

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking Regarding Policies and Protocols for Demand Response Load Impact Estimates, Cost-Effectiveness Methodologies, Megawatt Goals and Alignment with California Independent System Operator Market Design Protocols.

Rulemaking 07-01-041
(Filed January 25, 2007)

**COMMENTS OF ENERNOC, INC., ON THE
INVESTOR-OWNED UTILITIES' REPORT ON THE
JANUARY 19 - JANUARY 21 DIRECT PARTICIPATION WORKSHOP**

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EnerNOC, Inc. (EnerNOC) respectfully submits these Comments on the Investor-Owned Utilities' (IOUs') Workshop Report on the Direct Participation (DP) Workshop held on January 19 through January 21, 2011, to address issues identified in Administrative Law Judge's (ALJ's) Ruling of November 8, 2010 (November 8 ALJ's Ruling). These Comments are filed and served pursuant to the Commission's Rules of Practice and Procedure and the ALJ's Ruling issued on December 23, 2010, rescheduling the workshop and due dates for the IOUs' Workshop Report and responsive comments.

**I.
INTRODUCTION**

In response to the November 8 ALJ's Ruling, EnerNOC filed two sets of comments: (1) comments on the need for DP financial settlements on December 8, 2010, and (2) comments on the need for consumer protections, communications protocols, and financial settlement straw proposals on December 13, 2010. In addition, EnerNOC actively participated in the three-day workshop on DP issues held on January 19 through January 21, including making a presentation on the benefits associated with the participation of demand response resources in the wholesale market. EnerNOC has also now reviewed the IOUs' Workshop Report and, as detailed herein, will identify where it is not in agreement with the characterization contained in the Workshop

Report. However, EnerNOC fundamentally believes that the Commission cannot proceed to resolve any of the issues addressed at the workshop unless and until it answers important threshold questions and identifies its policy objective for DP.

**II.
BEFORE MAKING ANY DECISION ON THE “MECHANICS” OF DP,
THE COMMISSION MUST FIRST ANSWER THRESHOLD QUESTIONS AND
STATE ITS POLICY OBJECTIVES WITH REGARD TO PARTICIPATION IN PDR.**

To date, parties have responded to a significant number of information requests from the Commission staff (Energy Division) on issues related to how, and under what circumstances, direct participation (DP) in CAISO’s markets should be permitted. In addition, parties have participated in 2.5 days of workshops to discuss the positions submitted in the comments filed in December 2010. This comment and workshop process, however, has not yielded an agreement among the parties as to how to proceed. While the Workshop provided a helpful forum for to better understand the positions of the parties, several issues remain undecided. Principle among the open issues is whether a direct financial settlement between demand response providers (DRPs) and load-serving entities (LSEs) is warranted. Further, even if the Commission found a settlement to be warranted, there has been no agreement as to what would constitute a reasonable settlement.

But these questions are really the sub-text to larger policy questions regarding direct participation in CAISO, which have not been asked of the parties or answered by the Commission or its staff. Namely, what is the policy objective that would be achieved by either encouraging or discouraging demand response participation of retail customers in the wholesale market? Does the Commission intend to replace existing retail programs with direct participation? Does the Commission intend to continue direct participation and retail programs in tandem? Does the Commission intend to encourage competition for demand response

services? Each of these questions needs to be explored, since each has both positive and negative aspects.

EnerNOC stated during the workshop that while it is a provider of demand response resources in several wholesale markets, and a provider of demand response services to utilities in California today, it does not currently see the value proposition of participation in the CAISO's Proxy Demand Response (PDR) in relation to its current contracts with utilities. Why? Demand response resources are primarily "demand" or capacity resources. The CAISO's PDR does not provide a capacity payment nor does it recognize DR as providing a contribution toward resource adequacy.¹ PDR is an energy and ancillary (non-spinning reserves) service only. Participation in PDR will occur only when it is economic for the participant to do so relative to the cost to participate and relative to other DR alternatives available to the customer.

Therefore, it is unclear how often participation in PDR will actually occur. Further, to the extent financial settlements are required, the economics of PDR participation are further reduced. In addition, customers will make decisions based upon which DR option provides the greatest incentive for their participation. If that incentive comes from utility retail programs relative to PDR, then customers will stay with the retail program. EnerNOC believes that its contracts with the utilities provide a valuable resource to the utility and an important opportunity for retail participation in a demand response program. EnerNOC works very hard to provide a reliable, state-of-the-art DR service and believes the value of that service will continue beyond the ability to participate in PDR.

However, EnerNOC's comments here are focused on creating an environment that encourages participation in PDR by customers, third-party DRPs and LSEs/IOUs alike. For example, if the choice is between participating with the utility in PDR versus a third-party DRP,

¹ The issue of applicability of resource adequacy to participation in PDR is under investigation in R.09-10-032.

and the utility customer is not directly charged for any retail settlement while the customer of the third-party DRP is, then there is an incentive to use the utility as the DRP, versus a third-party DRP.

Any decision reached by the Commission must factor in these dynamics. As EnerNOC stated in its comments and during the workshop, examination of costs in isolation of benefits is a discriminatory lens through which to judge direct participation. If the Commission is determined to only weigh the costs of direct participation, and, in turn, require settlements between DRPs and LSEs, the Commission must acknowledge that such an approach will discourage direct participation of retail customers and third-party DRPs and will undervalue the benefits of wholesale market participation through lower market clearing prices. On that basis, the cost-effectiveness of direct participation will be determined solely on the costs of participation. Yet, no other demand response “program” is examined in that light. In addition, since the utilities could recover their “costs” and recognize the benefits, reduced wholesale market clearing prices, across their customer base, as opposed to directly charging participants, the IOUs will be able to participate in CAISO on a basis unlike any other market participant.

The failure of the Commission to account for these aspects of DP to date remains a key concern for EnerNOC. EnerNOC’s comments here underscore the need for the Commission to consider these impacts in addressing or resolving the outstanding issues of financial settlements, communications and data protocols, and consumer protection.

III. ENERNOC’S RESPONSE TO THE IOUS’ WORKSHOP REPORT

EnerNOC participated in the workshops that were recorded by the three IOUs. A draft of the IOUs’ Workshop Report was circulated for comment; however, Ms. Tierney-Lloyd, who attended the Workshop for EnerNOC, was not available to review the reports by the designated

deadline, the review period of which was exceedingly brief. As such, in these comments, EnerNOC will clarify either its statements or its recollection of the conversations that were conducted during the workshop that have not been accurately reflected (from EnerNOC's perspective) or were omitted from the IOUs' Workshop Report.

A. DAY ONE: FINANCIAL SETTLEMENTS; COMMUNICATIONS AND DATA PROTOCOLS

The Day One discussion began with an exploration of the mechanics of settlement: What would be the appropriate settlement rate, what data would be required, and what would be the timing, formula, and vehicle for developing and adopting such a rate? As noted above, EnerNOC objected at the Workshop, and continues to object, to the mechanics of a financial settlement being addressed, as it was at the Workshop, prior to an exploration and resolution of the threshold question of whether a settlement is appropriate at all. EnerNOC has consistently taken the position that a settlement is not necessary. Discussing mechanics before this important threshold question is addressed and answered is clearly a case of placing the cart before the horse.

1. FERC Order Approving PDR Suggests Market-wide Benefits of PDR Need to be Considered and Orders Study

During the Workshop, the CAISO clarified that the settlement process in the CAISO takes place when PDR clears in the wholesale market. The DRP is paid based upon the performance of the PDR at the locational-marginal price (LMP) of the customer load aggregation point (CLAP). The associated load-serving entity (LSE) is charged for the PDR performance at the default load aggregation point (DLAP). This mechanism, which recognizes that generation is paid on a "nodal" basis while load is charged on a "zonal" basis, was approved by the Federal

Energy Regulatory Commission (FERC) in Docket ER10-765-000 on July 15, 2010. In its Order approving PDR, FERC quotes the CAISO as follows:

“The CAISO contends that the proposed adjustment of the load serving entity’s meter quantity is not a cost that is being shifted to the load serving entity nor is it being spread to other market participants. The CAISO adds that its design does not expressly add, subtract or spread costs any differently than a supply-side resource does. The CAISO explains that, since a Proxy Demand Resource is modeled as a generator in the CAISO’s system, it is paid the full LMP at its Pricing Node, or Sub-LAP. The CAISO notes that this is the same payment that is afforded Participating Loads in the CAISO market. The CAISO continues that the underlying load of the Proxy Demand Resource’s load curtailment is scheduled by the load serving entity’s scheduling coordinator and is settled at the Default LAP like all other demand. Thus, the CAISO asserts that the Proxy Demand Resource design does not alter the respective settlement granularity of loads and resources in the CAISO market.”²

“The CAISO claims that the Proxy Demand Resource design upholds cost causation principles and ensures that neither the load serving entity nor the demand response provider is harmed by, nor does it benefit from, the actions of the other. The CAISO continues that the Proxy Demand Resource design does not contain a potential for revenue shortfall because it treats Proxy Demand Resources as generators, and the market and settlement rules are already established and approved in the CAISO market for generators.”³

While the CAISO noted that PDR provides system-wide benefits to the operation of the wholesale market, it did not provide information as to the potential market-wide impacts of demand response participation in the wholesale market.

“Price-responsive demand moderates price increases and price volatility for *all* customers...and it also helps to check potential market power because it provides a countervailing willingness to reduce demand in the face of high prices. Further, demand response contributes to reliability by shaving peak demand and providing reserves.”⁴

Specifically, FERC stated:

“...it is unclear whether the CAISO’s Proxy Demand Resource proposal fully recognizes the potential market-wide impacts that Proxy Demand Resource participation may have. When a Proxy Demand Resource clears the CAISO

² FERC Order in Docket ER10-765-000, Paragraph 26.

³ *Id.*, at Paragraph 27.

⁴ *Id.*, at Paragraph 33.

market, it will displace more expensive supply options and have the effect of lowering market clearing prices.”⁵

“This settlement practice distinguishes the way the CAISO allocates the cost of load reduction provided by the Proxy Demand Resource from the way it allocates the cost of purchasing generation, despite potentially similar market-wide impacts. Under the CAISO’s proposal, the cost of the Proxy Demand Resource program is borne largely by the load serving entity in which the Proxy Demand Resource is located. Although this method ensures that the Proxy Demand Resource cost is recovered and minimizes any potential wholesale revenue shortfall, it does not consider potential system-wide impacts of Proxy Demand Resources.”⁶

As a result, FERC ordered the CAISO to provide a study about the system-wide implications of PDR participation in the wholesale market. The implication of this report could affect the manner in which costs are recovered prospectively related to PDR participation.

The point that FERC is making, with respect to considering system-wide impacts of PDR participation in the wholesale market and identifying beneficiaries beyond the associated LSE, is exactly the point that EnerNOC has made in this DP Phase of R.07-01-041. Costs for PDR participation cannot be viewed in isolation of benefits. At a minimum, the Commission must explore the potential benefits of PDR participation to the associated LSE/IOU. In the future, once CAISO has conducted its study, CAISO will then be poised to examine the benefits more broadly, the results of which should be incorporated in any decision issued by this Commission and could potentially affect future wholesale cost recovery proposals.

2. Examination of Benefits Alongside Costs

At Day One of the Workshop, consistent with its previously filed comments, EnerNOC identified other independent system operators (ISOs) and regional transmission organizations (RTOs) that recognize that there is a value to demand response participation to market participants broadly that must be incorporated in the design of wholesale markets. For example,

⁵ Id., at Paragraph 32.

⁶ Id.

both the NYISO and ISO-NE establish a benchmark above which wholesale participation of DR resources provide a net benefit, in excess of its costs, such that payment of LMP is appropriate. Below the benchmark, the DR resource is paid LMP-G (the marginal retail generation rate).

In addition, in both of these markets, the costs of DR participation are spread among market participants in the location where the DR resource cleared. The benefits are acknowledged as well as the costs in the wholesale market design. While the issue of the appropriate compensation for DR resources participating in the wholesale market is before FERC presently in its DR Compensation Notice of Proposed Rulemaking (NOPR), the fact that benefits were considered alongside costs is an approach that the Commission has not yet taken in this proceeding, but must do so as part of any decision it issues on DP. .

The CAISO's PDR compensates DRPs appropriately, in EnerNOC view, by paying the equivalent of what a generator would receive in the wholesale market, full LMP. The CAISO's PDR does not recognize any benefits that could affect the DLAP price or beyond. If the Commission is considering reducing the compensation to the DRP, then it is imperative that the Commission first consider, and account for, the benefits of participation in PDR on reducing market clearing prices.

3. "G" vs. DLAP/Direct Charge vs. Recovery in Rates

The CAISO's representative at the Workshop, Mr. John Goodin, stated that it is not the CAISO's business to determine what happens relative to retail settlements, as that is the purview of the Commission.⁷ EnerNOC agrees. However, Mr. Goodin did offer that CAISO's position is that the appropriate payment from a DRP to a LSE should be G, with G representing what customers of the utility will pay in their bills. Mr. Goodin also said that generators have costs associated with their resources, such as fuel costs, that DRPs do not have. Therefore, generators

⁷ IOUs' Workshop Report, at p. A-2.

net less than LMP. Therefore, charging a DRP for G approximates what a generator pays for fuel costs from its LMP payment. This will create equity between DRPs and generators.

However, in response during the Workshop, EnerNOC's representative, Ms. Mona Tierney-Lloyd, refuted CAISO's position that DRPs do not have costs associated with their DR resources.⁸ In fact, while this was not reflected in the Workshop Report, EnerNOC pays customers a significant portion of its proceeds and then has costs for its systems, communications, employees, etc., that come out of EnerNOC's portion of the payment. In the end, that is no different the operating costs of a generator. EnerNOC pays a significant portion of the revenues it receives from DR participation to its customers.

However, EnerNOC, as the DRP and the portfolio manager, absorbs the risks of managing the portfolio when dispatched and meeting the bidding, scheduling, and settlement requirements of a DRP.⁹ It is also obligated to abide by the CAISO Tariff Requirements, meet the credit requirements, become or retain a scheduling coordinator, and install monitoring and communications equipment so as to enable the customer to participate as a DR resource, which includes assessing the curtailment capabilities of the customer and developing a curtailment plan.

The IOUs argue that DRPs should be charged the DLAP price, which would insulate the IOUs/LSEs from any costs associated with DRP participation in the wholesale market. However, EnerNOC's Ms. Tierney-Lloyd indicated at the Workshop that directly charging a DRP, and in essence, the customer, for the DLAP price would be a significant departure from the Commission's practices of cost recovery.¹⁰ If the Commissioner were to adopt the IOUs' approach, then solely for direct participation in PDR, the Commission would allow a direct charge of a cost, while all other costs are recovered by the IOUs through a plethora of

⁸ IOUs' Workshop Report, at p. A-5.

⁹ IOUs' Workshop Report, at p. A-4.

¹⁰ Id.

ratemaking instruments, including general rate case proceedings and balancing account adjustments, in which those costs are allocated across customer classes. When Ms. Tierney-Lloyd was asked as between DLAP and G, which settlement price she preferred, she stated clearly that it is *EnerNOC's position that, while no settlement is required¹¹*, if one were adopted, as between the two prices, G is more appropriate because it reflects the revenues lost by the IOU.

Further, as stated by the CAISO's Ms. Margaret Miller, over time the CAISO intends to shrink the DLAP such that the differential between DLAP and CLAP will disappear. In other words, building a settlement scheme wherein the only value of direct participation in the wholesale market is based upon whether or not there is a basis differential between a DLAP price and a CLAP price, which will disappear over time, ensures that DRPs will receive **NO VALUE** for participating in PDR. Such a result will doom the CAISO's PDR from the start.

4. Purpose of DR in the Wholesale Market

During the Workshop, Ms. Manz of Viridity asked: "Is the value of DR simply as a peaking resource or is there value in integrating renewable resources?" Mr. Laundergan of Southern California Edison Company (SCE) indicated that the DLAP price is greater than G, on SCE's system, only 10% of the time. Therefore, G is actually greater than DLAP 90% of the time. In that case, using DLAP would actually provide more revenues to the DRP than using G in non-peak periods. However, it is not clear that the pricing will be high enough in those periods to entice participation in PDR. Also, it is not clear whether the basis differential (the difference between the DLAP and the CLAP price) would be enough to encourage participation.

5. ESP Settlements

As for Energy Service Providers (ESPs), Sue Mara, Alliance for Retail Energy Markets (AReM) and Carolyn Kehrein, Energy Users Forum (EUF), both supported the use of the DLAP

¹¹ Not reflected in the IOUs' Workshop Report, at p. A-5.

price as the appropriate settlement price from DRPs to ESPs. Both AReM and EUF said that the customer would be obligated to compensate the ESP for any reduction in consumption resulting from participation in PDR and, as the associated LSE for the customer, would keep the ESP whole for charges incurred in the wholesale market resulting from the customer. Further, AReM raises concerns about EnerNOC's proposal to allocate the costs associated with DRP participation across customer classes as being anti-competitive to third-party ESPs, who may also provide DRP services, and would not have access to a regulated customer base from whom to recover costs.

EnerNOC suggests that the Commission not determine the appropriate compensation, if any, for ESPs as a result of direct access customers participating in PDR. The relationship of the customer and the ESP, including what happens if a customer participates in a DR program or PDR, is governed by a contract that is outside of the Commission's jurisdiction. EnerNOC notes, however, that not all DA customers have full-requirements contracts with ESPs, which necessitates that every kWh of electricity must be purchased through the ESP or that the customer must take-or-pay a specific amount of kWh. In the instance where the DA customer is purchasing a "shaped product", a product which matches the load shape of the customer, it is not uncommon for the ESP to have to purchase some component of the customer's requirements in the short-term markets. Times when DR is likely to occur would be high-price periods.

Therefore, if the contract had a fixed price and the incremental purchases were in excess of the fixed price, the ESP actually benefits by the DR by not having to purchase the next increment of high-priced energy.¹² Further, the ESP could benefit from a reduced LMP, as a result of DR clearing in the day-ahead and real-time markets, for purchases it makes in those markets. The example also holds for IOUs.

¹² IOUs' Workshop Report, at p. B-2.

Further, if the ESP is also the DRP, the ESP is paid for the PDR performance, as the DRP, and is charged the default load adjustment (DLA). In that example, it is not clear that the ESP, also acting as the DRP, is harmed. The ESP can figure out when best to bid the resource such that it is profitable to participate in PDR. DA customers participate in retail DR programs today. The utility spreads costs associated with retail demand response programs across customer classes which, according to AReM's argument against cost allocation, would disadvantage ESPs offering retail demand response programs. Therefore, allocating costs incurred by virtue of DR participation in the wholesale market across benefitting customers is entirely consistent with the existing cost allocation treatment for retail demand response programs. EnerNOC submits that ESPs should try not to discourage customer participation in DR, by charging the customer for its participation, as DR participation is in the customer's best interest.

6. No Settlement

If there is no settlement, the IOUs stated that they would recover the costs associated with participation in PDR in rates. This is what the utilities currently do with their retail DR programs.

EnerNOC has stated that it does not agree with a direct allocation of costs to the DRP because it will discourage participation by DRPs and ultimately customers and would result in discriminatory treatment for third-party DRPs vis-a-vis the IOU acting as a DRP. If there are benefits beyond the costs of participation, then all utility bundled consumers will benefit from DR participation in the wholesale market. As such, costs should be borne by the beneficiaries, which would be all utility bundled customers.

7. Sale for Resale

Both the CAISO and others have stated that “you can’t sell something that you didn’t buy,” implying that DR is, in essence, a sale-for-resale. DRPs are not engaging in a sale-for-resale, which is a specific transaction in the wholesale market. A sale-for-resale involves the purchase of electricity from one wholesale entity for the purpose of reselling it to another wholesale entity. The intermediate entity must take title to the commodity that will be resold. In addition, the entity must be registered as a Power Marketer with FERC.

EnerNOC does not engage in the purchase and sale of electricity, and EnerNOC is not a Power Marketer. EnerNOC does not take title to electricity that it purchases from a load-serving entity for the purpose of reselling the electricity to another purchaser. EnerNOC enables customers to participate as demand response resources that reduce their demand and consumption in response to market signals or incentives. Customers are paid not to consume energy and to decrease demand, thereby creating capacity to serve other customers. FERC recognized that demand response was not a “sale for resale” in its Order on EnergyConnect’s Request for Market-Based Rate Authority.¹³

8. Brattle Study for ISO-NE/ISO-NE Report to FERC

PG&E summarized the results of a Brattle Study for the IOUs’ Workshop Report.¹⁴ The Brattle Study for ISO-NE reaches conclusions that are supportive of the Brattle Group’s overall thesis. Namely, exposing consumers to real-time pricing (RTP) is the most efficient way for retail demand and wholesale pricing to interface. Further, the Brattle Study assumes that all customers with RTP can exactly respond to the pricing signals. Many customers do not have the ability to exactly respond to pricing signals and instead will incur much higher energy bills.

¹³ FERC Docket No. ER09-1307.

¹⁴ IOUs’ Workshop Report, at p. B-4.

However, the Brattle Group generally recognizes that there are political barriers to implementing real-time pricing and exposing consumers to fluctuating prices. As such, other means of allowing customers to choose to participate in demand response in wholesale markets need to be considered such as through aggregators or through price-responsive demand, such as critical peak pricing tariffs, etc. The analysis shows that LMP-RR (retail rate) is the most efficient and that any other payment of full LMP, whether only in peak hours or when savings exceed costs, will take revenues away from other generators, resulting in generators seeking future compensation through higher future rents (energy or capacity). The analysis assumes that the consumer surplus is equal to the producer surplus by exactly eliminating the short-term benefit of the price reduction. In other words, producers will seek to recover the exact savings that consumers reaped.

However, EnerNOC would question whether this theory of revenue recovery can or has happened in real markets. First of all, generators recover a significant portion of their fixed costs through a capacity payment and are entitled to recover their variable costs through the participation in energy markets. DR participation in wholesale markets has provided substantial reductions in market clearing prices in incidence of emergencies, shortages and scarcity. For producers to seek to recover the revenue that they would have otherwise received from market clearing prices when resources were scarce, but for DR, would raise concerns about the generator's ability to excessive market power, charge excess rents, and raise concerns about inefficient competition.

The Brattle Study also intentionally excludes other market influences that would affect the ability for generators to unilaterally recover "lost revenues" through the market. Those other influences include load growth and new market entry. In fact, if a new generator were to enter

the market, in a location wherein supply and demand are approaching equilibrium, the new generator will likely reduce market clearing prices simply by increasing supply. By the Brattle Study's logic, all existing generators would then try to recover their lost revenue (difference between market clearing prices before new entry versus after new entry) in future capacity price increases. With that logic, there would never be any value created through competition for consumers. EnerNOC rejects that logic.

Further, as referenced in EnerNOC's January 20, 2011 Workshop Presentation¹⁵, there has been a very recent ISO-NE Status Report of Load Management Programs to FERC (December 30, 2010)¹⁶, in which ISO-NE cited benefits in excess of costs by three times resulting from DR participation.

9. Which Baseline?

Since PDR is a wholesale product, performance should be measured, and compensation determined, based upon the CAISO baseline.

10. Contract vs. Tariff?

The following question was asked during the Workshop: If a settlement is required, how would that settlement occur -- through the tariff or a standard contract? The answer that seemed to resonate was that if the settlement was due from the customer, a tariff would make the most sense. Alternatively, if the settlement is due from the DRP, then a standard contract might make more sense.

11. Communications and Data Protocols

During the Workshop, time was set aside to discuss Pacific Gas and Electric Company's (PG&E's) proposed communications protocols as contained in PG&E's Comments filed on

¹⁵ IOUs' Workshop Report, Attachment B.2, at p. 8.

¹⁶ FERC Docket No. ER-03-345

December 13, 2010, beginning on page 11.¹⁷ EnerNOC is generally comfortable with PG&E's response to Questions 30 and 31.

However, with regard to Question 31, during the Workshop, EnerNOC asked whether its meter data would qualify as settlement quality meter data (SQMD), as EnerNOC currently provides the utilities and its customers with 5-minute interval data. This question has not been answered and remains outstanding.

In addition, PG&E indicates that the ability to provide 5-minute interval data represents a higher level of service than is currently provided. EnerNOC would note that the utilities are in the midst of rolling out "smart meters" and that the ability to provide 5-minute interval data should be squarely within the capability of those meters, which should be provided to customers, and their agents, upon request and with customer authorization. EnerNOC would be concerned about informing the LSE/UDC as the meter data management agent (MDMA) each time a bid was submitted, as it would indicate the DRP's bidding strategy to the LSE/UDC. In its response to Question 32, PG&E identifies information that may be required of the LSE/UDC from the DRP which includes whether the customer is currently enrolled in another DR program. Obviously, it is the LSE/UDC that is in the position of answering that question, not the DRP. Also, as it relates to SQMD, assuming that the MDMA is the UDC, the UDC will have access to the list of customers and meter numbers by virtue of having reviewed the DRPs PDR registration. There should not be a need to resubmit that information subsequently.

In its response to Question 34, PG&E states that the DRP needs to contact the LSE/UDC in advance of submitting its PDR registration to CAISO regarding the eligibility of customers to participate in PDR. PG&E is suggesting something comparable to the Direct Access Service Request (DASR) prior to the PDR registration. EnerNOC's concern with such a process is that it

¹⁷ IOUs' Workshop Report, at pp. A-6 through A-7.

creates additional lead-time prior to the PDR registration review period, which is 10 days. EnerNOC would be willing to work with the utility to develop some kind of system for determining eligibility of customers. However, EnerNOC is concerned that the process will be protracted and delay the registration process, wherein the utility will review the registration for, among other things, eligibility. Therefore, EnerNOC urges adoption of a process that would eliminate duplicative review and streamline the processes.

In its response to Question 35, PG&E provides responses for what should happen in the event of a breakdown in communication between the LSE/UDC and the DRP. EnerNOC finds several of these responses unsatisfactory. For example, if the LSE fails to provide information relative to customers to the DRP, the LSE should have an opportunity to “cure the defect.”

EnerNOC fully intends to work with LSEs/UDCs to make the registration process go as smoothly as possible. However, the DRP will be dependent upon the LSE to provide information and the timeliness of the provision of the information is critical to the success or failure of the DRP and, therefore, PDR. Customer information, including SQMD data are critical for participation in CAISO. PG&E states that if the LSE/UDC does not provide SQMD data on a timely basis, the DRP will not be paid. There is no discussion of any repercussions, penalties, or cure periods for such a failure.

However, the failure to be paid would be catastrophic to the DRP and the customers it represents. In addition, the DRP would be out of compliance with the CAISO Tariff, through no fault of its own. PG&E indicates that if the DRP fails to compensate the LSE/UDC for a settlement, if so ordered by the Commission, then there will be repercussions for such a failure. If this is the case, it is incumbent upon the Commission, if it determines that it has jurisdiction to regulate DRPs in this manner, to establish fair and equitable rules to govern the information

exchange between the DRP and the LSE/UDC to encourage timely performance, the ability to cure deficiencies, and the remedies for failure to perform..

B. DAY TWO: FINANCIAL SETTLEMENTS

1. Presentation by the Alliance for Retail Energy Markets (AREM)

Sue Mara, AREM, presented several examples of how ESPs and DA customers are disadvantaged by virtue of cost recovery scenarios in which the IOU would recover the DLA charges in rates from all customers.¹⁸ AREM contends that any allocation of costs among bundled or bundled and DA customers will disadvantage ESPs and associated DRPs and DA customers because DA customers would have costs directly assigned to them, whereas, costs for participating bundled customers could be recovered across both participating and non-participating customers alike.

Allocating costs among benefitting customers is still an appropriate cost allocation methodology that follows cost causation principles. However, EnerNOC agrees with AREM that energy-related costs should be allocated only to bundled customers of the utility and an allocation of energy-related costs to DA customers would not be appropriate. Therefore, an energy-related or procurement-related balancing account, such as the IOUs' ERRA (Electricity Revenue Recovery Account), would make sense as a possible means of recovering DLA charges.

However, AREM is also *only* looking at costs and not benefits of participation by its customers in PDR. ESPs could be better off by not having to purchase the next increment of high-priced supply and receiving a reduced market clearing price for purchases it does make. Finally, ESPs and its customer relationships are governed by a contract. Therefore, the ESP has the ability to structure its contract any way it chooses, as it relates to the customer's participation in PDR. Ultimately, if one ESP decides to charge for PDR and another does not, the charging

¹⁸ IOUs' Workshop Report, at pp. B-1 through B-2, and Attachment B.1.

ESP could face pressure to maintain its customers in face of competitive pressures. On its face, the arguments raised by the ESPs to directly charge customers for participation in PDR would seem to discourage PDR participation.

Lastly, as EnerNOC has stated at the Workshop and in its comments, it is EnerNOC's expectation that participation in PDR will be low due to alternative options for DR participation that are available to customers, including retail options. Therefore, cost allocation implications are likely to be small¹⁹ and this treatment would parallel existing retail DR program recovery treatment.²⁰

2. EnerNOC's Presentation

Prior to the Workshop, EnerNOC was asked to present information related to the "benefits experienced in other markets."²¹ In relation to the IOUs' Workshop Report, EnerNOC did state that it is not sure that there is a value proposition for participation in CAISO's PDR, but not in wholesale markets in general, as was reflected in the Workshop Report.²² Nor does EnerNOC agree with the use of the word "forced" in terms of parties participating in the stakeholder process at CAISO regarding PDR development. EnerNOC actively participates in the PJM, ISO-NE, NYISO and ERCOT markets. EnerNOC actively participated in the development of PDR. However, EnerNOC has consistently expressed a concern about the manner in which the issue of settlement would be addressed in the retail arena.

However, what the IOUs' Workshop Report did not include EnerNOC's discussion of the economic disadvantages associated with participating in PDR relative to existing retail DR program options that customers have, such as retail programs or participation with the IOU as

¹⁹ IOUs' Workshop Report, at p. B.1.

²⁰ IOUs' Workshop Report, at p. B-2.

²¹ IOUs' Workshop Report, at pp.B-3 through B-5 and B.2.

²² IOUs' Workshop Report, at p. B-3.

DRP. EnerNOC is engaged in providing demand response services to the utilities under contracts approved by the Commission, and those contracts have been found to be cost beneficial. In those contracts, customers are paid a capacity payment in exchange for being available to be called by the utility for a prescribed number of hours per year or season at the utility's discretion. The customers are also paid an energy payment, unless they are DA, when the resource is called. EnerNOC cannot see why a customer, at this point, from an economic perspective, would choose to participate in PDR as opposed to a retail program.

In comparison, PDR is an energy or ancillary services (non-spinning reserve) product for which the customer is paid an energy payment. There is no explicit recognition that PDR qualifies for resource adequacy (RA); however, the IOU can count the contract capacity toward its RA requirement. If the PDR resource is then charged for the DLA or G, the value proposition, relative to retail DR alternatives, is diminished further. Given that dual participation is also not permitted in PDR, such that resources that are enlisted by the LSE as the DRP cannot participate with a third-party DRP, the pool of customers available to be recruited by a third-party DRP into PDR is, in turn, rather limited. Lastly, as between the IOU, acting as a DRP, and a third-party DRP, if the DRP must reduce its payments to customer by the DLA or G, but the IOU is given the ability to spread those costs among ratepayers, the result will be that customers will choose to participate with the IOUs as opposed to a third-party DRPs because participation with the IOU will appear to pay the customer more. For all of these reasons, EnerNOC finds the value proposition for PDR to be less desirable than existing retail options.

The Workshop Report did not include any mention of the examples that EnerNOC provided as to studies of ISO-NE, PJM and NYISO that identified benefits, in the form of reduced wholesale market clearing prices, in excess of costs, associated with DR participation in

the wholesale market. ISO-NE, in its semi-annual report on load response programs to FERC on December 30, 2010, most recently, identified that from April through September 2010, while DR resources were paid \$10 million, benefits accrued to the market in the form of decreased energy costs of \$26 million and reductions in energy production costs of \$8.8 million.²³ This semi-annual report concedes that these are probably conservative estimates. It should also be noted that this past summer in the Northeast was very hot and resulted in a 10-fold increase in DR assets being dispatched from 2009 from June through September 2010.

Other studies presented by EnerNOC, but not reflected in the Workshop Report, included an excerpt from a study of the NYISO PRL program by the Neenan Associates in 2003 in which the benefit of DR participation on wholesale market clearing prices relative to the costs of the resources was over 7 times greater. Further, EnerNOC included an excerpt from the testimony to FERC of PJM's Vice President of Markets, Andrew Ott from April, 2007, in which, during a 7-hour period on August 2, 2006, DR participation reduced wholesale market clearing prices by \$239 million.

EnerNOC's presentation also provided some perspective on the potential magnitude of DR participation relative to peak demand in SCE's service territory, not included in the IOUs' Workshop Report. In that case, even if there were 500 MWs of PDR capacity, which is more than double the existing amount of dispatchable DR on SCE's system currently, and that capacity was dispatched for 200 hours/year, which is again several multiples of dispatchable retail DR programs, relative to SCE's peak, with a 50% load factor adjustment, a conservative adjustment, PDR would only represent .1% of the MWh on the system.

EnerNOC included in its presentation an example of how the benefit of reducing the DLAP LMP can far outweigh the cost of paying the DRP and the reduction in retail revenues,

²³ FERC Docket No. ER10-345.

even under modest assumptions of PDR participation or changes in LMP.²⁴ In addition, EnerNOC's Presentation²⁵ shows that the CAISO can experience significant intra-day price spikes. On August 17, a day upon which DR resources were dispatched, at hour 17, the CAISO DLAP LMP price spiked to about \$130/MWh versus the price for most hours throughout the day, which averaged around \$40/MWh.

While certain parties asserted at the Workshop that dispatching DR is no different than dispatching the next marginal resource in terms of the affect on the market clearing price, such a conclusion is not entirely true. Without DR, increasing demand pushes the ISO further up the supply curve to dispatch the next generation resource. DR blunts the march up the supply curve by offering curtailment as a replacement for supply. Another supply resource does not have the same effect as dispatching DR. Further, as noted by Elizabeth Dorman, CPUC, DR is a preferred resource in the Commission's preferred "loading order" of resources.²⁶

EnerNOC was asked by the CAISO if it participates in PJM. EnerNOC replied that it does. CAISO identified PJM as an LMP-G market. However, EnerNOC replied that PJM also has a capacity market, which CAISO does not. Further, PJM requested that FERC allow PJM to pay LMP in the top 5% of PJM's peak hours. This request by PJM was at least in part the catalyst for FERC to review DR compensation in its NOPR.

There was a statement made during the Workshop that reliability demand response product (RDRP) will be the program that responds to high prices, not PDR. RDRP can be used to respond to scarcity pricing; however, outside of a scarcity pricing event, RDRP can only be dispatched to prevent a system emergency. PDR can respond to pricing at any time in which it is economic for the customer to participate, whether that is a scarcity event or not.

²⁴ IOUs' Workshop Report, Attachment B.2, at p. 11.

²⁵ IOUs' Workshop Report, Attachment B.2, at p. 12.

²⁶ IOUs' Workshop Report, at p. B-4.

3. IOUs' Presentation

Based on the IOUs' Presentation, it is clear that the IOUs want a direct settlement with the DRP at the DLAP price. The IOUs argue that this follows cost causation principles and is needed to avoid PDR sending incorrect price signals and DRPs being overpaid. The IOUs specifically do not want to charge customers for "negawatts". SDG&E stated that the customer is not obligated to pay for energy it did not consume.²⁷

While this may be the IOUs' preferred model, a direct settlement with the DRP results in the same outcome as directly charging the customer. The DRP is representing the customers. If the utility reduces the LMP payment to the DRP by charging a DLAP price or G, the DRP will reduce the payment to the customer. The end result is the same. The customer will be charged for "negawatts" or for energy it did not consume, in the form of a reduced payment for PDR participation.

The IOUs have only focused on costs, not benefits, as EnerNOC has stated throughout this proceeding. By doing so, the IOU could recover its costs from the DRP, and, therefore, customers participating in a third-party PDR, while enjoying the benefits for its bundled customers of reduced market clearing prices. That is hardly equitable.

In addition, the IOUs' assertion that PDR would send the wrong price signal and that DRPs would be overpaid, is actually an argument against the payment for PDR that has been submitted by the CAISO and approved by FERC as just and reasonable, and *unopposed* by the IOUs. This forum is not the appropriate place to argue about wholesale compensation deemed reasonable by FERC. Since the IOUs agree that the payment at the wholesale level is appropriate, the only question for this Commission to ponder is: What is appropriate at the retail level? The Commission has no authority to require settlements from third-party DRPs to the

²⁷ IOUs' Workshop Report, at pp. B-5 through B-6.

IOUs. It only has authority over the utilities' charges to its jurisdictional customers. Further, the utilities have cost recovery mechanisms for costs that they incur in the wholesale market. The Commission has not made it a practice to directly assign wholesale costs to specific retail customers in the past. To do so now for customers participating in PDR would be a precedent of dubious distinction, as it would muddy the water as to whether the Commission is supporting retail DR participation over wholesale participation in PDR. Further, direct assignment of wholesale costs to retail customers opens a Pandora's Box of potential future demands to directly assign costs to customer classes for a whole host of other purposes.

4. No Settlement Option

If no settlement is adopted, then the IOUs would likely recover the DLA through the ERRA, which is allocated to bundled customers.

5. Dispute Resolution

If there is no settlement, it is not clear as to whether an agreement between the DRP and the LSE is necessary. There is a possibility that parties might agree to some form of rule, akin to Rule 22 for DA customers, which specify the data exchange protocols between DRPs and UDCs.

6. Discussion of Information Transfers

There was discussion that it would take up to 6 months to develop an understanding of the information exchanges, etc., in order to facilitate participation in PDR. EnerNOC suggests that the process commence in advance of a Commission decision on the issues addressed in the Workshop so as not to prolong the period before participation in PDR can occur. As it stands, meaningful participation in PDR will not occur until sometime in 2012.

C. DAY THREE: CONSUMER PROTECTIONS AND COMMISSION JURISDICTION

1. Energy Division Introduction

In the workshop report, Energy Division's Kaneshiro summarized the Commission's Order, D.10-12-060, which addressed a rehearing request of D.10-06-002, and stated that the decision confirms that the Commission does have jurisdiction over DRPs. Such a statement is not precise, as later corrected by Ms. Dorman, CPUC's Legal Division. D.10-12-060 actually states that the Commission has jurisdiction for the purpose of ensuring consumer protections for *residential and small commercial* customers, and only then, if a record is established in this phase of R.07-01-041 showing that there is a need for such protections in the first place. D.10-12-060 The does not find that the Commission has jurisdiction over DRPs for any other purpose or circumstance and certainly does not extend the Commission's jurisdiction to impose consumer protection requirements on DRPs serving medium-to-large commercial and industrial customers, which is the customer segment served by EnerNOC. The definition of small business (SMB) customers is not defined.

2. EnerNOC's Presentation

EnerNOC stated that no customer protections for medium-to-large business customers are necessary to be imposed by the Commission as a matter of law or fact. Specifically, there are existing remedies available to that customer segment. FERC has indicated that it intends to ensure that demand response participation represents true bids to reduce demand and to penalize falsified behavior that is not consistent with the ISO's Tariff.

In its presentation and statements at the Workshop, EnerNOC also noted that it does not charge customers for participation in DR programs administered by EnerNOC for equipment or penalties. Those charges are absorbed by EnerNOC in exchange for splitting the payment

received for the DR. Current contract laws provide recourse to counterparties when either party fails to honor and perform consistent with the terms of the contract. EnerNOC's business model and the payment to its customers is EnerNOC's model. It would not suggest that all DR companies must ascribe to EnerNOC's model. Further, existing laws protecting the privacy of and specifying the terms upon which access to customer data is provided already exist, including the requirement that customers agree to release their data to a third party.

PG&E has requested that an IOU have the ability to terminate a service agreement with a third party if the party is misrepresenting information to the customer or slamming. To that request, EnerNOC agreed that DRPs should not engage in such activities. However, EnerNOC did not agree that the IOU should not have the unilateral opportunity to terminate a service agreement. The third party should be notified if it is being accused of a behavior in violation of the service agreement to determine if the charges are legitimate and to cure the problem. Sometimes third parties retain marketing companies and are unaware if the marketing company is misrepresenting information until it comes to the third party's attention. There should always be an opportunity to be able to address accusations, ascertain the legitimacy of the claim and cure an identified, legitimate claim. Therefore, termination of service agreements should be a last resort and not a unilateral ability for a LSE/UDC.

The issue of consumer protection is, and, based on D.10-12-060, must be, specific to residential and small commercial customers participating in PDR. The extension of that discussion to third-party contracts with the utilities is inappropriate and beyond the scope of this proceeding.

During the Workshop, there was also discussion regarding the Commission's role as the relevant electric retail regulatory authority (RERRA) in approving DRP registrations in CAISO.

According to Order 719, participation of retail customers in the wholesale market for entities that distribute in excess of 4 million MWhs was permitted “*unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.*”²⁸

As further stated by FERC: “In Order No. 719-A, we reaffirmed that we would “leave it to the relevant retail authority to decide the eligibility of retail customers,” subject to the exception discussed above regarding the 4 million MWh threshold.”²⁹

As EnerNOC reads this language, the eligibility of customers to participate in the wholesale market is squarely within the role of the RERRA, as envisioned by FERC. However, EnerNOC does not agree that this Commission has the authority to determine whether a DRP can participate in PDR. That determination is made by the CAISO, based upon meeting the requirements of a DRP described in the CAISO Tariff and subject to the review of the LSE and the CPUC for ensuring that customers that are registered in a DRP’s PDR are eligible to participate.

EnerNOC does not see any benefit to a duplicative registration process at the Commission, especially for medium-to-large commercial and industrial customers. Lastly, as stated earlier, there may be some value to a process to discuss the exchange of information between the LSE and the DRP.

3. AReM’s Presentation

AReM correctly identified that there is no existing, specific statutory authority over DRPs, such as exists for ESPs. The Commission was given specific jurisdiction over providing consumer protections, including registration, of ESPs through PU Code 394.4.

²⁸ FERC Order No. 719, FERC Stats. & Regs. 31,281 at P 154 (emphasis added).

²⁹ FERC Order in Docket No. ER10-765, at P. 56, Referencing Order No. 719-A, FERC Stats. & Regs. 31,292 at P 50.

PG&E had suggested that the Commission could adopt a registration process for DRPs similar to that in place for ESPs and that customer protections should depend upon the size of the customer. EnerNOC protested the adoption of a registration process for DRPs derived from statutes applicable only to ESPs when the services are fundamentally different.

Further, as noted above, the Commission has already determined in D.10-12-060 that its jurisdictional reach, if any, should only extend to consumer protections for residential and small commercial customers. EnerNOC would oppose a registration process for medium-to-large commercial and industrial customers as unnecessary and inconsistent with the Order on Rehearing.

Finally, there was a discussion as to the individual components of the ESP registration process that could be considered onerous. For example, requiring fingerprints of the officers of the company may not be necessary. Further, security deposits may not be necessary unless a settlement between the DRP and the LSE is ordered. Therefore, EnerNOC does not support a whole-cloth adoption of the ESP registration process for residential and SMB customers. Further, EnerNOC opposes PG&E's and DRA's suggestion that a registration process is necessary for all DRPs, as noted above, and believes that such protections, if any, can only extend to residential and small commercial customers consistent with D.10-12-060.

4. Discussion of UDC/DRP Agreement

EnerNOC has entered into contracts with the utilities to provide DR services, subject to Commission approval of the agreement. However, EnerNOC is not today subject to the jurisdiction of the Commission, except to abide by the terms of the contract. SB 1497 identified terms that utilities would include in future contracts with third-party DR providers, but did not extend Commission regulatory jurisdiction to DRPs.

To the extent the parties work together to determine the flow of information that is necessary in order to effect participation of a retail customer with a third-party DRP in PDR in a Rule that is incorporated into a utility tariff and the Commission requires the UDC to enter into an agreement with a DRP that includes the agreement of the DRP to operate in accordance with the Rule of the utility's tariff, the DRP must decide if that is an acceptable pre-condition to participating in PDR and sign or not sign the agreement. In any event, it must be made clear that such an agreement does not subject the DRP to Commission jurisdiction except to ensure compliance with the Rule. This is similar to the UDC/ESP arrangement, which, consistent with the law governing ESPs, ensures that ESPs are not regulated as public utilities, but are required to follow the specific tariff provisions applicable to Rule 22 or Rule 24, as applicable.

It remains EnerNOC's position that no statutory mandate exists permitting this Commission to regulate DRPs. Nevertheless, if the Commission determines that a tariff rule should be developed that dictates the relationship between IOUs and DRPs, EnerNOC will clearly have to participate in that process.

5. Penalties

The final Workshop conversation related to whether the Commission should prohibit service providers from charging for equipment or for penalties for failure to perform. Again, if this discussion is limited only to residential and small commercial customers, EnerNOC has no real opinion to offer. Outside of the residential and small commercial customers, EnerNOC submits that the Commission should not interfere with the manner in which the DRP offers its services to the customer.

However, in any instance, it is important to realize that if customers are enticed by the potential to earn wholesale revenues for their demand response services, there needs to be an

explicit understanding that wholesale market participation carries costs and risks with it. Participation in the wholesale market is not a risk-free opportunity and requires the participant to bear the expense, have and maintain technical capability to participate, follow the requirements of the tariff and bear financial consequences for failure to perform. As EnerNOC stated at the Workshop and in its presentation, EnerNOC's payment to its customers is an explicit recognition that EnerNOC is bearing the upfront costs of registration and participation, and the risks, including penalties for non-performance. If The Utility Reform Network (TURN) or any other party wants to remove all risk from the customer for their participation in the wholesale market, then the payment to the customer to participate will reflect the elimination of that risk.

6. Customer Education

The Commission should not follow the same model for Direct Access education as for PDR education. The communication to customers about the ability to participate in PDR should be developed in conjunction with IOUs, customer representatives, DRPs, and Commission Staff to ensure that the information is balanced and fair.

IV. CONCLUSION

While issues related to PDR have now been addressed in comments and the Workshop, there is no agreement among the parties as to how to proceed. Further, as noted herein, the Commission has yet to make fundamental, threshold decisions, especially as to policy objectives, before any final decision is made on the *mechanics* of PDR participation (i.e., financial settlements). Those determinations must be consistent with the Commission's policy for supporting cost-effective DR and energy efficiency as preferred resources in the loading order. The Commission must also recognize that existing retail demand response contracts are likely to be needed for the foreseeable future because of the economic disparities between PDR and retail

programs. Further, the Commission must recognize that customer decisions to participate in either retail programs or PDR will be governed by the relative economic benefits those choices present.

Given these circumstances, EnerNOC recommends the following:

1. The Commission should decline to adopt a settlement between DRPs and LSEs for the DLA charges, because such a settlement would ignore benefits of participation in PDR to reducing wholesale market prices. Such a direct assignment of costs to participating customers would discourage participation in PDR relative to retail options and fails to acknowledge the benefits of wholesale market DR participation. Direct settlement would disadvantage customers of a third-party DRP relative to the regulatory treatment available to UDCs as DRPs. Further, the Commission must use similar methodologies for determining the cost effectiveness of wholesale DR programs and cost recovery mechanisms for retail participation in PDR as for retail DR programs.
2. Any settlement between DA customers participation in PDR should be governed by the contract between the customer and the ESP. The Commission should not attempt to create parity between DA customers and bundled, retail customers.
3. While there are communications that are necessary to occur between LSEs and DRPs to facilitate participation in PDR, the parties must first reach agreement as to the appropriate process and flow of that exchange. Such a discussion could lead to the development of a new Rule in the utility tariff that may necessitate an agreement between the UDC/DRP to abide by the Rule.

4. The Commission must find, consistent with D.10-12-060, that it does not have the authority or record support for adopting and imposing consumer protections on DRPs serving medium-to-large commercial and industrial customers.

Respectfully submitted,

February 11, 2011

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CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On February 11, 2011, I served the within document **COMMENTS OF ENERNOC, INC., ON THE INVESTOR OWNED UTILITIES' REPORT ON THE JANUARY 19 – JANUARY 21 DIRECT PARTICIPATION WORKSHOP**, in R.07-01-041, as prescribed by the Commission's Rules of Practice and Procedure and with additional and separate delivery of hard copies by U.S. Mail to Assigned Commissioner Peevey and Assigned ALJs Hecht, Sullivan, and Farrar at San Francisco, California.

Executed on February 11, 2011, at San Francisco, California.

/s/ SARA STECK MYERS

Sara Steck Myers

ELECTRONIC & MAIL SERVICE LISTS
R.07-01-041 (Demand Response (Direct Participation Phase))
February 11, 2011

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