provides that SCE and SDG&E will, upon issuance of a Commission decision addressing the revised PCIA methodology, promptly: (i) calculate the difference in the 2011 PCIA to be collected under the existing methodology and the revised methodology, from the effective date of the 2011 PCIA rate adopted in their respective ERRA decisions (which SCE and SDG&E have not implemented yet) through the effective date of the Commission decision adopting the revised PCIA methodology, and (ii) incorporate the adjustment into the prospective 2011 PCIA rate using the revised methodology. For PG&E, the Ruling provides that PG&E will: (i) establish a deferred account to track the difference between the PCIA rate under the existing versus revised methodology as of the effective date of the Ruling, and (ii) promptly pass through any adjustment upon the adoption of a revised PCIA methodology.

Commercial Energy believes that this approach ensures timely implementation of the revised methodology to be adopted by the Commission and helps to mitigate the negative effects of inflated PCIA rates.

III. THE TBS RATE COMPONENTS AND CALCULATIONS – PROPOSALS AND RECOMMENDATIONS

Commercial Energy agrees with the position of DAP that the TBS rate should be updated in a manner consistent with the modifications to the MPB proposed by the Joint Parties.[14] In addition, the TBS rate components should be made transparent and should be broken out by the costs of energy supply, resource adequacy, RPS compliance and CAISO load-related costs.

A. Resource Adequacy Costs

B. RPS Compliance Costs

C. CAISO Load-Related Costs

IV. DA SWITCHING RULES – PROPOSALS AND RECOMMENDATIONS

A. Minimum Stay Requirement

B. Notice Period to go to DA Service or Return to Bundled Service

C. Interaction, if any, with TBS Rate

Commercial Energy urges adoption of a uniform rule that DA customers returned to utility service without 6 months notice (whether voluntary or involuntary) should be placed on

[14] Ex. 200, p. 5, line 20 to p. 8, line 12.

the TBS rate for six months. This position is supported by many parties in the case, including DAP and CLECA/CMTA.[15] SDG&E also supports placing returning customers on the TBS rate rather than BPS, but believes that the TBS period for mass involuntarily returned customers should be 12 months as opposed to 6 months.[16] In sum, no customers, no ESP, and only two of the three utilities support automatically placing mass involuntarily returned customers on BPS. Tellingly, as acknowledged by SCE's and SDG&E's witnesses, the proposal to place mass involuntarily returned customers on the TBS is supported by the very customers who would be at risk for paying high TBS rates in the event of an involuntary return to utility service.[17]

1. Customer contracts with ESPs are sufficient to address and manage risk.

The risk of a DA customer being involuntarily returned to utility service can and should be addressed through the agreement between the customer and its ESP. Pursuant to SB 695, Public Utilities Code section 365.1,[18] only nonresidential customers, mainly commercial and industrial customers, will be able to obtain new DA service. Commercial customers are generally sophisticated customers responsible for entering into a wide variety of contracts, including contracts for energy.[19] Such customers have the ability and responsibility to receive detailed information about their energy options from a variety of ESPs as well as from their own resources.[20] Furthermore, such customers are expected to and have the responsibility to be familiar with the utility tariffs under which they receive service.[21] Even the utility witnesses agree that these customers have expressed the desire to address the risk of an involuntary return

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[15] Ex. 200, p. 3, lines 25-26; Ex. 800, pgs. 22-24.
[16] Ex. 500, p. JS-8, lines 12-15.
[17] SCE, Singh, Tr. Vol. 1, p. 185, line 27 to p. 186, line 8; Ex. 500, p. JS-8, lines 7-11; DAP, Fulmer, Tr. Vol. 3, p. 479, line 26 to p. 480, line 6.
[18] All statutory references herein are to the California Public Utilities Code unless otherwise indicated.
[19] SCE, Schictl, Tr. Vol. 1, p. 117, lines 16-27.
[20] SCE, Schictl, Tr. Vol. 1, p. 117, line 28 to p. 118, line 8; SCE, Singh, Tr. Vol. 2, p. 231, lines 10-18.
[21] SCE, Schictl, Tr. Vol. 1, p. 118, lines 9-21.

to utility service through contractual arrangements with their ESPs, notwithstanding that this could result in paying TBS rates during a time of high energy prices.[22]

The relationship between DA customers and ESPs is governed by their service agreements.[23] There is no evidence in the record that these agreements do not or cannot adequately address and manage a customer's risk of an involuntary return to utility service.[24] As testified to by PG&E's witness Hessami, contracts generally contain remedies in the event of default or breach.[25] In addition there are legal, regulatory, business and practical factors effectively preventing ESPs from simply walking away from their contractual obligations to their DA customers.[26] On the other side of the contract, by allowing DA customers to return to BPS, the proposal by SCE and PG&E eliminates moral hazard as a concern in the DA customer's assessment of the credibility of the ESP.[27] DA customers should not be shielded from this risk and should not be allowed to use the utilities as their "babysitters," especially not at the excessive administrative and financial costs proposed by SCE and PG&E. Nor do DA customers want such expensive "protection" provided by the utilities. The proposed financial security requirement is so potentially costly that it results in a substantial financial hardship on ESPs and their customers, even those who are not at risk of being involuntarily returned *en masse* to utility

[22] DAP, Fulmer, Tr. Vol. 3, p. 479, line 26 to p. 480, line 6; SCE, Singh, Tr. Vol. 1, p. 185, line 27 to p. 186, line 8. Ex. 500, p. JS-8, lines 7-15. Commercial Energy agrees with DAP's witness Mr. Fulmer that special protections for existing residential DA customers may be warranted. DAP, Fulmer, Tr. Vol. 3, p. 482, lines, 2-26.
[23] SCE, Singh, Tr. Vol. 1, p. 167, lines 22-28.
[24] SCE, Singh, Tr. Vol. 1, p. 168, lines 3-6; p. 171, line 28 to p. 172, line 5; p. 173, line 24 to p. 174, line 11; p. 191, lines 4-8; PG&E, Hessami, Tr. Vol. 3, p. 591, lines 16-20.
[25] PG&E, Hessami, Tr. Vol. 3, p. 591, line 28 to p. 592, line 17.
[26] SCE, Singh, Tr. Vol. 1, p. 169, line 28 to p. 170, line 22; p. 173, lines 6-23.
[27] Allowing returned customers to automatically return to BPS protects them from a market price scenario they chose not to be protected from by choosing DA (SCE, Schictl, Tr. Vol. 1, p. 107, lines 4-23) and unnecessarily shields them from the consequences of their own actions. PG&E, Hessami, Tr. Vol. 3, p. 606, line 23 to p. 607, line 17.

service. Such uneconomic costs represent a significant market barrier to participation in DA and should not be permitted by the Commission.[28]

SCE posits that mass involuntarily returned customers should be automatically placed on BPS in order to "protect" them from assumed high market prices.[29] However, DA customers have voluntarily chosen service other than utility service, including the rights and responsibilities associated with such service.[30] Customers should have the ability to negotiate contractual provisions addressing the risk of an involuntary return to utility service even if it results in their being held responsible for paying high energy prices under TBS rates.

There is no reason or requirement to automatically place certain involuntarily returned customers on BPS while other customers returning without advance notice are placed on the TBS rate for 6 months. Automatically placing mass involuntarily returned customers on BPS and then requiring a bond from ESPs to cover the utilities' costs for placing customers on BPS could result in a windfall to those returning customers in the event of the high market price scenario presumed by SCE and PG&E, as those returning customers would very likely be paying significantly lower prices than they would have been paying under their contracts with their ESPs.[31] There is no legitimate rationale for providing this subset of returning customers such a windfall. Placing all customers who return to utility service without advance notice on a fully compensatory TBS rate for 6 months[32] will achieve the paramount goal of maintaining bundled customer indifference, while treating all DA customers equally, and avoiding the need to

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[28] Ex. 201, p. 16, lines 4-13.
[29] SCE, Schictl, Tr. Vol. 1, p. 107, line 4 to p. 108, line 1; SCE, Singh, Tr. Vol. 2, p. 240, lines 14-16.
[30] SCE, Singh, Tr. Vol. 2, p. 242, lines 1-5.
[31] SCE, Schictl, Tr. Vol. 1, p. 105, line 20 to p. 106, line 13.
[32] Assuming the customer does not submit a new Direct Access Service Request during the "safe harbor period."

implement complicated financial security requirements or impose potentially enormous costs on ESPs and their customers.

2. A fully compensatory TBS rate avoids shifting costs to bundled customers.

The utility witnesses conceded that placing customers who return to utility service without 6 months notice on a fully compensatory TBS rate for the appropriate timeframe will avoid virtually all risk of shifting costs to utility bundled customers.[33] DRA's witness Mr. Ouyang agreed that having such returning customers pay the TBS rate would be one way to provide appropriate compensation to the IOUs for their incremental procurement costs associated with serving those customers, and that this approach would protect bundled customers from cost-shifting.[34]

Placing returning customers on the TBS rate avoids shifting costs to utility bundled customers while also avoiding imposing potentially insurmountable costs on ESPs and their customers. As testified to by SDG&E's witness, Mr. Spurgeon, the bond calculation could result in extremely high bond requirements.[35] In addition, as testified to DAP witness Mr. Fulmer, the bond calculation could result in high bond valuations that vary by *hundreds of millions of dollars* over the course of a year.[36] The proposed bond is so potentially costly that it would result in a substantial financial barrier to ESPs. Such a bond would also cause potential harm to current and prospective DA customers because the costs associated with the financial security requirements will likely be passed through to DA customers.

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[33] SCE, Schictl, Tr. Vol. 1, p. 117, lines 1-6; SCE, Singh, Tr. Vol. 1, p. 178, lines 1-15; Vol. 2, p. 250, line 16 to p. 251, line 4; PG&E, Hessami, Vol. 3, p. 665, lines 3-10; SDG&E, Spurgeon, Vol. 3, p. 691, lines 22-27.
[34] DRA, Ouyang, Tr. Vol. 3, p. 708, lines 1-14.
[35] SDG&E, Spurgeon, Tr. Vol. 3, p. 685, lines 17-28.
[36] Ex. 201, p. 13, line 9 to p. 14, line 3; p. 16, lines 4-13; DAP, Fulmer, Tr. Vol. 3, p. 466, lines 11-23 (emphasis added).

3. Utility Portfolios Have Sufficient Flexibility to Mitigate Costs.

Placing all customers who return to utility service without 6 months advance notice, even mass involuntarily returned customers, on the TBS rate for 6 months provides the utilities sufficient time to adjust their procurement planning to prevent any cost shifting. Utility resource portfolios are designed to account for changes in load due to fluctuations in factors such as weather and other conditions such as changes in the level of economic activity and population shifts.[37] As indicated in data request responses provided by PG&E, utilities routinely face total annual load changes that are comparable to or exceed the magnitude of annual changes in DA load experienced since 2004.[38] For example, since 2004, the annual changes in total retail sales due to temperature have ranged from approximately minus 913,000 MWhs to over 1.3 million MWhs. The net change in DA usage in the same time period has ranged from minus 1.4 million MWhs to plus 694,000 MWhs. PG&E's portfolio is already constructed to adapt to changes due to DA migration without significant additional cost (and presumably the other utilities' portfolios are as well).[39] A portion of PG&E's total portfolio consists of transactions of one year or less.[40] Significant flexibility is also provided by the term contracts that utilities hold wherein the price is not fixed until immediately prior to the beginning of a given month, week, or day. Utilities also make spot purchases on a day-to-day basis, further increasing their portfolios' flexibility to

[37] Ex. 404; PG&E, Barry, Tr. Vol. 2, p. 343, lines 10-28.
[38] Ex. 404.
[39] PG&E, Renson, Tr. Vol. 3, p. 560, line 9 to p. 561, line 5; SCE, Schictl, Tr. Vol. 1, p. 115, lines 1-21.
[40] Exs. 406 through 409 are PG&E's FERC Forms 1 (pgs. 326-327, including sub-pages) from 2006 through 2009. Also see Ex. 405. As explained by witness Barry, these pages list PG&E's power purchases for those years. PGE, Barry, Tr. Vol. 2, p. 346, line 13 to p. 349, line 7. Transactions classified as "OS" ("other service") in Column (b) (Statistical Classification) of p. 326 (and sub-pages) and further classified as Bilateral - WSPP/EEI (excluding transaction involving the Metropolitan Water District, Sierra Pacific Power Company, WAPA, Mirant, and those classified as Bilateral-Resource Adequacy, Bilateral – Physical Call Option, Bilateral – LT Wholesale and Bilateral – Demand Response) are generally transactions of less than one year. The MWhs purchased under each transaction are listed in the corresponding sub-pages under p. 327, in column (g) (MegaWatt Hours Purchased). Based on the information in these forms, PG&E purchased millions of MWhs annually through short-term transactions from 2006 through 2009.

accommodate load variations without incurring costs related to long term procurement commitments, and thereby minimizing their customers' exposure.

Utility witnesses acknowledged that they could adapt their portfolios for changes in bundled portfolio load within 6 months.[41] In addition, the DA market is capped by statute, which provides the utilities with planning certainty as to the maximum size of DA load.[42] Finally, the DA market is presumably spread across several ESPs in each service territory[43] such that even if one ESP were to fail it would not impact the majority of DA customers, nor would it be likely have an undue impact on a utility's portfolio. Thus, placing returning customers on a fully compensatory TBS rate for a 6 month period would allow utilities a sufficient amount of time to adjust their resource portfolios to account for returning customers.

4. SCE's proposal to automatically place mass involuntarily returned customers on BPS without a "safe harbor" period is unreasonable and unfairly seeks to discourage customers from taking DA service.

SCE's proposal to automatically place mass involuntarily returned customers on BPS includes a proposal to prohibit such customers from having any "safe harbor" period during which to try and quickly obtain service from a new ESP and return to DA. This aspect of SCE's proposal is particularly unreasonable as the proposal unfairly limits these customers' ability to return to DA service and potentially increases SCE's procurement costs.

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[41] SCE, Schictl, Tr. Vol. 1, p. 112, line 21 to p. 113, line 26; Ex. 300, p. 8, lines 22-25; Ex. 200, p. 13, lines 7-16.

[42] SCE, Schictl, Tr. Vol. 1, p. 88, line 21 to p. 89, line 2; Ex. 300, p. 5, line 22 to pg. 6, line 2; SDG&E, Spurgeon, Tr. Vol. 3, p. 679, lines 3-13. As further testified to by DAP witness Mr. Fulmer, changes in DA load under the cap should be well within the procurement adjustments utilities are used to making. DAP, Fulmer, Tr. Vol. 3, p. 517, line 21 to p. 518, line 14.

[43] Ex. 411. There are 12 ESPs registered and providing service in PG&E's service territory. Tr. Vol. 3, p. 587, lines 5-8. The Commission's website (http://docs.cpuc.ca.gov/published/ESP_Lists/esp_udc.htm) lists 15 ESPs registered to provide service in SCE's service territory and 14 in SDG&E's service territory.

Under current rules, voluntarily returning customers have a 60 day "safe harbor" during which they can find a new ESP and return to DA service fairly quickly.[44] Under SCE's proposal, mass involuntarily returned customers would not be subject to a minimum stay period on BPS, but such customers would have to go back into the DA queue with all other potential DA customers, instead of having the option to use a "safe harbor" period.[45] This greatly limits the ability of these mass involuntarily returned customers to return to DA service.

The DA queue has been highly competitive. For each phase in the re-opening, the available space has filled up in less than a minute, if not mere seconds.[46] Thus, despite the fact that these mass involuntarily returned customers were presumably on DA service because they believed that being on DA service was in their best interest, and they may still believe so even after being involuntarily returned to utility service, they would not have the same opportunity to quickly return to DA service that voluntarily returned customers would have. Although these customers were <u>involuntarily</u> returned to utility service, under SCE's proposal these customers would actually be worse off than other returning customers who can utilize the "safe harbor" period to promptly return to DA service with a new ESP.[47]

SCE's proposal demonstrates a clear intent to discourage the use of DA and to make it difficult for customers to retain their existing rights to use DA. The Commission should reject such a policy. If returning customers are permitted to quickly return to DA service during a safe harbor period, it could reduce the potential for additional procurement costs for the utility and its bundled customers. However, SCE indicated that it would not modify its proposal <u>even</u>

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[44] SCE, Rule 22.1. *Also see*, D.03-05-034, pgs. 18-23 (May 9, 2003).
[45] SCE, Singh, Tr. Vol. 2, p. 242, line 6 to p. 243, line 1.
[46] *Status Report on the Results of Energy Division's Review of the Utilities' Senate Bill 695 Implementation for 2010 per D.10-03-022*; PG&E, Barry, Tr. Vol. 2, p. 350, line 26 to p. 351, line 2.
[47] According to SCE witness Mr. Singh, SCE's proposal is for the purpose of protecting mass involuntarily returned customers from high market prices, not necessarily their right to return to DA service. SCE, Singh, Tr. Vol. 2, p. 240, lines 1-16.

though its proposal could actually increase procurement costs for the utility.[48] According to SCE, providing a safe harbor creates uncertainty in its procurement planning.[49] But during the safe harbor period, SCE would be serving returning customers on the TBS rate. Assuming that the TBS rate is fully compensatory, there is no reason why providing a safe harbor period would result in any uncertainty or increased costs in the utility's procurement for other bundled customers.[50] Thus, SCE's proposal is unreasonable because it potentially increases the risk of higher costs for their own procurement portfolio, while making it harder for DA customers to return to DA in the case of a mass involuntary return.

V. ESP FINANCIAL SECURITY REQUIREMENTS CALCULATION – PROPOSALS AND RECOMMENDATIONS

A. Defining Reentry Fees

Commercial Energy rejects the notion that the Commission *must* adopt a reentry fee. As Commercial Energy set forth in detail in Commercial Energy's Reply Brief on the legal issues arising under Public Utilities Code section 394.25(e), the Commission has the discretion to conclude that no such fee is necessary.[51] If the Commission provides that all customers returning to utility service without 6 months notice will return to the TBS rate (as proposed to be modified), no reentry fee is necessary except to address nominal administrative fees that are already provided for in the utilities' tariffs.

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[48] SCE, Schictl, Tr. Vol. 1, p. 152, line 8 to p. 153, line 13.
[49] SCE, Singh, Tr. Vol. 2, p. 268, line 8 to p. 269, line 9.
[50] DAP, Fulmer, Tr. Vol. 3, p. 535, line 13 to p. 537, line 23.
[51] See *Reply Brief of Commercial Energy on Legal Issues Arising Under Public Utilities Code Section 394.25(e)* (February 11, 2011). Also see, SCE, Singh, Tr. Vol. 2, p. 233, lines 12 to p. 234, line 5.

B. Calculating Reentry Fees

C. Security Requirements Administration

Under a fully compensatory TBS rate, the actual costs incurred in a return of DA customers to utility service are *de minimus* (a tariffed administrative fee).[52] There is no evidence in the record that commercial or industrial DA customers or their ESPs will be unable to pay the small administrative fee. Therefore there is no justification for imposing a significant and burdensome security requirement on ESPs, through a bond or otherwise, to assure payment of administrative fees.

1. The security requirement calculation proposed by SCE and PG&E is vague and its costs uncertain.

The bond calculation proposed by SCE and PG&E is not fully developed at this time. While SCE and PG&E have proposed a complex bond calculation, they concede that their calculation cannot even be performed by the Commission unless the critical component of volatility is determined in separate additional proceedings or workshops.[53] Furthermore, both SCE and PG&E witnesses testified that certain figures in the sample bond calculations are illustrative only so it is unclear whether the sample bond calculations have any relationship to realistic market situations.[54] As the proponents of the proposal to revise existing financial security requirements, the burden of proof is on SCE and PG&E to demonstrate in real time with real dollars the practical determination of the costs they suggest be borne by ESPs in this market. Commercial Energy submits that they have not met this burden and, thus, their proposal must be rejected.

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[52] SCE, Singh, Tr. Vol. 1, p. 178, lines 10-15; SDG&E, Spurgeon, Tr. Vol. 3, p. 689, lines 6-11.
[53] PG&E, Hessami, Tr. Vol. 3, p. 630, line 15 to p. 631, line 3; p. 650, line 16 to p. 651, line 8.
[54] SCE, Singh, Tr. Vol. 2, p. 252, line 28 to p. 253, line 2; PG&E, Hessami, Tr. Vol. 3, p. 615, line 25 to p. 616, line 14.

Potentially the most objectionable part of the SCE/PG&E security proposal is its retroactive effect. Current ESPs and their customers entered into agreements premised on the rules and security requirements in effect at the time. Imposing a new, costly methodology on existing contractual relationships, where the costs for compliance cannot be "passed through" the same way a cost of service regulated utility can, is fundamentally unfair. Approximately 12% of the California energy market is exposed to these excessive new security costs, while only the remaining 1% of customers representing the DA load in the final open season will have the time to address this issue prior to contracting in the 2013 queue.

In addition, the potential cost of the security sought by SCE and PG&E could be so large in a volatile market that it represents a substantial financial barrier to DA, and is further proof that PG&E and SCE are trying to create regulatory barriers to the use of DA, in violation of Commission and Legislative policy.[55] As already noted, the bond calculation could result in bond amounts that are potentially insurmountably high[56] and vary by hundreds of millions of dollars over the course of a year.[57]

The SCE/PG&E bonding requirement would only exacerbate the credit required of each ESP because the ESP would have to post the bond at the same time the ESP is using its credit to procure higher cost power. The proposed security amount could initiate a "death spiral" of the DA market in California. No ESP, creditworthy or not, would choose to post an abnormally high bond amount calculated at a peak in the market if there were an alternative. They may simply choose to return their customers to the utility, particularly if the utility offered

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[55] D.02-03-055, p. 16 (March 25, 2002), the Commissions states that there are "benefits associated with retaining a viable direct access market." Also see, D.02-07-032, in which the Commission states, "While we are committed to ensuring that bundled customers do not pay more than their fair share of costs, we also do not wish to eliminate the DA market through injudicious imposition of charges." D.02-07-032, pgs. 22, 24 (July 18, 2002).

[56] Ex. 201, p. 16, lines 4-13.

[57] Ex. 201, p. 13, line 9 to p. 14, line 3; DAP, Fulmer, Tr. Vol. 3, p. 466, lines 11-23.

BPS rates to such returning customers as SCE and PG&E have proposed. In such a case the customer would be better off with BPS rates and the ESP could walk away from the market while forfeiting a relatively meager bond amount if it were calculated prior to the price and volatility jump. In this fashion, the bond requirement would send precisely the wrong financial incentive to the DA market participants. Such counterproductive behavior that would lead to the mass abandonment of the California DA market has not occurred over the past ten years, even at the height of the energy price spikes. However, neither did California have a repressive proposed bonding requirement in place at that time. The SCE/PG&E bonding requirement could utterly frustrate Commission and Legislative policy and should not be adopted in this proceeding.

SCE's witness Mr. Singh acknowledges that SCE's proposal to use a one year timeframe for calculating the bond requirements rather than a 6 months timeframe results in a higher bond amount, which could impose higher costs on ESPs and their customers, potentially discouraging the use of DA.[58] SCE uses a one year timeframe despite acknowledging that returning customers may not necessarily stay on utility service for one year.[59] On the other hand, DAP's proposal to place returning customers on the TBS rate minimizes costs to DA customers by allowing them to address risk contractually rather than having the Commission impose security costs on ESPs that are predicated on the assumption that all ESPs will return all of their customers to utility service, and having those costs passed through to DA customers.[60] As testified to by DRA witness, Mr. Ouyang, the DA rules should be carefully balanced so as not to unduly exaggerate costs of DA service for customers who wish to participate in DA.[61] The

[58] SCE, Singh, Tr. Vol. 1, p. 182, lines 16-20; p. 183, line 20 to p. 184, line 1.
[59] SCE, Singh, Tr. Vol. 2, p. 248, line 13 to p. 249, line 3.
[60] DAP, Fulmer, Tr. Vol. 3, p. 477, line 22 to p. 478, line 13; Ex. 201, p. 18, line 7 to p. 19, line 4.
[61] DRA, Ouyang, Tr. Vol. 3, p. 710, lines 6-12.

proposed bond calculation fails to achieve this balance. Placing all returning customers on the TBS rate, without the need for exorbitant ESP financial security requirements, does achieve this balance.

2. The proposed security requirement calculation is predicated on a "worst case" scenario that presumes ESPs act irrationally.

As already discussed above, ESPs and their customers can and do address the risk of ESP failure through their contracts. There is thus no need to develop complex and costly security requirements to "protect" DA customers. In addition, SB 695 caps the amount of DA load, thereby also mitigating the potential scale of any mass return of customers.[62]

The proposed bond calculation seems to be premised on the idea that because ESPs are not regulated and required to have certain business practices that they therefore do not utilize sound business practices.[63] While ESPs are not regulated to the same extent as utilities there are certainly legal, regulatory, credit, business and practical factors effectively controlling how ESPs conduct their business.[64] Part of that business is planning future exposure to risk and mitigating such risks accordingly. Today, many more tools exist to manage risk exposure and no prudent executive in the industry lacks the tools to survive. As PG&E Witness Hessami pointed out, there were no bank failures from 2000 to 2007, but that did not mean there would never be any such failures. Mr. Hessami could have pointed to a recent utility bankruptcy that took place despite the fact that neither its management nor state regulators imagined such a possibility. But the fact that such unlikely risks exist is not a justification to apply such an onerous, speculative, and contradictory bonding requirement on ESPs and their clients.

[62] Section 365.1.
[63] Ex. 201, p. 10, lines 11-20; DAP, Fulmer, Tr. Vol. 3, p. 405, line 5 to p. 408, line 12.
[64] Ex. 201, p. 11, lines 15-18; SCE, Singh, Tr. Vol. 1, p. 169, line 28 to p. 170, line 22; p. 173, lines 5-23; PG&E, Hessami, Tr. Vol. 3, p. 669, line 26 to p. 670, line 13; p. 670, line 22 to p. 671, line 2.

The proposed bond calculation is also based on the premise that anomalously high price spikes will last for a year.[65] In addition, the concerns of SCE and PG&E about procurement costs appear to assume that the majority of ESP-served load fails simultaneously.[66] This is also unreasonable as there is no evidence in the record that the failure of one ESP in any given service territory would necessitate adjustments to a utility's resource portfolio that would exceed the amount of flexibility in a utility's portfolio already required to respond to annual changes in weather, economic and other conditions. In fact, there is only one example of a mass return of DA customers since the energy crisis, and that return took place in an orderly manner based on a decision of one ESP to exit the California market in 2008-2009.[67]

Thus, the proposed bond calculation is based on risks that are overstated, unrealistic and unsupported by the record in this proceeding.

VI. CONCLUSION

For the reasons set forth above, Commercial Energy urges the Commission to adopt the proposals of the Joint Parties and DAP for the adjustments to the PCIA calculation and the TBS rate, and to adopt the proposal to place all customers returning to utility service without 6 months notice on the TBS rate for the first 6 months, including a 60 day safe harbor period. Commercial Energy also urges the Commission to reject the financial security proposal of PG&E and SCE.

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[65] DAP, Fulmer, Tr. Vol. 3, p. 468, lines 1-6.

[66] Ex. 403. Note that for PG&E, weather related load variance is up to 2.61% from year to year while the entire DA load for that same period is 6.48%. Weather related variances equaled about 40% of the entire DA load. Therefore, for PG&E to face a significant risk from DA customer returns, it must assume that virtually all DA customers are returned at the same time, otherwise the risk is no greater than routine load variations that PG&E addresses without special security protections.

[67] SCE, Schictl, Tr. Vol. 1, p. 98, lines 13-20; Ex. 410; SDG&E, Spurgeon, Tr. Vol. 3, p. 682, lines 2-11.

Respectfully submitted this 6th day of May, 2011 at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Melinda LaJaunie, certify that I have on this 6th day of May 2011 caused a copy of the foregoing

BRIEF OF COMMERCIAL ENERGY OF CALIFORNIA ON PHASE III ISSUES

to be served on all known parties to R.07-05-025 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand delivered as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of May 2011 at San Francisco, California.

/s/ Melinda LaJaunie
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