

Decision 10-12-060

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

**ORDER MODIFYING DECISION (D.) 10-06-002,
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 10-6-002 (or “Decision”), filed by EnerNOC, Inc., EnergyConnect, Inc., and CPower, Inc. (collectively the “Joint Parties”).

In 2008, FERC issued Order 719, which required Independent System Operators such as the California Independent System Operator (“CAISO”) to modify their tariffs to allow retail customers to bid Demand Response (“DR”) directly into the wholesale electric and ancillary services markets, on their own behalf or through aggregators, unless direct bidding is prohibited by laws or regulations of the relevant state or local retail regulatory authorities.¹

In D.10-06-002, we considered issues related to Commission oversight of retail DR direct bidding participation, and determined that the Commission has

¹ See *Wholesale Competition in Regions with Organized Electric Markets* (October 17, 2008) 125 F.E.R.C. ¶ 61,071 (“FERC Order 719”). See also *Wholesale Competition in Regions with Organized Electric Markets* (July 16, 2009) 128 F.E.R.C. ¶ 61,059 (“FERC Order 719-A”).

jurisdiction over demand response providers (“DRPs”) to, among other things, resolve DRP customer complaints and establish financial responsibility standards.

(D.10-06-002, at p. 11.) The Decision also prohibited DRPs from participating in direct bidding on behalf of IOU retail customers until the Commission has established consumer protection rules and policies. (D.10-06-002, at pp. 2, 19, 24 [Ordering Paragraph Number 3].)

The Joint Parties filed a timely application for rehearing challenging the Decision on the following grounds: (1) the Decision violated Public Utilities Code section 1705 by failing to make adequate findings regarding Commission authority to regulate DRPs;² (2) the Commission acted in excess of its authority to assert jurisdiction over DRPs; and (3) the Decision violated the Joint Parties’ due process rights by imposing impermissibly vague regulations.

Responses were filed by Pacific Gas and Electric Company (“PG&E”), Southern California Edison Company (“SCE”), and the Environmental Defense Fund (“EDF”).

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 add some discussion to our rationale for exercising jurisdiction over DRPs.³ Specifically, modifications will clarify why it is reasonable and lawful to assert jurisdiction within our Constitutional and statutory authority in order to ensure that minimum consumer protections are in place for IOU residential and small commercial retail customers who receive DR service from DRPs. As part of our clarification, we will also add related findings of fact, conclusions of law, and ordering paragraphs. With these modifications, good cause has not been established to grant rehearing. Accordingly, we

² All subsequent section references are to the Public Utilities Code, unless otherwise stated.

³ Demand Response Providers are alternatively referred to as Curtailment Service Providers (“CSPs”) and/or Aggregators of Retail Customers (“ARCs”) by the California Independent System Operator (“CAISO”) and the Federal Energy Regulatory Commission (“FERC”).

deny the application for rehearing of D.09-08-027, as modified herein, because no legal error has been shown.

II. DISCUSSION

A. Findings of Fact Required by Section 1705

Joint Parties assert the Decision violated section 1705 and related case law, because it failed to make adequate findings to support Commission authority over DRPs. (Rhg. App., at pp. 12-14, relying on *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 258-259; and *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337.)

Section 1705 provides 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.

(Pub. Util. Code, § 1705.)

Related case law instructs that the Commission's findings must be sufficient 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 to 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.⁴

Joint Parties correctly argue that jurisdiction over DRPs was a material issue in the proceeding. The issue was specifically raised by the Amended Scoping Memo, parties filed legal briefs regarding the jurisdictional issues, and the Decision explicitly contains a section entitled "jurisdiction." (D.10-06-002, at pp. 6-11.)

⁴ See e.g., *California Manufacturer's Association v. Public Utilities Commission*, *supra*, 24 Cal.3d at pp. 258-259; *City of Los Angeles v. Public Utilities Commission*, *supra*, 7 Cal.3d at p. 337.

However, Joint Parties argue the Decision then erred by making no findings of fact regarding the issue. Further, they argue the Decision failed to provide any rational basis to support Commission authority over DRPs.

In response to Joint Parties' argument, we believe our determination regarding the jurisdictional issue could be more clearly stated. The Decision seems to suggest an intention to defer a determination regarding jurisdiction, but then the Decision proceeds to state that the Commission does have such authority. (See D.10-06-002, at p. 9.) We will modify D.10-06-002 to eliminate this apparent contradiction.

We also realize that more explanation of our intent and rationale regarding our jurisdiction over DRPs would be helpful. Accordingly, we will modify the Decision as specified in the ordering paragraphs of this Order.

B. Commission Authority to Regulate DRPs

Joint Parties contend that by asserting authority over DRPs, the Commission has acted in excess of its powers and jurisdiction. In particular, Joint Parties argue that DRPs are neither public utilities nor energy service providers ("EPS") as defined by the California Constitution and/or statute. And they argue that no reasonable interpretation of the Constitution or applicable statutes could result in such a finding. Consequently, Joint Parties argue the Decision must be reversed. (Rhig. App., at pp. 2-12.)

It was never our intent to assert the Commission's general regulatory authority over DRPs as if they were public utilities, or to specifically designate DRPs as ESPs. And while we see nothing in D.10-06-002 that would purport to do so, we believe there may be a misunderstanding about the basis for our jurisdiction over DRPs in the context of our broad regulation of energy matters authorized by the Constitution and the statutes. Our regulation of DRPs is reasonable and lawful.

The basis for jurisdiction over DRPs is grounded in our inherent broad regulatory authority over energy matters. The exercise of such jurisdictional authority has been affirmed by California Supreme Court decisions. (See e.g., *PG&E Corporation*

v. Public Utilities Commission (“*PG&E Holding Company Decision*”) (2004) 118 Cal.App.4th 1174, 1198-1199, also relying on *Hartwell Corporation v. The Superior Court of Ventura County* (“*Hartwell*”) (2002) 27 Cal.4th 256, 280.) Generally, unless the Legislature has placed a specific statutory limit the Commission’s power, our actions will be upheld so long as they are cognate and germane to utility regulation.⁵

Whether our actions are cognate and germane depends on whether the action is perceived as necessary to the Commission’s exercise of legitimate regulatory functions. Such authority has at times been found to extend over non-public utilities.⁶ For example, in *PG&E Holding Company Decision, supra*, the Court found jurisdiction over holding companies by reasoning in part, that while section 701 has never been specifically read to expand the scope of the Commission's authority beyond public utilities, absent express legislative restriction, nothing in section 701 or otherwise expressly limits the Commission's reach to public utilities.⁷ Accordingly, the Court found it was lawful and reasonable for the Commission to exercise jurisdiction over utility holding companies for the purpose of enforcing conditions that were the preconditions to formation of the holding companies.

Here, we believe it is reasonable and necessary to assert jurisdiction over DRPs in connection with our regulatory functions related to DR oversight, and based on our statutory obligation to ensure safe and reliability electric service. We exercise authority over DR programs and activities generally, related to section 454.5, which explicitly requires utility procurement plans to include demand reduction products.⁸ Our exercise of authority supports adopted energy policy under the Energy Action Plan II (“EAP II”), which explicitly requires demand response programs and

⁵ See *Consumers Lobby Against Monopolies v. Public Utilities Commission* (“*CLAM*”) (1979) 25 Cal.3d 891, 905-906. See also *Southern California Edison Company v. Peevey* (“*Edison v. Peevey*”) (2003) 31 Cal.4th 781, 792.

⁶ *PG&E Holding Company Decision, supra*, 118 Cal.App.4th at pp. 1198-1199

⁷ *Id.*

⁸ Pub. Util. Code, § 454.5, subd. (b)(9)(B).

products in the preferred loading order of California energy resources.² Various DR-related regulatory functions include the approval and oversight of specific DR programs proposed by utilities and other parties, as well as approval of associated IOU DR budgets.

This Commission also has authority to: ensure reliable electric service and protect public health and safety;¹⁰ and protect the public interest.¹¹ We also exercise consumer protection authority under statutes such as section 451 and 701,¹² and in enacting sections 394 *et seq.*, Legislature expressly recognized that consumer protection is a legitimate regulatory function.¹³

Two things operate to convince us it is reasonable to exercise our authority under these statutes so as to assert some degree of oversight over DRPs. First, while not public utilities or ESPs, DRPs are similar to ESPs in that they are non-utility entities operating in the regulated energy market to provide a particular type of energy service to IOU customers. Load reduction services provided by DRPs may directly impact energy procurement planning and decisions made by both the IOUs and CAISO. In that regard, the interaction between DRPs and retail end-use customers whose loads DRPs may use to bid directly into the CAISO markets, could affect the safety and reliability of Commission-regulated services received by retail end-use customers. Second, both

² EAP II acts as an "Implementation Roadmap for Energy Policies." Consistent with the State's climate change and greenhouse gas reduction policies, it articulates a priority sequence for actions to address increasing energy needs. The EAP II prioritizes meeting energy needs by energy efficiency, demand response, renewable resources, distributed generation, and clean and efficient fossil-fired generation before conventional generation. (See e.g., EAP II, dated October 2005, at p. 2, 6-7.) EAP II can be located at: www.cpuc.ca.gov/PUC/energy/Resources/Energy+Action+Plan/.

¹⁰ See e.g., *Hartwell Corporation v. The Superior Court of Ventura County* ("Hartwell") (2002) 27 Cal.4th 256, 265, 270-272.

¹¹ The public interest standard arises under Pub. Util. Code, § 851.

¹² See e.g., *Investigation on the Commission's own Motion to Consider the Costs and Benefits of Various Promising Revisions to the Regulatory and Market Structure Governing California's Natural Gas Industry and to Report to the California Legislature on the Commission's Findings* [D.01-12-018] (2001) ___ Cal.P.U.C.3d ___, 2001 Cal. PUC LEXIS 1137, *146 - *154, [Noting the Commission's broad jurisdiction to implement consumer protection programs pursuant to Pub. Util. Code, §§ 451, 701, 702, 761, and 770].

¹³ See e.g., Pub. Util. Code, § 394.2.

FERC and CAISO have acknowledged that retail utility customers could be harmed by the potential for gaming and market abuse by DRPs that may bid DR into the wholesale market on behalf of those customers.¹⁴ Developing consumer protections would be one means to mitigate against potential abuse. However, although FERC and CAISO may take some steps to try and mitigate market abuse, it is not clear whether those steps will include the necessary consumer protection for state IOU retail customers.¹⁵

Viewed in this context, it is cognate and germane to utility regulation to assert some degree of jurisdiction over DRPs. However, if we move forward to adopt consumer protections, we intend that our exercise of jurisdiction be narrowly tailored to focus on developing protections that relate to our interest in ensuring safe and reliable electric service for IOU customers. In the next phase of this proceeding we will consider whether it is reasonable to adopt such protections and develop a record to determine whether protections are needed. If we decide consumer protections are warranted, we expect that regulation would be limited to possible registration, and/or consumer protections of IOU residential and small commercial retail customers that receive DR services from DRPs. Because the Commission is cognizant that its actions impact the development of the DRP market and it wishes to encourage that market, Commission staff should proceed as expeditiously as possible with their review of this issue.

C. Alleged Imposition of Impermissibly Vague Regulations

Joint Parties contend the Decision violated their due process rights by imposing impermissibly vague regulations on DRPs. Joint Parties argue that nowhere in the Decision did we identify what consumer complaints we intend to resolve, explain the process for doing so, or state what financial responsibility standards will be required. (Rhg. App., at pp. 14-16, relying on *People v. Superior Court* (1988) 46 Cal.3d 381, 389-390.)

¹⁴ See e.g., 130 F.E.R.C. ¶ 61,031, at P32; CAISO Draft Final Proposal for the Design of Proxy Demand Resource, dated August 28, 2009, at pp. 11-18.

¹⁵ 130 F.E.R.C. ¶ 61,031, at P32; CAISO Draft Final Proposal for the Design of Proxy Demand
(continued on next page)

People v. Superior Court reflects the principle that administrative regulations, as well as statutes, must be sufficiently clear and definite to enable a reasonable degree of certainty as to what is prohibited or required.¹⁶ Regulations or statutes failing to meet this standard will be found to be impermissibly vague in violation of Constitutional due process requirements.¹⁷

While the principle cited by the Joint Parties is correct in and of itself, the Joint Parties argument is premature. The Decision did not purport to establish any consumer protection rules or regulations at this time. It explicitly stated that the nature of the consumer protections to be developed and adopted would be determined in a subsequent proceeding or phase of the proceeding.¹⁸ Joint parties will have the opportunity to participate in the development of consumer protections. Accordingly, their due process argument has no merit.

III. CONCLUSION

For the reasons stated above, D.10-06-002 is modified to reflect the clarifications and additions specified below. The application for rehearing of D.10-06-002, as modified, is denied because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. D.10-06-002 is modified as follows:
 - a. The last sentence on page 1 and continuing to page 2 is modified to read:

“In today’s decision, the California Public Utilities Commission (Commission or CPUC) directs the Investor Owned Utilities (IOUs) to prepare to bid DR from existing Participating Load Pilot (PLP) programs into the CAISO’s wholesale market as soon as feasible if the FERC approves tariff language that is acceptable to the CPUC.

(continued from previous page)
Resource, dated August 28, 2009, at pp. 19-20.

¹⁶ *People v. Superior Court, supra*, 46 Cal.3d. at pp. 389-390.

¹⁷ *Id.* also citing to U.S. Const. 5th & 14th Amends.; Cal. Const., art. I, § 7.

¹⁸ D.10-06-002, at pp. 19, 22 [Finding of Fact Number 5].

However, we delay approving direct bidding of DR load of IOU retail residential and small commercial customers that receive DR services from demand response providers (DRPs) until the CPUC completes its consideration of whether minimum ratepayer protections are needed to ensure continued safe and reliable provision of electric service. We expect direct bidding could proceed either when the Commission adopts such protections, or determines that none are necessary.”

- b. The second full sentence on page 2 is modified to read:

“This decision does not prohibit electric service providers (ESPs) from engaging in direct bidding of retail DR on behalf of their own customers, either on their own or through third party DRPs.”

- c. After the first full sentence on page 6, Section 3.1 Jurisdiction, add the following language:

“In addition, the Amended Scoping Memo specifically posed the following question for comment: ‘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?’

- d. Delete all text after the first full sentence on page 9 extending through the end of Section 3.1 on page 11, and replace with the following language:

“We agree with the Joint Parties that DRPs do not fall within the strict definition of either a public utility or an ESP, as those entities were contemplated by the Legislature. Nevertheless, we do see certain similarities between DRPs and ESPs. Specifically, they both provide a form of energy-related service directly to IOU customers in the regulated energy market.

Further, load reduction services provided by DRPs may directly impact energy procurement

and planning needs of the IOUs and CAISO. It is not unreasonable to conclude that the interaction between DRPs and retail end-use customers whose loads DRPs may use to bid DR into the CASIO markets may affect the safety, reliability and maintenance of CPUC-jurisdictional services received by end-use customers, similar to the interactions involving ESPs. Such interactions are relevant in the context of our broad statutory authority under Public Utilities Code sections 761, 768, and 770, to ensure the provision of safe and reliable practices that impact public utility service.

It is not uncommon for the Commission to exercise its consumer protection authority under statutes such as sections 701, and 451. And in section 394 *et seq.*, the Legislature explicitly recognized the Commission's role to ensure adequate consumer protections are in place for residential and small commercial ESP customers.

Consistent with our statutory duty to ensure safe and reliable electric service, and our role in protecting the public interest and providing consumer protection oversight, we believe it is reasonable and lawful to consider what, if any, protections are needed for the IOU residential and small commercial retail customers that receive DR services from DRPs. We will work with the parties to develop a record to complete that evaluation in a subsequent proceeding or phase of this proceeding. Until such protections are in place, or we determine that no protections are needed, we delay approving direct bidding into the CAISO wholesale market of the DR load of IOU retail residential and small commercial customers that receive DR services from DRPs.”

- e. The first sentence on page 16 is modified to read:

“Since the complexities identified by parties in this proceeding cannot be resolved at this time, we will defer a final determination regarding settlement and communication issues until a

subsequent proceeding or phase of this proceeding.”

- f. The first sentence on page 19 is modified to read:
- “Our review of the record supports a conclusion that the Commission should not allow DRPs to bid DR load into the CAISO market on behalf of IOU retail residential and small commercial customers, until we complete our consideration regarding what, if any, consumer protections are needed. An exception may be made where bidding of the retail DR is allowed as part of a Commission-authorized pilot program.”
- g. Finding of Fact 5 is modified to read:
- “The Commission will consider what, if any, consumer protection policies should be developed for DRP retail residential and small commercial DR load and services in a subsequent proceeding or phase of this proceeding.”
- h. The following findings of fact shall be added on pages 22-23, as Finding of Fact 11, Finding of Fact 12 and Finding of Fact 13:
- “11. Public Utilities Code sections 761, 768, and 770, among others, provide the Commission authority over safety, reliability and maintenance practices that impact public utility service.
12. The Commission exercises consumer protection authority with respect to residential and small commercial ESP customers under Public Utilities Code section 394 et seq.
13. The Commission has exercised consumer protection authority generally under Public Utilities Code sections 451 and 701, among others.”
- i. Conclusion of Law number 5 is modified to read:

“The Commission will consider whether it is reasonable to require the development of consumer protections for residential and small commercial IOU customers that receive DR services from DRPs in connection with the Commission’s statutory authority to ensure the safety and reliability of practices impacting public utility service.”

j. Ordering Paragraph 3 on page 24 is modified to read:

“The demand response load of IOU residential and small commercial retail customers that receive demand response service from DRPs shall not be bid directly into the CAISO’s wholesale market until the Commission either adopts consumer protections, or determines that none are needed. An exception may be made where bidding of the retail DR is allowed as part of a Commission-authorized pilot program.”

2. Rehearing of D.10-06-002, as modified, is denied.

This order is effective today.

Dated December 16, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
Commissioners

I dissent.

/s/ NANCY E. RYAN
Commissioner