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

APPLICATION OF ENERNOC, INC., ENERGYCONNECT, INC., AND CPOWER, INC. (“JOINT PARTIES”) FOR REHEARING OF DECISION 10-06-002

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APPLICATION OF ENERNOIC, INC., ENERGYCONNECT, INC., AND CPPOWER, INC. (“JOINT PARTIES”) FOR REHEARING OF DECISION 10-06-002


I. INTRODUCTION:
GROUNDs FOR REHEARING

Rule 16.1(c) of the Commission’s Rules of Practice and Procedure requires applications for rehearing to set forth specifically “the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous.” The purpose of an application for rehearing “is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”

That is the precise purpose of this application for rehearing – to “alert” the Commission of the wholly erroneous determination in D.10-06-002 that the Commission can and will regulate demand response providers (DRPs). For a rulemaking like R.07-01-041, Public Utilities (PU) Code Section 1757.1 has identified six bases for a court to review and reverse a Commission decision. D.10-06-002 commits four of those six identified errors. Namely, by concluding that

1Rule 16.1(c), Commission’s Rules of Practice and Procedure.
it regulates DRPs in D.10-06-002, the Commission has “acted without, or in excess of, its powers or jurisdiction,” “has not proceeded in the manner required by law,” has “not supported” this conclusion by any finding in violation of Public Utilities (PU) Code §1705, and has adopted impermissibly vague “regulations” that violate the due process rights of DRPs.²

Any one of these errors requires rehearing of D.10-06-002. Collectively, they yield a deeply flawed decision that must be reversed in favor of an order that makes clear that the Commission has no jurisdiction to regulate DRPs for any purpose.

II.

D.10-06-002 RESULTS IN ACTION BY THE COMMISSION THAT EXCEEDS ITS JURISDICTION AND FAILS TO PROCEED IN THE MANNER REQUIRED BY LAW.

A. The California Legislature, Not the Commission or Another Regulatory Agency, Determines What “Classes of Private Corporations or Other Persons Are Public Utilities” Subject to the Commission’s Regulatory Jurisdiction.

Put simply, this Commission’s jurisdiction does not exist in a vacuum or extend to every business conducted in California. The Commission was created by the California Constitution solely for the purpose of regulating monopoly, investor-owned public utilities as expressly defined by the Legislature in the California Public Utilities (PU) Code.³ Only the California Legislature can “prescribe that additional classes of private corporations or other persons are public utilities.”⁴

Under these circumstances, the Commission’s regulatory jurisdiction is defined by statutes enacted as part of the PU Code. In addition, for purposes of statutory construction, the courts have adopted and applied well-established principles, which, in turn, have been routinely followed by the Commission in its own decisions.⁵ Those principles include (1) ascertaining the

² PU Code §1757.1(a)(2), (3), (4), and (6).
³ See, Cal. Const. Art. XII, Sections 3 and 5.
⁴ Cal. Const., Art. XII, Section 5.
⁵ See, e.g., Decision (D.) 01-11-031, at p.6.
intent of the legislature so as to effectuate the purpose of the law,\(^6\) (2) giving words used in a statute a plain and common sense meaning consistent with the statute’s “legislative purpose,”\(^7\) (3) construing “technical words and phrases,” which “have acquired a peculiar and appropriate meaning in law,” “according to such peculiar and appropriate meaning or definition,”\(^8\) and (4) construing “a statute in context, keeping in mind the nature and purpose of the legislation,” including reference to “the legislative history of the statute and the wider historical circumstances of its enactment.”\(^9\)

These principles stem from a clear understanding of the “judicial role” in a democratic society, which is “to interpret laws, not to write them,” a power reserved to the legislative branch, and, in turn, to interpret statutes in accordance with the “expressed” intention of the Legislature.\(^10\) Administrative regulations that seek to alter a statute or “enlarge” its scope are void.\(^11\)

**B. The California Legislature Has Not Authorized this Commission To Regulate Demand Response Providers for Any Purpose.**

On November 9, 2009, an Amended Scoping Memo was issued to initiate a “Direct Participation Phase” of this rulemaking to address “certain issues related to the possibility of changes to the CAISO [California Independent System Operator] wholesale market design protocols to accommodate direct participation of retail Demand Response [DR] resources in CAISO wholesale markets.”\(^12\) The Amended Scoping Memo, by asking parties to address whether Commission jurisdiction extended to “Demand Response Providers” (DRPs) that might

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\(^{8}\) California Code of Civil Procedure, §16; California Civil Code, §13.

\(^{9}\) *Dyna Med, Inc., supra*, 43 Cal. 3d at 1387; *People V. Valladoli, supra*, 13 Cal. 4th at 602; *Squaw Valley Ski Corp. v. Superior Court*, (1992) 2 Cal. App. 4th 1499, 1511.

\(^{10}\) *California Teachers Ass’n, supra*, 14 Cal.4th at 633.

\(^{11}\) *Dyna Med. Inc., supra*, 43 Cal.3d at 1389.

\(^{12}\) Amended Scoping Memo, at p. 1.
participate in such bidding, appeared to clearly understand that the Commission’s jurisdictional reach was not endless or discretionary, but limited to the provisions of the PU Code. Thus, the Amended Scoping Memo posed its jurisdictional inquiry regarding DRPs specific to statutory provisions:

“Public Utilities Code Sections 394.2 and 394.25 require the CPUC to attempt to resolve complaints by retail customers against electric service providers. Does the Commission have similar jurisdiction under these or other code sections over retail customer complaints involving demand response providers?”

The Joint Parties took this issue seriously and provided detailed legal analysis in their opening and reply briefs demonstrating that the Commission has been given no statutory authority to regulate DRPs. That analysis, incorporated herein by reference, correctly examines demand response services in context both as to what they represent and what the PU Code provides and correctly concludes that the California Legislature has never, either today or in the past, expressly included, or shown an intention to include, DRPs as a “public utility” or other class of entity subject to Commission regulation.

In sum:

- Demand response is not defined by the generation, delivery, or consumption of energy, but rather by “changes to electric usage by end-use customers from their normal consumption patterns,” namely reducing or changing the time of energy use, “in response to changes in the price of electricity over time, to incentive payments, or to reliability conditions.”

- A DRP has not been defined or added by the California Legislature as a “public utility” or an “electrical corporation,” does not provide public utility “electric service” as defined by the PU Code, and is not a private company operating as a monopoly within described service territories to provide an “essential service” to the public through plant dedicated

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13 Amended Scoping Memo, Appendix A, at p. 8 (emphasis added).
14 Joint Parties’ Opening Brief, at pp. 5-19; Joint Parties Reply Brief, at pp. 1-4.
15 Joint Parties Opening Brief, at p. 7, citing Amended Scoping Memo, at p. 3 and n. 3.
to that use.\textsuperscript{16} Thus, DRPs have not been subjected to Commission regulation by the Legislature, are “not natural monopolies, [and] have not been granted enforceable monopolies, and the legislative rationale for Commission jurisdiction over them pursuant to the Public Utilities Code is nonexistent.”\textsuperscript{17}

- A DRP is not an “electric service provider” (“ESP”) pursuant to PU Code §§394, et al., and the Legislature has taken no steps and indicated no intent to include them within the statutory definition of an ESP.\textsuperscript{18}

- Even if a DRP were allowed to “bid customers into the CAISO on days when the IOU is not dispatching the CPUC program,”\textsuperscript{19} the fundamental character of the DR service would not change. Namely, DRPs do not purchase or generate electricity supplies in order to meet load or demand requirements of participating customers, but rather provide an incentive to those customers to reduce demand and associated usage that can be bid into the wholesale market and accounted for by the CAISO. Thus, such action would not result, in either instance, in a “purchase” of electricity by a participating retail customer, would not be the action of a public utility electrical corporation or ESP, and would not subject the DRP to Commission jurisdiction or the provisions of PU Code §§394, et al., or necessitate the application of those provisions to the DRP.\textsuperscript{20}

- Not once, in the context of any approved demand response program or contract has the Commission ever identified a need or basis for Commission regulation of DRPs for any purpose, including consumer protection, nor has it been shown that such protection is not or cannot be provided by standard contract terms and enforcement.

\textsuperscript{16} Joint Parties Opening Brief, at pp. 9-11, citing PU Code §§216, 217, and 218; Re California Western Railroad, Inc. (1998) 78 CPUC 2d 292, 295 (“public utilities are ordinarily understood as providing essential services, the kind that other industries and the public generally require”); Western Travel Plaza, Inc. (1982) 9 CPUC 2d 681, 687; Richfield Oil Corp. v. Public Util. Com. (1960) 54 Cal.2d 419, 428-429; Ocean Park Etc. Corp. v. Santa Monica (1940) 40 Cal.App.2d 76, 81-82 (“the devotion to public use must be of such character that the public generally…has the right to demand that that service shall be conducted,…with reasonable efficiency under reasonable charges.”).

\textsuperscript{17} R.09-08-009 (Alternative-Fueled Vehicle Tariffs (EV)) Revised Proposed Decision, Finding of Fact 12, at p. 44 (statutory interpretation applied in finding that electric vehicle charging stations are not public utilities subject to Commission regulation).

\textsuperscript{18} Joint Parties Opening Brief, at pp. 11-13, citing, PU Code §§218.3, 394(f); D.98-03-072; D.01-09-060 (i.e., “an ESP is in the business of ‘procur[ing] the electricity in order to satisfy its load.’ (D.98-03-072, at p. 28.)”) (Joint Parties Opening Brief, at p. 12, n. 36). The Joint Parties fully demonstrated that no Commission decision exists to support such a jurisdictional claim. (See, Joint Parties’ Opening Brief, at pp. 14 -19.)

\textsuperscript{19}Amended Scoping Memo, Appendix A, at p. 2.

\textsuperscript{20} Joint Parties Opening Brief, at p. 17.
Joint Parties have only been recruiting commercial, industrial, and institutional customers. While DRPs are not public utilities, even the Commission has declined to impose consumer protection regulations in the case of a Commission-regulated public utility service provided to larger customers in light of their sophistication and in order to avoid discouraging competitive markets.21

DRPs, like other companies doing business in California, are subject to a wide range of existing California law and oversight dedicated to protecting consumers from fraudulent or bad business practices – from laws embodied in the California Business and Professions Code to oversight by the Department of Consumer Affairs, the Attorney General’s Office, and local District Attorneys. No law exists permitting the Commission to add itself to this list in the case of DRPs.

The Joint Parties note that, even in the case of ESPs, the Commission’s “consumer protection” authority emanates from a detailed and clear statutory mandate by the California Legislature.22 In contrast, no such statutory mandate or authority exists for the Commission to regulate DRPs for any purpose.

C. D.10-06-002 Errs Fundamentally and Wholly in Assuming, Without Requisite Legal Support or Analysis, that the Commission Can and Will Regulate DRPs.

D.10-06-002 does not establish why DRPs, as opposed to other private enterprises operating legally in California, are subject to Commission regulation. Instead, D.10-06-002, like the Proposed Decision on which it was based, seems to defer this question while nevertheless concluding that the Commission can and will regulate DRPs.23

Thus, after a summary of party positions that virtually ignores the Joint Parties’ detailed briefing of the applicable law, D.10-06-002 simply states that “parties take markedly different positions regarding whether DRPs should be treated as public utilities or ESPs, and whether such

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21 D.01-12-018, at pp. 95-98. See also, Joint Parties Opening Brief, at pp. 17-19.
22 See, PU Code, Part I, Chapter 2.3 (“Electrical Restructuring”), Article XII (“Consumer Protection”), §§394, et seq.
23 D.10-06-002, Conclusion of Law 5, at p. 23; Proposed Decision, Conclusion of Law 5, at p. 20.
a determination conclusively establishes Commission jurisdiction.”

D.10-06-002 continues: “The Commission need not provide a comprehensive analysis of the Commission’s jurisdiction over direct bidding in California at this junction.” Instead, D.10-06-002 concludes: “Commission jurisdiction in this area shall be further examined in subsequent phases of this or other proceedings as particular regulations and protocols are developed for this nascent type of product.”

However, these statements make absolutely no sense when in fact D.10-06-002 proceeds to conclude that the Commission can and will assert jurisdiction over DRPs: “The Commission has a role in consumer protection and may, among other things, resolve customer complaints related to DRPs, establish financial responsibility standards for DRPs, and require DRPs to inform potential customers that enrolling with the DRP will mean that they will be unenrolled from DR programs offered by another carrier.”

The vague premise of a Commission “role in consumer protection” is the sole basis for the Commission’s exercise of this jurisdiction over DRPs. Yet, whether or not the Commission “has a role in consumer protection,” it is a “role” that does not extend to any entity doing business in California, but rather only to those defined as or added to the definition of “public utility” by the California Legislature in the PU Code. Thus, a “determination” of whether a DRP is a public utility or an ESP is a necessary condition precedent and required statutory nexus to “conclusively establish[h] Commission jurisdiction” for any purpose, including consumer protection.

That the end result of this claimed “consumer protection” jurisdiction is Commission regulation of DRPs is also clear. Conclusion of Law 5 and Ordering Paragraph 3 establish that

24 D.10-06-002, at p.
27 D.10-06-002, at pp. 11, 23 (Conclusion of Law 5).
28 D.10-06-002, at p. 9.
the Commission intends that it, not courts of general jurisdiction or another government agency, will be the venue for resolving customer complaints against DRPs and will establish “financial standards” and have imposed other requirements with which it has ordered DRPs to comply.

What California statutory basis does D.10-06-002 rely upon to establish that the Commission can and will regulate DRPs in this manner? Absolutely none. D.10-06-002 completely fails to establish that critical condition precedent of Commission jurisdiction over DRPs and further fails to provide any analysis establishing that current law governing businesses in California is not sufficient to “protect” large commercial, industrial and institutional customers that might be recruited by DRPs to participate in demand bidding.

Instead, D.10-06-002 only provides a vague reference to Commission “authority” over ESPs (with no mention of DRPs or analysis or conclusion that DRPs are ESPs) and Commission “authority” over “the potential impacts of direct bidding on consumer protection, long-term procurement, resource adequacy requirements, or Loading Order related issues,” which it wrongly claims that “no party disputes.” These sentiments are not tied in any way to a statutory definition of DRPs as a public utility or ESP and do not even identify, with reference to the PU Code, the “consumer protection” risk posed by DRPs in direct bidding that gives rise to Commission jurisdiction over DRPs.

The Joint Parties reaction to these statements is the same as it was in responding to similar language in the Proposed Decision:

“ The Joint Parties have no idea what this sentence means. If it means that the Commission has the authority to regulate DRPs in any manner, including their participation in a CAISO direct bidding tariff, the Proposed Decision does not establish the legal basis to support such regulation. Further, the only citation offered for this statement is to the Commission’s ‘Energy Action Plan II’ (EAP II). It must be assumed that this citation is used to identify the term ‘Loading Order’ since the EAP II never lists or references the term ‘consumer protection’ in

29 D.10-06-002, at p. 10. The Joint Parties in their Opening Comments on the Proposed Decision were very clear:
any context or the terms ‘direct bidding’ or ‘demand response providers.’ The Proposed Decision also never discusses why the EAP II or any of the other proceedings it references (‘the Commission’s long-term procurement and Resource Adequacy duties’) permits it to adopt ‘registration and certification’ or ‘financial standards’ for DRPs.”

Not only does D.10-06-002 continue the errors of the Proposed Decision in this regard, it compounds them by adding a quote from the Federal Regulatory Energy Commission (FERC) suggesting that it is FERC that gives, and has given, this Commission the authority to regulate DRPs. Thus, D.10-06-002 quotes FERC as “aptly explain[ing]” that it has left to “appropriate state or local authorities to set and enforce their own requirements” for retail customers’ eligibility to bid demand response into organized markets.

However, FERC has absolutely no authority to determine what entities this Commission regulates or to establish “state law” in that regard. That job has been left to the California Legislature, and it has not included DRPs among the entities that this Commission regulates. Yet, D.10-06-002 uses this FERC statement, along with a vaguely claimed need to “account for direct bidding within the Commission’s long-term procurement and Resource Adequacy duties,” as the basis for reaching its ultimate conclusion: “In particular, the Commission may, among other things, resolve customer complaints related to DRPs, establish financial responsibility standards for DRPs, and require DRPs to inform customers that enrolling with the DRP will mean that they will be unenrolled from DR programs offered by an IOU.” In addition, D.10-06-002 takes this direction further and states that the Commission can and will “not allow DRPs

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30 Joint Parties Opening Comments on Proposed Decision, at p. 8 (citing Proposed Decision, at pp. 9-10, and Conclusion of Law 5). While D.10-06-002 no longer references a “registration and certification” requirement for DRPs, it continues to assert its regulatory authority to resolve customer complaints against DRPs and impose financial standards, notice requirements, and customer prohibitions on DRPs. (D.10-06-002, Conclusion of Law 5, at p. 23; Ordering Paragraph 3, at p. 24.)
31 D.10-06-002, at p. 10.
32 D.10-06-002, at pp. 10-11.
to participate directly in CAISO markets on behalf of IOU retail customers until the CPUC develops adequate customer protections.”

These conclusions and orders have no basis in the law. As repeatedly stated herein, D.10-06-002 provides no statutory authority, citation, or analysis in support of this conclusion and, in further disdain for the law, rejects the need to establish that the Commission has any regulatory authority over DRPs in the first place. In fact, the Joint Parties are amazed that D.10-06-002 chose to quote from FERC, using language that offers no jurisdictional support for the Commission, while completely ignoring FERC’s more relevant determination that DRPs are not public utilities. As the Joint Parties detailed in their Opening Brief:

“Of note, FERC in its Order 719, which directs the CAISO to revise its tariffs to create direct bid-in opportunities for DRPs, equates such DRPs, not to regulated utilities, but to non-utility generators. Of even greater significance, on January 19, 2010, FERC issued an order expressly finding that an entity engaged in providing demand response services or resources is not a public utility engaged in the sale of electricity and subject to FERC’s jurisdiction. In making this determination, FERC rejected an earlier determination that certain demand reduction transactions could involve the ‘sale for resale of energy,’ and concluded that ‘demand response’ involves only ‘a reduction in the consumption of electric energy by customers’ in response to increased electric costs or incentive payments.”

The bottom line is that D.10-06-002 has attempted to do indirectly what it cannot do directly – infuse the Commission with regulatory jurisdiction over DRPs where no statutory authority exists to do so. In this regard, D.10-06-002 stands in stark contrast to a Proposed Decision issued on May 21, 2010, in R.09-08-009 (alternative-fueled vehicle tariffs (“May 21 EV Proposed Decision”)), which addressed Commission jurisdiction over entities that own or operate a facility that sells electricity at retail to the public for use only as a motor vehicle fuel

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33 D.10-06-002, at p. 19; Ordering Paragraph 3, at p. 24; emphasis added.
(“electric charging stations”). In the May 21 EV Proposed Decision, unlike D.10-06-002, the “Legal Framework” required in resolving that issue – from applicable statutory language to Commission and judicial decisions interpreting those statutes – is examined in depth, with particular focus on the meaning to be given individual terms used in the PU Code. The May 21 EV Proposed Decision notably follows the “canons of statutory interpretation,” including reading statutory terms and analyzing the service at issue in context and concludes that such electric sales do “not make the corporation or person a public utility within the meaning of Pub. Util. Code §216 solely because of that sale, ownership or operation.”

While a later revised version of the May 21 EV Proposed Decision expands on Commission regulatory authority that could be available to provide oversight of electric charging stations, that authority stems from treating such stations, not as public utilities, but as “customers” of regulated public utilities subject to the rules and conditions applicable to receiving electric service from the utility. Significantly, in either version, this Proposed Decision remains grounded in an analysis and application of the “legislative rationale for Commission jurisdiction” tied to “legally enforceable monopolies” and does not attempt to create jurisdiction in the case of electric charging stations where no statutory authority exists.

Further, in response to parties asking for “additional consumer protection oversight” of electric charging stations, the Proposed Decision recognized that it would be up to “the Legislature to expand, if necessary,” existing statutory provisions in the Business and Professions Code.

The recognition in these Proposed Decisions of the legal constraints on Commission jurisdiction and the need to consider the subject services in context is completely missing from

35 R.09-08-009 (EV), Proposed Decision of Commissioner Ryan, at pp. 1, 13-23.
36 R.09-08-009 (EV), Revised Proposed Decision, at pp. 29-31; Conclusions of Law 6 and 7, at p. 46.
37 Id., at pp. 43-44.
38 Id., at p. 35.
D.10-06-002. As the Joint Parties demonstrated in their Opening and Reply Briefs, as well as comments on the similarly flawed Proposed Decision on which D.10-06-002 was based, and repeated herein, DRPs are not public utilities, electric service providers, or any other entity identified and added by the Legislature in the PU Code as entities subject to Commission regulatory jurisdiction. D.10-06-002 does not undertake such analysis, but merely assumes, that the Commission can and will regulate DRPs contrary to the law.

The Commission’s regulatory jurisdiction, however, is defined, and limited, by statute, to be construed in context based on the plain meaning of its terms. This circumstance cannot be ignored, statutes cannot be interpreted to be given a meaning that was never intended, and the Commission cannot invent jurisdiction where none exists. Based on applicable statute, the Commission has no jurisdiction to regulate DRPs today. As a result, by D.10-06-002, the Commission has acted “without, or in excess of, its powers or jurisdiction” and has “not proceeded in the manner required by law.” Rehearing of D.10-06-002 should, therefore, be granted, and the decision reversed to find that the Commission does not have jurisdiction to regulate DRPs in any manner.

III.

D.10-06-002, IN VIOLATION OF PU CODE SECTION 1705, CONTAINS NO FINDING ON THE MATERIAL ISSUE OF THE COMMISSION’S AUTHORITY TO REGULATE DEMAND RESPONSE PROVIDERS FOR ANY PURPOSE.

Both by statute (PU Code §§1705 and 1757.1) and case law, a Commission decision must be supported “by the findings.” Pursuant to Section 1705, a Commission decision must

39 Joint Parties Opening Brief, at pp. 5-17; Joint Parties Reply Brief, at pp. 1-4. This opinion was shared and well-supported in the briefs filed by the Alliance for Retail Energy Markets (AREM). (AREM Opening Brief, at pp. 2-8; AReM Reply Brief, at pp. 2-3.) Both the Joint Parties and AReM fully refuted all of the contrived and meritless “constructions” of the Public Utilities Code and Commission decisions offered by the investor-owned utilities (IOUs) and the Division of Ratepayer Advocates (DRA) in a misplaced and unsupported effort to extend the Public Utilities Code to apply to DRPs. (Id.; Joint Parties Opening Brief, at pp. 14-18; Joint Parties Reply Brief, at pp. 1-4.)

40 PU Code §1757.1(a)(2) and (3).

41 PU Code §1757.1(a)(4).
“contain, separately stated, findings of fact and conclusions of law by the commission on all
issues material to the order or decision….” In applying this provision, the California Supreme
Court has found:

“Findings are essential to ‘afford a rational basis for judicial review and
assist the reviewing court to ascertain the principles relied upon by the
commission and to determine whether it acted arbitrarily, as well as assist parties
to know why the case was lost and to prepare for rehearing or review, assist others
planning activities involving similar questions, and serve to help the commission
avoid careless or arbitrary action.’”42

Thus, as an example, a finding of “public convenience and necessity” requires the Commission
“to state what those factors are and to make findings on the material issues which ensue from the
factors.”43

The material issue in this case is whether the Commission has jurisdictional authority to
regulate DRPs to permit the Commission to “among other things, resolve customer complaints
related to DRPs, establish financial responsibility standards for DRPS, and require DRPS to
inform potential customers that enrolling with the DRP will mean that they will be unenrolled
from DR programs offered by another carrier.”44 Ordering Paragraph 3 prohibits DRPs from
participating in CAISO wholesale electric and ancillary services markets “until the Commission
establishes consumer protection policies.”45 Conclusion of Law 5 suggests that this assertion of
jurisdiction emanates from the Commission’s “role in consumer protection. 46

Does D.10-06-002 include findings identifying the “factors” that support the
jurisdictional reach identified in Conclusion of Law 5 and Ordering Paragraph 3? No. Of the 10
Findings of Fact in D.10-06-002, only one even arguably relates to this issue, and it summarily

42 California Manufacturers Association v. Public Utilities Commission (1979) 24 Cal.3d 251, 258-259 (citing 5
other California Supreme Court decisions in support, including City of Los Angeles v. Public Utilities Commission
(1972) 7 Cal.3d 331, 337).
43 City of Los Angeles v. Public Utilities Commission (1972) 7 Cal.3d 331, 337.
44 D.10-06-002, at pp. 11, 23 (Conclusion of Law 5); emphasis added.
46 D.10-06-002, at p. 23.
states: “The Commission will consider what customer protection policies should be developed for DRPs in a subsequent phase of this proceeding.”

This is not a finding of fact, but an assumption that the Commission has the requisite regulatory authority to impose such rules on DRPs. No law, “factors,” or other “findings” are identified for, or in support of, this assumption.

In fact, it could be concluded that, in D.10-06-002, the Commission demonstrates a complete indifference to the PU Code. Yet, these laws define Commission authority and have a purpose that has been embraced by the courts and serves to ensure that the Commission’s decisions are comprehensible, consistent with the law that governs the Commission, and are not arbitrary and capricious. However, as demonstrated herein, D.10-06-002 provides no authority for asserting that such a Commission “role” or jurisdiction over DRPs for any purpose has been established by the Legislature. The legal insufficiency of D.10-06-002 is inescapable - D.10-06-002 does not comply with PU Code Section 1705, provides no “rational basis” for its material determination that it can and will regulate DRPs, is a “careless [and] arbitrary action” by the Commission, and must, in turn, be reversed.

IV.
D.10-06-002 IMPOSES IMPERMISSIBLY VAGUE REGULATIONS ON DEMAND RESPONSE PROVIDERS IN VIOLATION OF DUE PROCESS PROTECTIONS.

The basic due process rights of notice and opportunity to be heard for DRPs are compromised and violated not only by the absence of findings in D.10-06-002 discussed above, but by its imposition of impermissibly vague consumer protection “regulations” on DRPs. All DRPs know as a result of D.10-06-002 is that the Commission intends to impose and enforce “consumer protection” rules against DRPs that are yet to be identified (“among other things”) and, in three respects, have only been broadly stated as involving the resolution of “customer

47 D.10-06-002, Finding of Fact 5, at p. 22.
48 California Manufacturers Association, supra, 24 Cal.3d at 258-259.
complaints,” the establishment of “financial responsibility standards,” and limitations on DRP interactions with its customers. Nowhere in D.10-06-002 does the Commission identify the “customer complaints” it intends to resolve, the process for resolving those complaints, or even a need for such requirements in the first place, based on facts specific to demand bidding or an analysis of other existing consumer protection laws. Nowhere in D.10-06-002 are the “financial responsibility standards” identified or defined. Nowhere in D.10-06-002 is the basis for, or extent of, Commission interference with DRP customers established. While not relevant to whether the Commission is legally empowered to regulate DRPs, which it is not, the Joint Parties again emphasize that D.10-06-002 completely fails to establish any specific risk to large consumers in the context of a direct bidding program that warrants “consumer protection” regulations to be imposed by this Commission on DRPs in the first place.

The courts have long held that due process is violated when a statute or “administrative regulation” does not provide adequate notice or sufficient specificity of the conduct proscribed or a rational basis for such rules to avoid arbitrary, subjective, or discriminatory application. 49 D.10-06-002 is a model of an impermissibly vague, arbitrary “administrative regulation” made worse by the Commission, not just failing to specify, but leaving completely open what rules it “will” develop for application to DRPs in the future.

Put simply, a DRP has no notice today of the basis for the Commission “regulating” DRPs, and no notice of the conduct that will be proscribed. As a result, D.10-06-002 fails to meet the basic requirements of due process and, in turn, is open to arbitrary, subjective, and

49 See, e.g., People v. Superior Court (1988) 46 Cal.3d 381, 389-390 (a statute or “administrative regulation” must be sufficiently definite to provide adequate notice of the conduct proscribed and must be written with sufficient specificity so as to avoid arbitrary, subjective, or discriminatory application).
discriminatory application that will inappropriately chill private enterprise. Rehearing of D.10-06-002 must be granted.\footnote{People v. Superior Court, supra, 46 Cal.3d at 389-390. As the Commission has seen firsthand recently, clarity in its regulations is not only necessary to provide notice to those affected, but also to ensure that the IOUs themselves do not improperly interfere with other legitimate California businesses or entities. (See, Resolution E-4250 (April 8, 2010) (providing additional “guidance” to the IOUs on Community Choice Aggregation rules)).}

V. CONCLUSION

D.10-06-002 is a deeply flawed order and fails to provide any support for the Commission extending its jurisdiction to include regulation of DRPs. By D.10-06-002, the Commission has exceeded its jurisdiction, failed to proceed in the manner required by law, failed to provide any finding in support of its conclusion that it can and will regulate DRPs, and created an impermissibly vague decision that violates the due process rights of DRPs. Rehearing of D.10-06-002 must be granted, and its conclusion and order seeking to regulate DRPs eliminated in their entirety.

Respectfully submitted,

July 2, 2010

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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 July 2, 2010, I served the within document APPLICATION OF ENERNOC, INC., ENERGY CONNECTION, INC., AND CPower, INC. (“JOINT PARTIES”) FOR REHEARING OF DECISION 10-06-002 in R.07-01-041 (DR), with service on the R.07-01-041 service list in the manner prescribed by the Commission’s Rules of Practice and Procedure and with additional and separate electronic service and hard copy delivery of this Application for Rehearing by U.S. Mail to Assigned Commissioner Grueneich and Assigned ALJs Hecht, Sullivan, and Farrar at San Francisco, California.

Executed on July 2, 2010, at San Francisco, California.

/s/ SARA STECK MYERS
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