

Decision 10-03-023

March 11, 2010

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

Application of Southern California Edison Company (U338E) for Approval of Demand Response Programs, Goals and Budgets for 2009-2011.	Application 08-06-001 (Filed June 2, 2008)
And Related Matters.	Application 08-06-002 Application 08-06-003

**ORDER MODIFYING DECISION (D.) 09-08-027 AND  
DENYING REHEARING OF DECISION, AS MODIFIED**

**I. INTRODUCTION**

In this Order we dispose of the application for rehearing of Decision (D.) 09-08-027 (or “Decision”) filed by Transphase Company (“Transphase”).

The Decision adopted 2009-2011 demand response (“DR”) activities and budgets for Pacific Gas & Electric Company (“PG&E”), Southern California Edison Company (“SCE”), and San Diego Gas & Electric Company (“SDG&E”) (collectively, “the utilities”). The total combined budget adopted for the three utilities is \$349,509,463. The funding will support a range of DR programs and activities, including Emergency Programs, Price Responsive Programs, Individual Utility Programs, Emerging Markets and Technologies Programs, Marketing, Education, and Outreach, and various Pilot Programs for 2010-2011.

We also evaluated various Permanent Load Shifting (“PLS”) proposals submitted by the utilities and two third-party vendors, Ice Energy and Transphase. Permanent load shifting occurs when a customer moves energy usage from one time period to another on an ongoing basis. Permanent load shifting can be achieved by storing electricity produced during off-peak hours and then using the stored energy to

support load during periods when peak energy use is typically high.<sup>1</sup> We have supported investment in certain PLS technologies as a means to encourage load shifting. Examples of PLS technologies include thermal energy storage (“TES”),<sup>2</sup> battery storage, and the pumping and storage of water.

We declined to authorize new utility PLS solicitations at this time.

However, we did authorize the utilities to continue their existing pilot PLS contracts approved in Resolution E-4098.<sup>3</sup> We denied Ice Energy’s proposal because it lacked detailed analysis or implementation plans necessary to evaluate the cost-effectiveness, benefits and overall quality of the proposal.<sup>4</sup> Our Decision also denied the Transphase TES proposal because it was not clear that the proposal was cost-effective or in the public interest.<sup>5</sup>

Transphase filed a timely application for rehearing challenging the Decision on the grounds that it: (1) violates Public Utilities Code sections 454.5 and 454.55;<sup>6</sup> (2) errs in its finding regarding cost-effectiveness; (3) wrongly applies a “least cost, best fit” approach; (4) is anti-competitive; and (5) refuses to regulate. A response to the application was filed by PG&E, SDG&E, and SCE (jointly).

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<sup>1</sup> See D.09-08-027, at p. 167.

<sup>2</sup> Thermal energy storage draws electricity during off-peak hours, which is then stored in the form of thermal energy in ice, chilled water, or a eutectic salt solution. The stored energy can be used during peak hours, generally to cool buildings without drawing additional electricity from the power grid during the day.

<sup>3</sup> D.09-08-027, at p. 171. In *Order Adopting Changes to 2007 Utility Demand Response Programs* [D.06-11-049] (2006) \_\_Cal.P.U.C3d \_\_, at p. 52 (slip op.), we authorized initial utility expenditures to pursue PLS projects and directed the utilities to conduct a request for proposals (“RFP”) competitive solicitation process. In Resolution E-4098, dated July 26, 2007, we evaluated the results of the solicitation and authorized particular projects. Because we view many PLS technologies as new and emerging markets, the approved utility projects were deemed pilots subject to further evaluation regarding issues such as cost-effectiveness, ease of implementation, the amount of load shifting that can be obtained, potential for growth and expansion, and reliability of the technology. (Resolution E-4098, at p. 23 [Findings of Fact Nos. 3, 7 & 8].)

<sup>4</sup> D.09-08-027, at p. 173.

<sup>5</sup> D.09-08-027, at pp. 179-180.

<sup>6</sup> All subsequent section references are to the Public Utilities Code unless otherwise stated.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that while the Decision is lawful, it would benefit from modifications to clarify the evidentiary support for our finding regarding Transphase's TES proposal. Good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.09-08-027, as modified herein, because no legal error has been shown.

## II. DISCUSSION

### A. Alleged Violation of Public Utilities Code Sections 454.5 and 454.55

Transphase contends the Decision errs because: (1) denial of its thermal energy storage proposal violates Public Utilities Code sections 454.5 and 454.55; and (2) the direction for further study is beyond the scope of this proceeding and relevant legislation. (Rhg. App., at pp. 4-9.)

#### 1. The Statutes

Transphase argues that sections 454.5 and 454.55 operate to require the Commission to target and approve, *all* project proposals that are cost-effective, reliable, and feasible peak demand reduction resources.<sup>7</sup> Specifically, Transphase relies on section 454.5(b)(9)(C), which states:<sup>8</sup>

The electrical corporation will first meet its unmet resource needs through all available energy efficiency and demand reduction measures that are cost-effective, reliable, and feasible.

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<sup>7</sup> Transphase contends the Energy Action Plan II ("EAP") supports its position. We agree the EAP reflects our support for demand response, but it does not impose any requirement for individual project approval. The EAP is a policy document which acts as an "Implementation Roadmap for Energy Policies." (EAP II, dated October 2005, at p. 2. EAP II can be located at: [www.cpuc.ca.gov/PUC/energy/Resources/Energy+Action+Plan/](http://www.cpuc.ca.gov/PUC/energy/Resources/Energy+Action+Plan/). Transphase also references Chapter 850, Stats. 2002 (Senate Bill ("SB") 1976.). SB 1976 was merely a precursor to the current section 454.5.

<sup>8</sup> Transphase quotes excerpts from Section 1301, Energy Independence and Security Act of 2007 ("EISA") (H.R. 6, 100<sup>th</sup> Congress). The quoted language is a general statement of federal support for certain technologies including thermal energy storage. As Transphase concedes, EISA imposes no project approval requirement on states. (Rhg. App., at p. 5.)

Transphase then argues the Commission is obligated to regulate and enforce the alleged approval requirement under section 454.55, which states:

The commission, in consultation with the State Energy Resources Conservation and Development Commission [Energy Commission], shall identify all potentially achievable cost-effective electricity energy efficiency savings and establish efficiency targets for an electrical corporation to achieve pursuant to Section 454.5.

Implicit in Transphase's argument is the presumption that its proposed TES project is cost-effective, reliable, and feasible. We disagree. Our Decision found the evidence to be inconclusive regarding cost-effectiveness.<sup>9</sup> We made no findings related to the reliability or feasibility of Transphase's specific proposal. Although Transphase suggests we "effectively conceded" that its project is reliable and feasible, the statements Transphase relies on merely reflect our opinion of TES technologies generally, or are assertions from Transphase's own testimony. (Rhg. App., at p. 8, fn. 5.)

We also disagree with Transphase's interpretation of sections 454.5 and 454.55. In interpreting statutes we are guided by traditional statutory interpretation principles which provide that the meaning of a statute should be determined by first looking to its plain language, giving words their ordinary or "plain meaning."<sup>10</sup>

The plain language of section 454.5(b)(9)(C) applies to direct *utility* actions, not Commission action. The plain language of section 454.55 merely directs this Commission and the Energy Commission to "identify" overall energy efficiency goals and savings that utilities should meet. Nothing in the plain language of either statute mandates the Commission to approve any particular projects.

Even if there were some ambiguity regarding the meaning of these statutes, when read in context and viewed consistent with their legislative histories, it is clear that

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<sup>9</sup> D.09-08-027, at pp. 177-182.

<sup>10</sup> *People v. Canty* (2004) 32 Cal.4<sup>th</sup> 1266, 1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

neither statute applies to demand response and PLS projects, particularly independent third-party proposals such as Transphase's.<sup>11</sup>

Viewed in its entirety, section 454.5 relates to ongoing utility procurement of energy supply to satisfy unmet energy demand. The statute establishes a process for the utilities to submit proposed procurement plans for Commission review. Among other things, section 454.5 establishes minimum content requirements for utility plans, as well as objectives to be served.

In that context, section 454.5(b)(9)(C) attempts to minimize the amount of new energy resources a utility should acquire by directing the utility to first try to and meet the energy need by utilizing load reduction and load shifting measures such as energy efficiency and demand response, if those measures are cost-effective, reliable, and feasible. Section 454.5 applies only to utility procurement plans. It is not used to evaluate the merits of demand response or PLS proposals.

Similarly, section 454.55 is not related to demand response program review. It applies to utility energy efficiency programs. PLS technologies such as Transphase's TES proposal are not considered to be energy efficiency programs.<sup>12</sup>

The Legislative histories of the two statutes also fail to support Transphase's interpretation. Our review indicates that section 454.5 was enacted to serve three purposes: (i) to require utilities to resume procuring energy following the 2000-2001 California Energy crisis;<sup>13</sup> (ii) to provide "guidance" going forward;<sup>14</sup> and (iii) to ensure utilities have diversified utility procurement portfolios at reasonable rates.<sup>15</sup>

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<sup>11</sup> See *Walnut Creek Manor v. Fair Employment & Housing Commission* (1991) 54 Cal.3d 245, 268; *Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4<sup>th</sup> 1233, 1239.

<sup>12</sup> D.09-08-027, at p. 167. See also D.06-11-049, *supra*, at p. 49 (slip op.).

<sup>13</sup> See e.g., Sen. Rules Comm., Off. of Sen. Floor Analyses, 3rd Reading of AB 57 (2005-2006 Reg. Sess.) as amended June 24, 2005, p. 1. During the 2000-2001 energy crisis the Legislature authorized the State Department of Water Resources ("DWR") to procure the "net short" energy requirements of the electric utilities.

<sup>14</sup> AB 57 Section 1.(a) and (b).

<sup>15</sup> AB 57 Section 1.(c).

Our review indicates that section 454.55 was enacted only to codify certain Commission energy efficiency decisions, and require utilities to acquire energy efficiency before conventional generation or other resources.<sup>16</sup> There is nothing at all in the respective legislative histories to suggest a Legislative intent to mandate Commission approval of any individual projects.

## **2. Requirement for Further Study**

Transphase contends the Decision errs in directing any further study before approving new PLS proposals. Transphase argues such direction is beyond the scope of sections 454.5 and 454.55, beyond the scope of the proceeding, and otherwise irrelevant. (Rhg. App., at pp. 7-9.)

In requiring further study, the Decision reasons:

Many circumstances relevant to the expansion of permanent load shifting are likely to change by 2011. For example, it is likely that AMI meters and dynamic rates will be in broader use by 2011 and 2012....<sup>17</sup>

.... Based on information provided by parties in this proceeding we do not have enough information to decide whether a RFP process to solicit contracts with third parties or a standard offer eligible to all types of permanent load shifting vendors is the best answer going forward for permanent load shifting. Additionally, no parties addressed whether a standard offer could be effective for all types of permanent load shifting or whether it would need to be limited to thermal energy storage....

... the Commission is already pursuing permanent load shifting activities through a Commission-ordered RFP process....This decision orders further study of possible strategies for increasing the availability of Permanent Load Shifting in the future. This is consistent both with the

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<sup>16</sup> See Sen. Rules Comm., Off. of Sen. Floor Analyses, SB 1037 (2005-2006 Reg. Sess.), as amended August 15, 2005, p. 2.).

<sup>17</sup> D.09-08-027, at p. 171.

provisions of the public utilities code and with the Commission's responsibility to spend ratepayer funding effectively and efficiently.<sup>18</sup>

Contrary to Transphase's contention, it is lawful to require further study. Our authority to act is broadly construed, and is limited only when there is an express statutory prohibition.<sup>19</sup> Even if the statutes applied to this matter, nothing in either statute expressly bars us from requiring further study.

Nevertheless, Transphase asserts further study is unnecessary because there is nothing to be gained from comparing TES with other PLS technologies.<sup>20</sup> (Rhg. App., at p. 7.) Transphase is entitled to its viewpoint, however, that does not preclude the Commission from taking a comparative approach. A comparison of the relative costs and benefits of PLS technologies is consistent with our stated preference for a more comprehensive and generic approach in evaluating PLS technologies.<sup>21</sup>

Finally, Transphase suggests that two prior Commission decisions apply here to warrant use of standard offer contracts (as Transphase proposed) and negate any need for a comparison of PLS technologies. (Rhg. App., at p. 7, relying on *Re Southern California Edison Company* [D.87-12-066] (1987) 26 Cal.P.U.C.2d 392, 472-476; and *Re Southern California Edison Company* [D.91-12-076] (1991) 42 Cal.P.U.C.2d 645, 725.)

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<sup>18</sup> D.09-08-027, at pp. 180-181.

<sup>19</sup> See e.g., *Consumers Lobby Against Monopolies v. California Public Utilities Commission* (1979) 25 Cal. 3d 891, 905-906.

<sup>20</sup> Transphase also suggests that study of time-of-use ("TOU") rate impacts or other standard offers throughout the United States is irrelevant and improper. (Rhg. App., at pp. 7-8.) This is incorrect. Rate design strategies such as dynamic pricing and TOU rates are load shifting strategies that are integral to the consideration of PLS technologies, and we have previously directed utilities to study such impacts in the PLS context. (See e.g., D.06-11-049, *supra*, at p. 52 (slip op.)) Further, nothing bars the Commission from looking to related information and developments in other states.

<sup>21</sup> (See e.g., D.06-11-049, *supra*, at p. 52 (slip op.); Resolution E-4098, dated July 26, 2007, at p. 23 [Findings of Fact Nos. 7 & 17].)

While the two decisions reflect our support for TES development, they do not bind us or guide us here. In those instances, we approved significantly smaller utility TES projects. We did not adopt any generic findings, procedures, or protocols that would apply for purposes of other individual TES proposals. And the decisions did not encompass considerations that may be relevant to approval of independent third-party vendor projects such as Transphase's. In fact, we have been reluctant to approve independent third-party projects that have not been vetted through a utility solicitation process.<sup>22</sup> Even if we were inclined to look to these decisions for guidance, in this instance they do not contain sufficient factual information or discussion of the projects in question to allow us to make an informed comparison with Transphase's proposed TES project.

## **B. Alleged Error in the Finding Regarding Cost-Effectiveness**

Transphase contends the Decision: (1) errs in finding it was unclear whether Transphase's proposed TES project is cost-effective; and (2) fails to state adequate findings consistent with section 1705.<sup>23</sup> (Rhg. App., at pp. 9-13.)

### **1. Evidence Supporting the Decision's Finding**

In Transphase's view, the spreadsheets and exhibits it submitted during the proceeding were sufficient to establish its proposal is cost-effective. Transphase asserts that in finding otherwise, we ignored pertinent aspects of its proposal.<sup>24</sup> (Rhg. App., at pp. 10-11.)

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<sup>22</sup> D.06-11-049, *supra*, at p. 52 (slip op.)

<sup>23</sup> Transphase asserts that the Administrative Law Judge ("ALJ") improperly denied its Motion to Compel certain information from the utilities, and refused to allow Transphase to cross-examine witnesses. (Rhg. App., at p. 12.) This is incorrect. Transphase's Motion sought data that was either not relevant for purposes of evaluating TES or other PLS technologies, or confidential. Accordingly, it was appropriate to deny Transphase's Motion. Further, Transphase did cross-examine witnesses. Transphase was precluded only from cross-examination regarding confidential information.

<sup>24</sup> Transphase also suggests its proposal must be cost-effective since the Commission has allowed a more expensive PG&E project (Shift and Save). (Rhg. App., at p. 10.) It is not possible to compare the projects to reach such a conclusion. As Transphase acknowledges, PG&E's project is a pilot. The results and evaluation of existing pilots are currently pending. Moreover, the Decision does not find that PG&E's project is cost-effective as Transphase states. The Decision merely states that PG&E found its

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The Commission has an obligation to consider and weigh all the evidence, and we did so here. However, in this case, there was convincing evidence to show that Transphase's case for cost-effectiveness could not be established with reasonable certainty.

In reaching our conclusion we looked to Transphase's own testimony, which admitted that its proposed incentive payments are "extraordinary."<sup>25</sup> Transphase did not then, and does not now, establish how we could lawfully approve "extraordinary" costs without contravening our statutory obligation is to ensure ratepayers are charged only just and reasonable rates.<sup>26</sup>

We were also persuaded by the arguments of various other parties who asserted Transphase's proposal was too expensive and not cost-effective.<sup>27</sup> In particular, we agreed with testimony which demonstrated at least three significant flaws in Transphase's cost-effectiveness analysis.<sup>28</sup> Transphase improperly calculated the Total Resource Cost ("TRC") as required by the Standard Practice Manual.<sup>29</sup> Its analysis was

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pilot to be cost-effective. (D.09-08-027, at p. 177.)

<sup>25</sup> Exh. 1025, at p. 12 (Transphase/Ames); Reporter's Transcript ("RT") Vol. 5, at p. 674 l:13-28, p. 675 l:1-3, and p. 679 l: 9-19 (Transphase/Ames).

<sup>26</sup> See e.g., Pub. Util. Code, § 451. Even if Pub. Util. Code, § 454.5 applied, it too requires just and reasonable rates. (See Pub. Util. Code, § 454.5(d)(5).) In addition, Transphase now claims its project costs can easily be reduced from the \$111 million originally proposed to perhaps \$60 million. (Rhg. App., at p. 18.) It is difficult to conceive how the proposal that we evaluated could reasonably have been found cost-effective if at least \$40 million in expenditures can so easily be eliminated.

<sup>27</sup> See e.g., Exh. 421, at pp. 2-3 (The Utility Reform Network ("TURN")/Nahigian); Turn Reply Brief, dated February 11, 2009, at pp. 22-24; Reply Brief of the Division of Ratepayer Advocates, dated February 11, 2009, at pp. 14-15; Joint Opening Brief of PG&E, SDG&E and SCE, dated February 4, 2009, at pp. 1-5, 8-10.

<sup>28</sup> See D.09-08-027, at p. 15 regarding the requisite cost-effectiveness tests for demand response programs. Analyses should comply with the State's Standard Practice Manual and the Consensus Framework. The Standard Practice Manual identifies cost and benefit components and cost-effectiveness calculation procedures from four major perspectives: Ratepayer Impact Measure ("RIM"), Participant and Program Administrator Cost ("PAC"), and Total Resource Cost ("TRC"). The Standard Practice Manual can be located at: [http://www.energy.ca.gov/greenbuilding/documents/background/07-J\\_CPUC\\_STANDARD\\_PRACTICE\\_MANUAL.PDF](http://www.energy.ca.gov/greenbuilding/documents/background/07-J_CPUC_STANDARD_PRACTICE_MANUAL.PDF)

<sup>29</sup> Compare Exh. 12, at p. 24 (SCE) and Exh. 1025, Table 2 (Transphase).

inconsistent with the November 19, 2007, Consensus Framework.<sup>30</sup> And Transphase improperly calculated transmission and distribution (“T&D”) costs.<sup>31</sup>

In view of the above, there was at best conflicting evidence regarding the issue which could not be reconciled. It was thus reasonable and appropriate to find the issue was unclear and defer our determination pending further study and consideration.

## 2. Findings Required Under Section 1705

Transphase contends the Decision’s findings fail to comply with the requirements of section 1705 and related case law. (Rhg. App., at pp. 10-12.) As explained below, while we believe our Decision complies with the applicable law, we do agree the Decision could benefit from further clarification regarding the evidence we relied on. Accordingly, we will modify D.09-08-027 as set forth in the ordering paragraphs of this Order.

Section 1705 requires that Commission decisions contain separately stated findings of fact and conclusions of law on all issues material to the order or decision.<sup>32</sup> Relevant case law instructs that among other things, the Commission’s findings must be adequate to afford a rational basis for judicial review, and allow parties to understand why the case was lost.<sup>33</sup>

The finding Transphase takes issue with states: “[A]t this point, it is unclear whether the standard offer proposal as described by Transphase is cost effective or in the public interest.”<sup>34</sup> Transphase appears to take the position that this finding is inadequate because the law requires the Commission to state a definitive (i.e., yes/no) finding on the

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<sup>30</sup> See Exh. 202, at pp. 4-14, 4-15 (PG&E/Keane); RT Vol. 5, at p. 656 l: 8 – 657 l: 16 (Transphase/Ames).

<sup>31</sup> Exh. 421, at pp. 4-7 (TURN/Nahigian); Exh. 1, at pp. 215-216 (SCE/Silsbee); Exh. 7, at pp. 5-6 (SCE/Silsbee); Exh. 202, at pp. 4-7, 4-8 (PG&E/Keane).

<sup>32</sup> Pub. Util. Code § 1705 states in pertinent part: “...the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision.”

<sup>33</sup> *Utility Consumers’ Action Network v. Public Utilities Commission* (2004) 120 Cal.App.4<sup>th</sup> 644, 662; *Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813.

<sup>34</sup> D.09-08-027, at p. 177.

issue of cost-effectiveness. Nothing in section 1705 or relevant case law imposes such a requirement. The Commission is only required to fulfill its duty to weigh the evidence and render a finding on the issue. As explained above, the evidence in this proceeding did not support a definitive finding.

Further, the Decision's findings and explanation are adequate to enable a rehearing applicant and a reviewing court to know why Transphase's proposal was denied. With respect to Transphase, the Decision found the evidence to be unclear. It also found that the proposed incentive levels may be higher than appropriate,<sup>35</sup> and that section 454.5 does not mandate the approval of the proposal.<sup>36</sup> We also went on to discuss other relevant factors warranting denial of any new PLS at this time. Such factors included that: additional facts are needed before the Commission can make an informed determination regarding approval of new PLS projects;<sup>37</sup> and circumstances relevant to expansion of PLS may change in the near future.<sup>38</sup>

Nevertheless, we believe the Decision could be strengthened by clarifying some of the specific evidence that supported our finding. Specifically, we are clarifying that we relied on Transphase's testimony as well as evidence that its cost-effectiveness analysis was flawed. Accordingly, D.09-08-027 is modified as set forth in the ordering paragraphs of this Order.

Finally, Transphase contends there is nothing in the record to support the Decision's Conclusion of Law Number 22 which states: "It is reasonable to defer decisions on the best method for expanding the availability of permanent load shifting until more information is available."<sup>39</sup> (Rhg. App., at p. 12.)

Conclusion of Law 22 flows from the discussion language in the Decision quoted in Part B.2. above. The point is, it is reasonable to defer action in view of the *lack*

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<sup>35</sup> D.09-08-027, at pp. 177-178.

<sup>36</sup> D.09-08-027, at p. 179.

<sup>37</sup> D.09-08-027, at p. 181.

<sup>38</sup> D.09-08-027, at p. 171.

<sup>39</sup> D.09-08-027, at p. 234 [Conclusion of Law Number 22].

of information and record on a number of pertinent issues. While Transphase's argument attempts to put the Commission in the position of proving a negative, as we established above it is lawful and within the Commission's discretion to require further study and defer a decision on any new PLS expansion until more information is available.

**C. Alleged Wrongful Application of "Least Cost, Best Fit" Approach**

Transphase contends that in rejecting its proposal, the Decision ignored the statutory scheme and instead wrongly employed a new "least cost, best fit" standard for evaluation. (Rhg. App., at pp. 13-15.)

Contrary to Transphase's assertion, there is nothing in the record or the Decision that would support this contention. The Decision correctly identifies the established tests employed to evaluate demand response programs, and those tests are contained in the State's Standard Practice Manual and the Consensus Framework.<sup>40</sup> Specifically, cost-effectiveness is analyzed using a Total Resource Cost ("TRC") test, a Ratepayer Impact Measure ("RIM") test, and a Participant and Program Administrator Cost ("PAC") test.<sup>41</sup> "Least cost, best fit" is not an element of demand response program review and nowhere does the Decision articulate the use of, or evidence any application of, a "least cost, best fit" approach.

Further, we did not ignore any applicable statutory scheme. Transphase again relies on sections 454.5 and 454.55 to argue they contain nothing which would allow review of incentive levels. However, as demonstrated in Part A.1. of this Order, these statutes do not apply. Even if they did, they contain no prohibition on issues or costs that the Commission may consider.

Transphase also takes issue with the following language in the Decision:

Setting the maximum [incentive] payment too high could encourage vendors to overcharge for their systems, which would not be in the public interest. In the case of the

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<sup>40</sup> D.09-08-027, at p. 15.

<sup>41</sup> See *ante*, fn. 28.

Transphase proposal, a comparison of the incentive amount with objective measures such as the cost of the initial investment in Thermal Energy Storage equipment makes a compelling case that the incentive is too high.<sup>42</sup>

Transphase argues that it is “horrific public policy” for the Commission to evaluate incentives and vendor payments. Transphase views any such review as an improper attempt to regulate vendor profit margins contrary to fundamental concepts of a free marketplace. (Rhg. App., at pp. 13-14.)

Transphase’s free market preferences and policy arguments ignore that here it is seeking regulatory approval for its proposal, and more specifically, ratepayer funding. In approving such funding, this Commission has a statutory obligation to protect the public interest, and ensure just and reasonable rates. Commission review of proposed project and program costs is inherent to fulfilling these functions, including evaluation of appropriate incentive levels when incentives are a project component to be funded by ratepayers.

Finally, Transphase contends the Decision relied on a “totally nebulous, imprecise, and unclear” comparison chart of the costs of various energy storage technologies presented by Mr. MacCracken.<sup>43</sup> Transphase claims the Decision used that chart as the “objective measure” of the cost of thermal energy storage. (Rhg. App., at pp. 14-15, referencing Exh. 1025, at pp. 71-78.)

While we must consider and weigh all the evidence, Transphase points to nothing which demonstrates the Decision specifically relied on Mr. MacCracken’s testimony to reach any conclusion. In fact, our Decision made no finding regarding the comparative costs of various energy storage technologies. On this point, even Transphase concedes the Decision merely notes that the costs may vary more widely. (Rhg. App., at p. 15.)

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<sup>42</sup> D.09-08-027, at p. 179.

<sup>43</sup> Mr. MacCracken testified in support of thermal energy storage on behalf of CALMAC Mfg. Corp.

**D. Alleged Anti-Competitive Result**

Transphase asserts that the Decision is anti-competitive, based on repeated allegations that it is improper to require further study. In particular, Transphase contends that a comparison of PLS technologies will stifle innovation, and any lowering of vendor incentive payments would micro-manage the PLS marketplace. Transphase also questions the usefulness of any future utility request for proposals solicitation process. (Rhg. App., at pp. 16-17.)

We recognize Transphase's views and differing policy preferences. However, Transphase's arguments fail to establish any legal error in the Decision. Transphase reiterates its general reliance on "California law", but identifies no new authorities beyond those already addressed in this Order. As already discussed, the authorities relied on by Transphase do not apply to render any aspect of the Decision unlawful.

**E. Alleged Refusal to Regulate**

Transphase broadly asserts that the Commission has a duty to regulate. While it is not explicitly stated, it appears Transphase means that we are required to approve its TES proposal. To support this result, Transphase discusses portions of its testimony and brief regarding cost aspects of its proposal. In addition, Transphase presents revised budget estimates to reduce the overall project cost over the term of the proposed contract.<sup>44</sup> (Rhg. App., at pp. 17-19.)

Transphase's discussion fails to allege, specify, or establish any legal error as required under the standard for applications for rehearing under section 1732.<sup>45</sup> There is no applicable legal authority that requires the Commission to approve its proposal. Transphase merely attempts to relitigate whether its proposal is cost-

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<sup>44</sup> During the proceeding evidence indicated Transphase's TES project costs would be in the area of \$111 million. (See e.g., D.09-08-027, at p. 175; Exh. 1025, at p. 9 (Transphase/Ames). Transphase now states project costs could be reduced to approximately \$60 million. (Rhg. App., at p. 18.)

<sup>45</sup> Pub. Util. Code, § 1732 provides in pertinent part: "The application for rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful."

effective and submit new evidence in its application for rehearing. Neither is proper or permissible in an application for rehearing.

### III. CONCLUSION

For the reasons stated above, D.09-08-027 is modified to reflect the clarifications specified below. The application for rehearing of D.09-08-027, as modified, is denied because no legal error has been shown.

Therefore **IT IS ORDERED** that:

1. D.09-08-027 is modified as follows:
  - a. On page 178, at the start of second full paragraph, the following shall be added:

“Transphase’s own testimony admits that its proposed incentive levels are “extraordinary. (See RT Vol. 5, at pp. 674-675, 679.)”
  - b. On page 180, at the end of first full paragraph, the following shall be added:

“As the record in this proceeding demonstrates, there were several flaws in Transphase’s analysis. The analysis did not conform to the requirements of the State’s Standard Practice Manual and the Consensus Framework. ( SCE Exh. 12, at p. 24; PG&E Exh. 202, at pp. 4-14, 4-15; TURN Exh. 421, at pp. 4-7.)”
  - c. On page 230, the following findings of fact shall be added:
    46. There is conflicting evidence regarding the cost-effectiveness of Transphase’s proposed thermal energy storage project.
    47. The State Standard Practice Manual and Consensus Framework set forth the tests for cost-effectiveness of demand response programs.
    48. Public Utilities Code section 454.5 applies to utility proposed procurement plans.
    49. It is unclear from the record that Transphase’s thermal energy storage proposal is cost-effective or in the public interest.
  - d. On page 234, the following conclusion of law shall be added:

23. Public Utilities Code section 454.5 does not apply to require approval of Transphase's proposal.

2. Rehearing of D.09-08-027, as modified, is hereby denied.

3. This proceeding, Applications (A.) 08-06-001, A.08-06-002, and A.08-06-003, is closed.

This order is effective today.

Dated March 11, 2010, at San Francisco, California.

MICHAEL R. PEEVEY  
President

DIAN M. GRUENEICH

JOHN A. BOHN

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners