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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Annual Local and Flexible Procurement Obligations for the 2019 and 2020 Compliance Years.	R.17-09-020 (Filed September 28, 2018)

APPLICATION FOR REHEARING OF DECISION 19-10-021 OF THE CALIFORNIA COMMUNITY CHOICE ASSOCIATION

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APPLICATION FOR REHEARING OF DECISION 19-10-021
OF THE CALIFORNIA COMMUNITY CHOICE ASSOCIATION

The California Community Choice Association (CalCCA)[1] submits this Application for Rehearing (Application) of Decision (D.) 19-10-021, addressing Resource Adequacy (RA) import rules, pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure. Decision 19-10-021 was mailed on October 17, 2019.

I. SPECIFICATION OF LEGAL ERROR

The question of how import RA will help meet California's RA program requirements is an important one, and CalCCA does not challenge the need to examine the question. Indeed, CalCCA has called for such an examination in Rulemaking (R.)16-02-007.[2] This does not give the Commission license, however, to adopt new import RA requirements and attempt to pass them off as an affirmation of existing rules. The law provides a process for such important changes, and the Commission has failed to follow the law. Moreover, the adopted rules violate both state and federal law.

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[1] California Community Choice Association represents the interests of 19 community choice electricity providers in California: Apple Valley Choice Energy, CleanPowerSF, Clean Power Alliance, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, Marin Clean Energy, Monterey Bay Community Power, Peninsula Clean Energy, Pioneer Community Energy, Pico Rivera Innovative Municipal Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Jacinto Power, San Jose Clean Energy, Silicon Valley Clean Energy, Solana Energy Alliance, Sonoma Clean Power, and Valley Clean Energy.

[2] *See Opening Comments of CalCCA on Assigned Commissioner and Administrative Law Judge Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues,* Rulemaking (R.)16-02-007, July 22, 2019, at 3-18.

Decision 19-10-021 (Decision) purportedly "affirms the requirements governing the use of energy imported into California to meet RA requirements, as set forth in D.04-10-035 and D.05-10-042."[3] To the contrary, the Decision creates new requirements that will effect a sea change in the way import RA is transacted and bid in the California Independent System Operator (CAISO) market, and in turn, will cause a major market disruption on the eve of a compliance deadline. Not only will the new requirements unleash market disruption, they are rooted in numerous legal errors. CalCCA thus requests rehearing of D.19-10-021 and, pending resolution, a stay of the Decision, as requested in CalCCA's *Motion for Stay of D.19-10-021* filed contemporaneously with this Application. CalCCA has also filed a *Motion to Shorten Time to Respond to Motion for Stay of Decision 19-10-021* contemporaneously with this Application.

The Decision violates both state and federal law in several ways. Specifically, the Decision:

1. Fails to provide findings or substantial evidence to support its central conclusion that the import RA requirements it adopts are simply "affirmations" of D.04-10-035 and D.05-10-042; in fact, the Decision's conclusions run directly counter to those decisions.

2. Violates Public Utilities Code §311(e) and the Commission's own Rule 14 by "materially chang[ing] the resolution of a contested issue" without the issuance of an "alternate" and an opportunity for public comment.

3. Violates the Due Process Clauses of the United States and California Constitutions through its effective abrogation of existing RA contracts.

4. Violates Public Utilities Code §380 by exacerbating potential RA capacity shortfalls in 2021.

5. Discriminates, on its face, against out-of-state generators, in violation of Article 1, Section 8, Clause 3 of the United States Constitution and Public Utilities Code §399.11(e)(2), which requires "generating resources located outside of California that are able to supply [renewable energy] to California end-use customers to be treated identically to generating resources located within the state, without discrimination."[4]

6. Encroaches on Federal Energy Regulatory Commission (FERC) jurisdiction by "tethering" the requirements to and directly and substantially impacting bidding and pricing in the CAISO energy markets.

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[3] Decision (D.)19-10-021 (Decision), Oct. 17, 2019, at 1.

[4] CAL. PUB. UTIL. CODE § 399.11(e)(2).

CalCCA seeks rehearing of the Decision to correct the legal errors identified in this Application.

The Commission should begin by acknowledging that the new requirements modify, not affirm, D.04-10-035 (2004 Decision) and D.05-10-042 (2005 Decision). If new requirements are required, it should reopen the record to appropriately tailor and establish a phase-in schedule for the requirements, as it did in the 2005 Decision, including grandfathering existing import RA contracts. Finally, in reopening the record, CalCCA recommends modifying the adopted rules in two respects:

a. Clarify that "resource specific" RA contracts include all contracts that specify a resource ID, a portfolio of resources that will be available to meet the need for energy, or a Balancing Authority backed by operating reserves or are supplied by an Asset Controlling Supplier.

b. Clarify that non-resource-specific contracts must ensure delivery at a time consistent with CAISO operational needs.

Recognizing that compliance for 2020 must be shown by October 31, 2019, the Commission should also delay implementation of the new requirements until the 2021 compliance year.

II. THE DECISION FAILS TO PROVIDE FINDINGS OR SUBSTANTIAL EVIDENCE TO SUPPORT ITS CENTRAL CONCLUSION THAT THE IMPORT RA REQUIREMENTS IT ADOPTS ARE SIMPLY "AFFIRMATIONS" OF D.04-10-035 AND D.05-10-042

The Decision purportedly "affirms" the RA import compliance requirements "as set forth in D.04-10-035 and D.05-10-042."[5] The adopted requirements are not, however, mere affirmations. The Decision, for the first time, adopts a distinction in the import RA compliance requirements for resource-specific and non-resource specific contracts. It further requires, for the first time, that non-resource-specific resources self-schedule (*i.e.*, bid as a price taker) in the CAISO energy market.[6] Critically, the Commission fails to offer any findings, evidence or even reasoning to connect the dots between the 2004 and 2005 Decisions and its adopted import RA requirements. And, as discussed below, the Decision reaches conclusions that run directly counter to the directives issued in the 2005 Decision and requirements provided in Senate Bill (SB) 100. Any attempt to characterize the Decision as a mere "affirmation" is patently in error.

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[5] Decision at 1.

[6] *Id*. at 8-9.

A. **The Decision Directly Conflicts with Decision 05-10-042**

The Decision claims to "affirm" the 2004 and 2005 Decisions. Astonishingly, however, it runs *directly contrary* to these decisions. The legal error could not be more apparent.

The 2004 Decision set the requirements, as the Decision recites, for import RA to qualify for compliance. By incorporating an extraneous Workshop Report by reference, the 2004 Decision concluded that qualifying capacity for import contracts is the contract amount, provided the contract:

1. Is an Import Energy Product with operating reserves;

2. Cannot be curtailed for economic reasons;

3a. Is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission; or,

3b. Specifies firm delivery point (*i.e.* not seller's choice).[7]

A year later, the 2005 Decision interpreted those requirements with exquisite clarity. While adopting a phase-out plan for liquidated damages (LD) contracts for in-state resources, the Commission affirmed the continued use of firm import LD contracts for RA compliance.

The 2005 Decision did not use the terminology of "resource-specific" or "non-resource-specific" contracts, but addressed the issue as one between "unit-specific" and "liquidated damages" contracts. It defined LD contracts as "bilateral agreements that provide energy, capacity, or ancillary service products without reference to a specific unit or resource backing the obligation," for which the "enforcement mechanism for breach of these contracts is their liquidated damages provisions."[8] It contrasted an LD contract with a "unit-specific contract," which "identif[ies] specific, committed assets or units (*i.e.*, physical resources) that back up contractual obligations."[9]

While the 2005 Decision adopted a phase-out plan for in-state LD contracts, it did not include import RA LD contracts. Indeed, the Assigned Commissioner's Ruling (ACR) recites this fact.[10] Noting that "firm import contracts are backed by spinning reserves,"[11] in the 2005

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[7] D.04-10-035 at 54.
[8] D.05-10-042 at 59-60.
[9] *Id*. at 60, n.17.
[10] *Assigned Commissioner's Ruling Seeking Comment on Clarification to Resource Adequacy Import Rules* (ACR), July 3, 2019, at 2.
[11] D.05-10-042 at 58.

Decision the Commission expressly approved "the exemption of firm import LD contracts from the sunset/phase-out provisions applicable to other LD contracts…."[12] The Commission explained its reasoning for the import RA exemption from the unit-specific RA requirement: "[f]irm import LD contracts do not raise issues of double counting and deliverability that led us to conclude that other LD contracts should be phased out for purposes of RAR."[13]

The 2005 Decision's clear conclusion is 180 degrees from the Decision's directive. Thus, the Decision cannot remotely be construed as an "affirmation," unless it constitutes an "affirmation" to state that "black is now white."

The Decision is also devoid of any explanation or reasoning, with the bulk of the decision consisting largely of recitation of background and parties' comments. Indeed, the only explanation the Decision provides for its interpretation of the new requirements as affirmations is as follows:

> As stated in the ACR, the Commission finds that D.04-10-035 and D.05-10-042 established the requirements for import contracts to count as RA and finds insufficient record for modifying those requirements at this time. One of the goals of the RA program is to ensure that sufficient energy flows into California when the system is peaking in order to maintain grid reliability. As such, we find that the import requirements in D.04-10-035 and D.05-10-042 are critical to the objectives of the RA program and affirm those requirements in this decision.[14]

The referenced ACR does not interpret the prior decisions, but only quotes from them without interpretation or conclusion. Indeed, the ACR readily acknowledges that non-unit specific LD contracts were *not* phased out.[15]

The lack of any connection to these decisions, or any attempt to connect them, is evident in the Decision's two Findings of Fact:

> 1. D.04-10-035 and D.05-10-042 established the requirements for import contracts to count as RA.
>
> 2. It is reasonable that non-resource-specific RA imports are required to self-schedule into the CAISO markets. This

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12 *Id*. at 68.
13 *Id*.
14 Decision at 8.
15 ACR at 2.

> requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.[16]

Nothing in these findings explains *how* or *why* the Commission reached the second finding. Neither do the limited conclusions of law provide any such interpretation of the 2004 and 2005 Decisions.

The Decision has completely mischaracterized prior precedent. No legal error could be clearer.

B. The Decision for the First Time Distinguishes Between Resource-Specific and Non-Resource-Specific Import RA Contracts

The Decision creates separate rules for resource-specific and non-resource-specific import RA contracts. It states:

> For non-resource-specific RA imports, an "energy product" that "cannot be curtailed for economic reasons" should be self-scheduled into the CAISO market consistent with the timeframe established in the governing contract. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.[17]

The Decision claims that this rule "affirms" the 2004 Decision and the 2005 Decision,[18] yet nowhere in these decisions does any such distinction between rules for import RA contracts arise.

Nowhere in the 2004 Decision, its Attachment, or the extraneous Workshop Report is a distinction drawn in rules applicable to "resource-specific" or "non-resource-specific" import RA contracts. Moreover, the term the Decision appears to lean on in defining import RA requirements—"Import Energy Product"—does not appear in the 2004 Decision and is likewise not defined in the Attachment to that decision. Instead, it is buried—mentioned once *without definition*—in Section 5 of the Workshop Report.[19] In other words, the 2004 Decision provides absolutely no distinction between resource-specific and non-resource-specific imports and does not define "energy product," a key term in the requirements for import RA.

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16 Decision at 20.

17 *Id*., Conclusion of Law 3 at 20.

18 *Id*. at 1.

19 *Workshop Report on Resource Adequacy Issues* (Workshop Report), June 15, 2005, at 21, available at: http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/REPORT/37456.PDF.

Decision 05-10-042 removes any ambiguity, but not as the Decision suggests. The 2005 Decision, like the 2004 Decision, did not use the terminology of "resource-specific" or "non-resource-specific" contract. Instead, as discussed in Section II.A, it addressed this issue as one between unit-specific and LD contracts. Critically, however, the 2005 Decision essentially determined that all import RA is "firm" because it is backed by spinning reserves.

Far from being an "affirmation" of the 2004 and 2005 Decisions, the Decision actually flips those decisions on their heads. The distinction between requirements for resource-specific and non-resource-specific import RA contracts is an unsupported and material change to existing law.

C. The Decision for the First Time Requires Non-Resource-Specific RA Contracts to Self-Schedule Into the CAISO Energy Market

The Decision requires a non-resource-specific RA import "to self-schedule into the CAISO markets consistent with the timeframe reflected in the governing contract."[20] There is absolutely nothing in either the 2004 Decision or the 2005 Decision that could be construed to reach this conclusion. Similarly, there is nothing in the Workshop Report supposedly girding the 2004 Decision that establishes this requirement.

In fact, once again, the Decision contradicts D.05-10-042 and prior decisions. The Commission has made clear in developing the programs that it "seeks to ensure that the generation capacity …. is available to the grid at the time and at the locations it is needed."[21] In the 2005 Decision, the Commission stated:

> The Commission's policy that RAR should ensure that capacity is available when and where it is needed means that the RAR program design <u>must be consistent with the CAISO's operational needs</u>.[22]

The CAISO expresses the hours of need through its Must-Offer-Obligation, which creates the obligation to make energy from RA capacity available to the market. The self-scheduling requirement draws no connection to the CAISO's operational needs.

Finally, the self-scheduling requirement appears aimed more at controlling prices for import RA rather than ensuring availability. Self-scheduling ensures that the import RA seller is

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[20] Decision at 8-9.
[21] D.05-10-042 at 7-8.
[22] *Id*. at 10 (emphasis added).

not price-setting in the CAISO energy market during times of scarcity. Controlling pricing in the energy market, however, is not the Commission's domain but a matter of FERC jurisdiction.

The self-scheduling requirement, applicable only to non-resource-specific resources, is indisputably a new requirement in conflict with existing law and directed at a goal outside of its proper jurisdiction.

III. THE DECISION VIOLATES PUBLIC UTILITIES CODE SECTION 380 BY EXACERBATING POTENTIAL RA CAPACITY SHORTFALLS IN 2021

The Legislature placed responsibility on the Commission for ensuring resource adequacy in Section 380. The Decision, by arbitrarily imposing new and onerous requirements on import RA contracts, threatens to shrink the market for import RA and thereby exacerbate any risk of shortfalls.

In its June 20, 2019, ruling, the Commission sounded a note of alarm over its belated discovery of the potential for a system RA shortfall in 2021.[23] In part, the concern arose from uncertainty over the role import RA would play in meeting system RA requirements over time.[24] It stated: "[c]entral to this analysis is the growing reliance on imported resource adequacy resources to meet forecasted peak system resource adequacy needs."[25] It concluded, in fact, that increased import RA would be required to meet 2021 needs.[26] Despite the increased need for import RA to meet reliability, the Decision imposes *more onerous* restrictions on import RA contracts, reducing the likelihood that out-of-state resources will come to California's aid.

The new requirements are at odds with many existing import RA contracts, as explained in Section IV.B below. Because import RA contracts may also obligate sellers for damages if they are not capable of supplying RA-program compliant capacity, the value of import RA contracts to sellers is also potentially eviscerated. This regulatory disruption will raise costs for market participants and customers. Moreover, without greater certainty in the rules, as discussed below in Section IV.B, import RA sellers may be unwilling to enter into contracts to secure their supply in times of need. Self-scheduling 24/7 into the CAISO market, and risking the associated

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[23] *Assigned Commissioner and Administrative Law Judge's Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues* (IRP Ruling), R.16-02-007, June 20, 2019, at 12.
[24] *Id.* at 10.
[25] *Id.*
[26] *See id.* at 16.

negative prices, may be a bridge too far to invite out-of-state resources to participate in California's RA market.

The Decision erects barriers to participation in the RA market by out-of-state generators and suppliers—a point heightened by the discrimination discussed in Section V. It is counterproductive and, indeed, violates the Commission's obligations under Section 380 to adopt a policy likely to reduce the amount of RA capacity made available to California in the face of a looming potential shortage of RA capacity.

IV. THE DECISION VIOLATES STATE AND FEDERAL DUE PROCESS REQUIREMENTS

A. The Decision Violates Public Utilities Code Section 311(e) and Rule 14.1 by Materially Changing the Resolution of a "Contested Issue" Without Due Process

The Decision differs materially from the Proposed Decision issued on September 6, 2019. Despite these material changes, the Commission failed to follow the law by issuing an Alternate Proposed Decision (APD or Alternate) and providing for public comment on those changes. The Decision is thus tainted by procedural error.

Public Utilities Code Section 311(e) requires the Commission to issue an APD when it materially modifies a Proposed Decision. The statute defines an "alternate" as "either a substantive revision to a proposed decision that materially changes the resolution of a contested issue or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs."[27] A similar definition is carried through to Rule 14.1(d) of the Commission's Rules of Practice and Procedure (Rules). Rule 14.1(d) further states that

> A substantive revision to a proposed decision or draft resolution is not an "alternate proposed decision" or "alternate draft resolution" if the revision does no more than make changes suggested in prior comments on the proposed decision or draft resolution, or in a prior alternate to the proposed decision or draft resolution.

A comparison of the Proposed Decision and the Revised Proposed Decision show 117 total changes, including 84 insertions, 37 deletions, 54 changes and 2 moves.[28] The changes to the

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[27] CAL. PUB. UTIL. CODE §311(e).

[28] *See* Exhibit A, Redline Comparison of September 26, 2019, Proposed Decision and Revised Proposed Decision.

Proposed Decision were material, substantive changes not directly stemming from party recommendations.

The Proposed Decision was issued on September 6, 2019, and served on all parties for comment pursuant to the Commission's rules. Following comments, on October 9, one day before the Decision was voted out at the Commission's business meeting, a Revised Proposed Decision showed up on the Commission's website. It was not served to parties to this proceeding, nor was an opportunity for comment provided.

The Decision changed more than half of the language in the Proposed Decision's Findings of Fact and Conclusions of Law.[29] Of the two limited Findings of Fact, the only substantive finding was rewritten entirely:

~~2. It is reasonable that RA import contracts should be structured to require energy to flow during peak system periods.~~

2. It is reasonable that non-resource-specific RA imports are required to self- schedule into the CAISO markets. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.

Three key areas of changes are evident: elimination of "peak system period" from the initial finding, the addition of a self-scheduling requirement in the new finding, and the addition of the differentiation between resource-specific and non-resource-specific contracts in the new finding.

Similarly, Conclusions of Law 2 was materially modified:

~~2. "Firm" energy should encompass energy delivery that flows, at a minimum, during the Availability Assessment Hour window.~~

2. A contract for an import energy product that is available only when called upon in the CAISO's day-ahead market or residual unit commitment process should not qualify as an "energy product" that "cannot be curtailed for economic reasons."

These two findings are largely unrelated; the original specifies the required hours of delivery and the second excludes certain types of products from compliance eligibility.

In addition, the Decision added a new Conclusion of Law:

3. For non-resource-specific RA imports, an "energy product" that "cannot be curtailed for economic reasons" should be self-scheduled into the CAISO market consistent with the timeframe established in the governing contract. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.

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[29] *See* Decision at 20-21.

This sets a new requirement, not in the original Proposed Decision, for self-scheduling and differentiates between resource-specific and non-resource-specific contracts. Significant changes in Ordering Paragraphs roughly tracked the changes in Findings of Fact and Conclusions of Law.[30]

In light of these and other changes, the Revised Proposed Decision issued on October 9, 2019, was in fact an "alternate" proposed decision under Section 311(e) and Rule 14.1. Any "alternate" must be "served upon all parties to the proceeding without undue delay and shall be subject to public review and comment before it may be voted upon."[31] The alternate was not served upon all parties. Moreover, the Commission failed to provide the public an opportunity for comment on these material changes.

Finally, the Commission cannot simply conclude that parties otherwise had ample due process to dismiss any question of procedural impropriety. Unlike the Commission's dismissal of Section 311(e) arguments in the past,[32] parties in this instance have not had the opportunity to comment in testimony, briefs and comments on the Proposed Decision. Decision 19-10-021 is procedurally defective, depriving parties of the process required by Section 311(e) and Rule 14.1.

B. The Decision Violates the Due Process Clauses of the United States and California Constitutions

1. The Decision Abrogates Existing RA Contracts Resulting in an Unconstitutional Taking by the State

The Decision's sudden and swift change in RA compliance rules on October 10, 2019, devalued and effectively abrogated existing import RA contracts, resulting in an unconstitutional taking by the state. Under the U.S. and California Constitutions, a state may not deprive any person of property without due process of law.[33] Therefore, the "first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property'

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30 *Id.* at 21.
31 *Id.*
32 *See* D.18-07-025 at 30.
33 U.S. Const., Amend. 14, § 1; Cal. Const., Art. I, § 7(a).

or 'liberty.'"[34] It is commonly accepted that "contractual rights are a species of property within the meaning of the Due Process Clause."[35]

The Decision abrogates affected import RA contracts by changing the contractual relationship between the parties. The very reason the parties entered into the import RA contracts has effectively been voided by the Decision's addition of new compliance requirements for non-resource specific import RA contracts. In the current RA market, California contracts and rules for import RA generally require that sellers make their energy available to the market, but do not control the pricing of energy sales by those sellers. Sellers must bid into the CAISO Day Ahead Market (DAM), but make their own economic decision as to what price to bid based on their particular circumstances and prices on the given day. In order for contracts structured this way to "count" for RA compliance obligations, the seller must be obligated to deliver energy if its bid is accepted, and the LSE must be able to attest that its contracts for import RA include this obligation. This structure appears to be what the Commission's prior decisions had in mind.

The Proposed Decision (PD) would dramatically change this structure. Import RA contracts cannot be used for compliance obligations unless the RA product is associated with firm energy that is self-scheduled into the CAISO energy market. In other words, the generator will be required to self-schedule energy as a price taker in the CAISO market in order to satisfy this requirement. In fact, this requirement appears to reflect a desire to control energy *prices,* not availability to the market – which should not be the function of the RA program.

The vast majority of contracts for import RA in California do not include this bidding requirement.[36] Under the Decision's new requirements, all LSEs who have contracted on this standard basis will be unable to provide the required attestation. The import RA contracts on which they relied for compliance will no longer suffice for that purpose, and these LSEs will fall out of compliance with their RA obligation. Given that import RA contracts will no longer be able to serve their stated purpose, the immediate result of the PD is the evisceration of the majority of import RA contracts' value to LSEs. Not only will the value of the contract decrease, but if the contracts are terminated as a result of this change in law, millions of dollars

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[34] *K.W. v. Armstrong*, 789 F.3d 962, 972 (2015) (quoting *Bd. Of Regents of State Colls. V. Roth*, 408 U.S. 564, 569 (1972)).

[35] *Charles v. Baesler*, 910 F.2d 1349, 1352 (6th Cir. 1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972)).

[36] *See* Declaration of Evelyn Kahl.

of transmission investments by California entities may be stranded due to a large decline of import RA transactions.

Import RA contracts entered into that would previously have been deemed acceptable by the Commission for compliance – indeed, contracts consistent with the requirements of D.05-10-042—no longer can be used for compliance under the Commission's RA program. Since the only purpose served by an RA contract is to supply the RA product required by the Commission, contracts that do not meet the new requirements no longer have any purpose and have effectively been abrogated. The Decision has deprived parties of their contractual rights, thus implicating the Due Process Clause.

2. The Decision Abrogates Existing RA Contracts without Procedural Due Process of the Law

For the Commission to suddenly—without taking evidence, holding hearings, or allowing sufficient time for briefing and comment—materially modify those rules without justification fails to meet any standard of procedural due process. The requirements of due process "extend to administrative adjudications."[37] The "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[38] Once it is determined that due process applies, the "question remains what process is due."[39] Here, parties to the RA contracts were not afforded the opportunity to be heard "at a meaningful time and in a meaningful manner,"[40] and notice was not provided in an adequate manner.

a. The Commission Did Not Afford Parties a Meaningful Time or Meaningful Manner to be Heard

With a minor modification, California courts have adopted the four-factor "*Mathews* balancing test as the default framework for analyzing challenges to the sufficiency of proceedings under [California's] due process clause."[41] The first three factors—"the private

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[37] *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (*Today's Fresh Start*), 57 Cal. 4th 197, 214 (2013)

[38] *Id*. at 212 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

[39] *Id*. at 214 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)).

[40] *Id*. at 212 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[41] *Id*. at 214.

interest affected, the risk of erroneous deprivation, and the government's interest—are the same"[42] in California.

First, a court must determine whether any person has been deprived of a protected interest in property. The Decision abrogates existing import RA contracts, as discussed in Section 1, above.

Second, the "erroneous deprivation" inquiry looks to the "procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[43] While the Commission had reasonable procedures available to it, lacking any immediate urgency, it failed to avail itself of those procedures.

The Commission considered a similar problem in the 2005 Decision—the decision the Commission claims to rely upon—and came to the conclusion that it must provide for notice, a phase out and grandfathering. The Commission began to consider issues surrounding the use of LD contracts—*for in-state resources*—in the RA program, but "did not definitively state an intention … to terminate their usage."[44] It thus concluded that "D.04-10-035 did not constitute fair notice to LSEs that, as of October 29, 2004, they should only enter into new LD contracts with the understanding that they were at risk that those contracts would not qualify" for RA compliance.[45] The Commission clearly and accurately concluded: "[n]or did any other event prior to today constitute such notice."[46]

Recognizing the need for notice, the Commission carefully constructed a phase-out process to protect existing contracts. The Commission:

- ✓ Grandfathered LD contracts executed before the date of D.05-10-042;[47]
- ✓ Established a sunset set date, making clear that "LD contracts will not count for purposes of RA showings after December 31, 2008."[48]
- ✓ Established step-down maximum limits for LD contracts, as a percentage of an LSE's RA portfolio, during the phase-out years 2006-2008.[49]

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42 *Id*. (California adopted a fourth "dignitary interest" factor which is inapplicable here as it only applies to the rights of natural persons).
43 *Id*. at 213.
44 D.05-10-042 at 63.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* at 64.
49 *Id.* at 65.

Finally, and most succinctly, the Commission stated:

> [B]y phasing out the ability of LD contracts to count in LSEs' RAR showings, we are not abrogating those contracts as has been claimed. The contracts will remain in effect until they expire on their own terms.[50]

It is critical to note that, while phasing out LD or non-unit-specific contracts for in-state resources, the Commission in the same decision provided an *exemption* from this phase-out for import RA contracts. The Commission stated: "we approve the exemption of firm import LD contracts from the sunset/phase-out provisions applicable to other LD contracts as adopted in Section 7.4."[51]

This makes concrete the fact that the Commission in the past engaged in procedural activities to ensure that existing RA contracts survived new rules and regulations. The instant Decision failed to provide such adequate review, and instead chose to unconstitutionally destroy RA contracts without any additional procedural review.

Third, the "government's interest" inquiry looks to the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[52] The fiscal and administrative burden to the Commission to extend review of the Decision – even to hold hearings -- would be extremely limited relative to the damages the Decision will do to import RA contracts.

Fourth, the Commission failed to provide an opportunity for hearing, examination and presentation of evidence tens of millions of dollars are at issue. Moreover, as discussed above, the Commission even failed to use its own statutory processes to provide an opportunity to provide comments on the Alternate Proposed Decision.

In short, not only does the Decision err in concluding that the import RA requirements are "affirmations," it abrogates contracts without procedural due process, without any showing of urgency. The Commission has endeavored in other circumstances to avoid abrogation of existing contracts in its regulatory changes; it should heed its own counsel and grant rehearing of the Decision in light of the obvious constitutional violations at hand.[53]

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[50] *Id.* at 66.

[51] *Id.* at 68.

[52] *Today's Fresh Start*, 57 Cal. 4th at 213.

[53] *See, e.g., Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development*, Cal. P.U.C. D.19-03-012, at 2 (Mar. 28,

C. The Decision Is Unconstitutionally Vague and Thus Fails to Provide Affected Parties Due Process

The new requirements are unconstitutionally vague and fail to provide adequate notice to LSEs of the standards against which their RA showings will be judged in two respects. "Due process requires notice that gives an agency's reason for its action in sufficient detail that the affected arty can prepare a responsive defense."[54]

First, the Decision fails to define or distinguish "resource-specific" and "non-resource-specific" import RA contracts. Second, it lacks clarity regarding the hours during which an import RA contract would be required to self-schedule, leaving open an interpretation that 24/7 self-scheduling would be required. Despite the Decision's vagueness, LSEs are expected to meet compliance requirements on October 31, 2019, for the 2020 compliance year. For these reasons, the Decision is based in legal error.

To determine what type of notice is adequate to satisfy the Due Process Clause, California applies the test set forth in *Mullane v. Central Hanover Bank & Trust Co*.[55] The fundamental requisite of due process law in any proceeding is:

> Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.[56]

2019) ("For a party that is not a party to the contract, nor to the original proceeding, the [abrogation of a contract] bar is even higher."); *see also Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electronic Service Industry and Reforming Regulation*, Cal. P.U.C. D.95-05-045, at 56 (May 24, 1995) ("This proposal reiterates the Commission's commitment against abrogating [] contracts…."); *In the Matter of the Investigation on the Commission's own Motion into the Pacific Gas and Electric Company's Gas Gathering Operations, Including the Reasonableness of its Charges and how it shall Structure and Offer the Service in the Future*, Cal. P.U.C. D.89-12-016, at 40 (Dec. 6, 1989) ("we do not wish to…abrogate contracts which were negotiated in good faith and under a different regulatory framework.").

[54] *Barnes v. Healy*, 980 F.2d 572, 279 (9th Cir. 1992) (citing *Goldberg v. Kelly*, 397 U.S 254, 267-68 (1970)).

[55] *Traverso v. People ex rel. Dept. of Transportation*, 6 Cal. 4th 1152, 1169-70 (1993) (citing *Mullane v. Central Hanover Bank & Trust Co*. (*Mullane*), 339 U.S. 306 (1950)).

[56] *Mullane*, 339 U.S. at 314.

The California Supreme Court further has concluded that the law will uphold a requirement against a challenge if the requirement "(1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement."[57]

The Decision fails to meet the standard for fair notice. In particular, it fails to give fair and adequate notice regarding two details that materially influence whether a contract will comply with the Commission's RA requirements: (1) interpretation of a "resource-specific" and "non-resource-specific" contracts and (2) the hours the contract will be required to self-schedule.

The Decision does not define "resource-specific" and "non-resource-specific" despite its critical reliance on the terms in setting RA compliance requirements. Indeed, as explained above, this terminology was *not used* in the 2004 and 2005 Decisions which the Commission claims to "affirm." Consequently, the Decision provides insufficient information to determine compliance in advance of the Commission's compliance review.

There are several different types of resources that could be determined to be resource-specific. Most obviously, an import contract that is backed by an individual generating unit would comply. A contract backed by a pool of specified resources, however, is also resource-specific, although specific to a group of resources. Finally, because the Decision appears to rest upon the use of "Import Energy Product" in the 2004 and 2005 Decisions, a contract that specifies the Balancing Authority (BA) may also be considered resource-specific. For example, the CAISO is only proposing in its RA Enhancements Stakeholder Process that import RA contracts specify the Balancing Area (BA) from which the power will be delivered[58] and be able to demonstrate that they are "firm" energy, with the BA carrying reserves – *i.e.*, specific resources -- to ensure that the energy is firm.[59] While all of these categories *should* be eligible for compliance, the Decision leaves the question utterly unclear.

The Decision also leaves open the question of when an import RA contract must self-schedule into the CAISO market. The Revised Proposed Decision materially modified the PD on this point. The PD required that an import RA contract "flow" energy during Availability Assessment Hours (AAH). It stated:

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[57] *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 702 (1984).

[58] California Independent System Operator, *Resource Adequacy Enhancements Revised Straw Proposal*, July 2, 2019, at 44.

[59] *Id*. at 45.

> While RA import contracts should consist of energy flowing at all times covered by the contract, we find that "firm" energy should encompass energy delivery, at a minimum, during the Availability Assessment Hour (AAH) window (e.g., 4:00 p.m. to 9:00 p.m.).[60]

The Decision, however, modifies the PD, eliminating the AAH requirement and providing practical advice to LSEs to avoid forcing the contracts into negative pricing hours utilizing "MCC buckets."[61] Its only directive is that "an 'energy product' that 'cannot be curtailed for economic reasons' is required to be self-scheduled into the CAISO markets, *consistent with the timeframe established in the governing contract*." The meaning of "timeframe" is unclear; if the contract does not specify a "timeframe" for self-scheduling, does that mean no self-scheduling is required? Finally, the Decision adds a disjointed Conclusion of Law, stating that "Import RA resources should be accounted for in the current MCC buckets and align with identified reliability needs."[62] Is this a directive or a suggestion, and what does "accounted for in MCC buckets" mean?

The Decision places LSEs between a rock and a hard place. An LSE can abandon and replace all of its existing contracts, uncertain of their status, and bear the associated financial consequences. Alternatively, it can retain those contracts and face noncompliance penalties. The vagueness of the requirements is particularly problematic given the 21 days between issuance of the Decision and LSEs' obligations to make their 2020 compliance showings. Under these circumstances, the Decision is impermissibly vague, denying LSEs due process.

D. The Decision Cannot Be Justified as a Legitimate Exercise of the State's Police Power as it Addresses No Emergency

The Commission's action cannot be justified as a legitimate exercise of its police power because it does not address any urgent threats to the public interest. It is settled law in California that "legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a [] governmental purpose."[63] While the state no longer has to prove the existence of an emergency

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60 Proposed Decision at 9.
61 Decision at 9.
62 *Id.,* Conclusion of Law 4 at 20.
63 *Birkenfeld v. Berkeley*, 17 Cal. 3d 129, 158 (1976).

as a "prerequisite" to overcome a potential due process violation,[64] where the state act is adopted on the premise of addressing an urgent situation, as the Decision appears to do here,[65] that emergency must be validated to determine if the state legitimately asserted its police power.[66] Despite the risk of contract abrogation, the Commission has not demonstrated any compelling reason why the import RA rules need to be changed now, for 2019 or 2020 compliance. There is not a single Finding of Fact stating urgency; indeed, to do so would have undermined the Commission's "affirmation" fiction. Moreover, while it alludes to conclusions by the CAISO's Department of Market Monitoring (DMM),[67] this reasoning likewise does not support urgency. As an initial matter, potential reliability shortfalls have been forecast for 2021, not 2019 and 2020.[68] As discussed below, the Decision exaggerates the DMM's conclusions, without considering more recent findings by the CAISO, and steps directly into FERC's jurisdiction over energy market pricing.

The Decision appears to be based, in large part, on a special report issued by the CAISO's Department of Market Monitoring (DMM) in September of 2018.[69] The Commission focuses on the potential, identified in the report, for "speculative supply"- *i.e.*, RA that has no true physical resource of contractual obligation backing the RA showing. The Commission seems particularly alarmed by the possibility that RA imports can be bid significantly above projected prices in the day-ahead market to help ensure they do not clear, thus relieving the imports of further offer obligations in the real-time market.[70]

However, had the Commission reviewed *current* materials, it would see that this alarm is misplaced. The CAISO has performed further analysis on its own findings, and determined that the non-delivery of import RA is on average the same as that applicable to in-state RA. Most recently the CAISO demonstrated that, on average, "non-delivery [of import RA] is relatively low, and generally consistent with expected forced outage rates of internal RA resources."[71] In

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64 *Id*.
65 *See* Decision at 4, 6, 18-19.
66 *See Birkenfeld*, 17 Cal. 3d at 158.
67 D.19-10-021 at 3.
68 IRP Ruling at 12.
69 Decision at 3.
70 *Id*.
71 CAISO Resource Adequacy Enhancements: *Second Revised Straw Proposal Stakeholder Meeting*, October 9, 2019, at 77, available at: http://www.caiso.com/Documents/Presentation-ResourceAdequacyEnhancements-SecondRevisedStrawProposal.pdf.

other words, the "crisis" of speculative supply the Commission claims must be addressed has been shown not to exist. Thus, not only is there no "emergent" need for action- there may be no action needed at all.

The ironic thing about the Decision is that it, in fact, creates an existing emergency. The abrogation of the RA contracts will throw the affected LSEs out of compliance with RA requirements weeks before the compliance deadline. The material changes in rules will leave these parties at risk of non-compliance for their October 31, 2019, annual RA showing, and subsequent showings for which they intended to rely on these existing RA contracts. Most importantly, the Decision will result in the unintended consequence of reducing available energy sources by restricting otherwise legitimate import RA sources, as discussed above. The Commission's arbitrary action, unjustified by any showing of public necessity, takes value from these parties without due process.

V. THE DECISION DISCRIMINATES, ON ITS FACE, AGAINST OUT-OF-STATE GENERATORS, IN VIOLATION OF THE UNITED STATES CONSTITUTION AND PUBLIC UTILITIES CODE §399.11(E)(2)

A. The Decision Facially Discriminates Against Out-Of-State Generators in Violation of the Dormant Commerce Clause

The Decision adopts new rules on import RA that are not imposed on in-state RA. Specifically, import RA will be required to self-schedule, *i.e.,* bid as a price taker, in the CAISO energy market. This significant burden on import RA is unconstitutional on its face as it expressly violates the Commerce Clause of the U.S. Constitution.

The Commerce Clause provides that "[t]he Congress shall have Power…[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[72] The Commerce Clause "by its own force restricts state protectionism."[73] The U.S. Supreme Court has long held that this Clause "prohibits state laws that unduly restrict interstate commerce."[74] Where a state act "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic *interests* over out-of-state *interests*, [the U.S. Supreme Court has] generally struck down the statute without further inquiry."[75]

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72 U.S. Const. Art. I, § 8, Cl 3.

73 *Tenn. Wine & Spirits Retailers Ass'n v. Thomas* (*Tenn. Wine*), 139 S. Ct. 2449, 2453 (2019).

74 *Id*. at 2459 (citing *Comptroller of the Treasury of Md. V. Wynn*, 135 S. Ct. 1787, 1794 (2015)).

75 *Id*. at 2471 (quoting *Granholm v. Heald*, 125 S. Ct. 1885, 1904 (2005)).

Although the Clause is framed as a "positive grant of power to Congress," the U.S. Supreme Court has consistently held that this language contains a "further, negative command, known as the dormant Commerce Clause, prohibiting certain state [actions] when Congress has failed to legislate on the subject."[76] The dormant Commerce Clause thus precludes States from "discriminat[ing] between transactions on the basis of some interstate element."[77]

In evaluating the constitutionality of a state action under the dormant Commerce Clause, the Supreme Court has held that "the first step…is to determine whether it 'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."[78] Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[79] State laws which "discriminat[e] against interstate commerce on their face are 'virtually *per se* invalid.'"[80] "In determining whether a state statute is facially discriminatory, the following matters are irrelevant: the justification that the state offers for the discrimination, the legitimacy of the state interests that the statute is designed to protect, the degree and scope of the discrimination, and the volume of commerce affected."[81] In fact, the State's burden of justification is so heavy that '"facial discrimination by itself may be a fatal defect."'[82]

When a state action is found to be facially discriminatory, the state may be able to overcome the *per se* rule by demonstrating it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[83] With respect to the import RA rules at issue here, it is true that the Commission enjoys a level of autonomy with respect to reliability concerns, based on its police power authority.[84] However, "it does not at all follow

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76 *Wynn*, 135 S. Ct. at 1794.

77 *Id*. (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977)).

78 *Fulton Corp. v. Faulkner* (*Fulton Corp.*), 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Ore.* (*Oregon Waste*), 511 U.S. 93, 99 (1994)).

79 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 338 (2007).

80 *Camps Newfound/Owatonna v. Town of Harrison* (*Camps Newfound*), 520 U.S. 564, 757 (1997) (quoting *Fulton Corp*., 516 U.S. at 331).

81 *Pacific Merchant Ass'n v. Voss*, 12 Cal. 4th 503, 517 (1995).

82 *Tenn. Wine*, 139 S. Ct. at 2473 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

83 *Camps Newfound*, 520 U.S. at 581 (quoting *Oregon Waste*, 511 U.S. at 101).

84 *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017) (where the State regulates a "traditional state function," e.g., resource adequacy programs adopted to ensure *local* reliability, FERC is less likely to intervene).

that every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion of the police powers of the State."[85]

The burden of overcoming the "strictest scrutiny" applicable here falls on the State. Even a legitimate reliability concern is not enough to support the Commission's facially discriminatory rule when, as here, the Commission's concerns with respect to reliability could be achieved through nondiscriminatory means.[86]

The Decision clearly discriminates against out-of-state generators. The Decision requires an import RA supplier to self-schedule its supply into the CAISO market during a window of time left vague by the Decision. During the self-scheduling hours, the import RA as a price taker could receive a price of zero or a negative price, depending upon the resources on the margin. Critically, these prices may not cover the costs of delivering the energy. An in-state RA supplier, on the other hand, has no such requirements and may bid its marginal cost into the market and is not obligated to "flow" if the generator's bid is not selected.

Based on the U.S. Supreme Court's decision in *GMC v. Tracy*,[87] it is highly likely that the Decision would also be found an import duty and thus in express violation of the dormant Commerce Clause. In its holding, the Court stated, "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'"[88] Here, the fact that out-of-state sellers of capacity must participate in the CAISO market on different terms than their in-state counterparts has the effect of an import duty, which the Supreme Court has described as the "paradigmatic" violation of the Commerce Clause.[89] "A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."'[90] The Supreme Court has made clear that this type of facial discrimination is "at the very core of activities forbidden by the dormant commerce clause."[91]

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85 *Tenn. Wine*, 129 S. Ct. at 2473 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

86 *See Oregon Waste*, 511 U.S. at 102.

87 519 U.S. 278, 287 (1997).

88 *Id.* at 287 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)).

89 *West Lynn Creamery, Inc. v. Healy* (*West Lynn*), 512 U.S. 186, 193 (1994).

90 *Id*. at 203 (citing *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984))); *see also West Lynn*, 512 U.S. at 193 (tariffs forbidden by the dormant Commerce Clause).

91 *Camps Newfound*, 520 U.S. at 581.

The Decision, on its face, sets different requirements and standards for out-of-state generators which are more costly and burdensome than those requirements set for in-state generators. This is a textbook case of a state action discriminating against out-of-state interests, thereby trespassing into the interstate commerce jurisdiction exclusively controlled by the U.S. Congress. The Decision clearly violates the dormant Clause and will in all likelihood be found unconstitutional if challenged in a federal court.

B. The Decision's Discriminatory Treatment of Out-of-State Generators Violates Public Utilities Code Section 399.11

Not only does the Decision directly contravene the Commerce Clause through its discriminatory impacts on out-of-state generators, it also expressly violates a requirement of Senate Bill (SB) 100. Senate Bill 100 amended §399.11(e)(2) of the California Public Utilities Code to "require[] generating resources located outside of California that are able to supply that electricity to California end-use customers to be treated identically to generating resources located within the state, without discrimination."[92] Requiring self-scheduling during an indeterminate window of time, when the requirement does not apply to in-state generators constitutes the type of disparate treatment SB 100 prohibits.

In addition to discriminating against import RA, the Decision creates two separate import RA markets within California, discriminating against Commission-jurisdictional LSEs. The Commission's rules will apply only to capacity procured to meet the RA requirements imposed on Commission-jurisdictional LSEs. Municipal utilities, however, will be able to procure RA to meet the CAISO's reliability requirements without these restrictions, thus increasing the supply available to them and reducing the cost of supply. The Decision thus disadvantages Commission-jurisdictional LSEs in the market.

VI. THE DECISION ENCROACHES ON FERC JURISDICTION BY "TETHERING" THE REQUIREMENTS TO AND DIRECTLY AND SUBSTANTIALLY IMPACTING BIDDING AND PRICING IN THE CAISO ENERGY MARKETS

The Decision directly affects the wholesale energy market, thereby opening the doors for the assertion of federal preemption. By mandating self-scheduling for all import RA, thus restricting the way energy is sold at wholesale and bid in CAISO markets, the Decision is trespassing into FERC jurisdiction. While FERC has generally allowed the CPUC to establish

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[92] CAL. PUB. UTIL. CODE § 399.11(e)(2).

RA requirements for its jurisdictional LSEs, the Decision's implication of the wholesale market through is discriminatory treatment of import RA contracts practically invites FERC to assert its jurisdiction over these contracts, if not the RA program as a whole.

The Federal Power Act (FPA) bestows FERC exclusive jurisdiction over the rates, terms and conditions of wholesale sales, requiring "just and reasonable" rates,[93] prohibiting "undue preference or advantage,"[94] and conferring authority to rectify any action that violates these statutory directives.[95] Under the FPA, the term "sale of electric energy at wholesale" means "a sale of electric energy to any person for resale." In *FERC v. Elec. Power Supply Ass'n*,[96] the Supreme Court observed that the FPA obligates FERC to oversee "'[a]ll rates and charges made, demanded, or received by any public utility for or in connection with' interstate transmissions or wholesale sales—as well as "all rules and regulations *affecting* or pertaining to such rates or charges."[97] The Court also approved a "common-sense" construction of the FPA's language which "limit[s] FERC's 'affecting' jurisdiction to rules or practices that '*directly* affect the [wholesale] rate.'"[98]

Where a state law or program is so "tethered" to, or directly impacts participation in, the wholesale market, FERC is likely to challenge the state's action and assert jurisdiction. In *Hughes v. Talen Energy Mktg., LLC.,*[99] the Supreme Court ruled that a program designed by the State of Maryland to provide subsidized price support to encourage development of new resources was preempted by federal law.[100] The program provided "subsidies, through state-mandated contracts, to a new generator, but condition[ed] receipt of those subsidies on the new generator selling capacity into a FERC-regulated wholesale auction."[101] FERC sought to preempt the program due to its effect on wholesale markets, noting the tension with state policy:

> Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives. We are

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93 16 U.S.C. § 824d(a).
94 16 U.S.C. § 824d(b).
95 16 U.S.C. § 824e(a).
96 136 S. Ct. 760 (2015).
97 *Id.* at 773 (quoting 16 U.S.C. § 824d(a) (emphasis added)).
98 *Id.* at 774 (emphasis added) (quoting *Cal. Indep. Sys. Operator Corp. v. FERC,* 372 F.3d 395, 403 (D.C. Cir. 2004)).
99 136 S. Ct. 1288 (2016).
100 *Id*. at 1290.
101 *Id*. at 1293.

> forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity.[102]

The Fourth Circuit affirmed FERC's conclusion, reasoning that the program "functionally sets the rate that [generator] receives for its sales in the PJM auction," which is a FERC-approved organized market.[103] The Supreme Court agreed: "[b]y adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf."[104]

Conversely, state programs that provide support for generators *separate from and independent of market operations* have been found not preempted by federal law. "State law claims are not preempted…where the action does not relate to wholesale sales in interstate commerce…or where claims do not require the court to second-guess rates or tariffs set by FERC."[105] For example, *Electric Power Supply Ass'n. v. Star*[106] addresses an Illinois program to provide support for nuclear plants. Under the program, nuclear plants received emission credits which other types of generation were required to purchase. The price of the credit varied based on wholesale market prices. Differentiating from the fatal feature of the Maryland program, the Seventh Circuit allowed the program, finding that the subsidy did not depend on participation in the wholesale market, or directly affect wholesale prices.

> To receive a credit, a firm must *generate* power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences.[107]

The instant Decision can be distinguished from the *Star* case in that it requires out-of-state generators to self-schedule in the FERC-regulated CAISO energy market in order to participate in California's capacity market. Unlike *Star*, the Decision does not give import RA suppliers alternative options to participate in the market; instead, it strictly requires them to self-schedule

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102 *Id.* at 1296 (citing *PJM Interconnection,* 137 F.E.R.C. ¶61,145, 61,747 (Nov. 17, 2011)).
103 *Id*. (quoting *PPL EnergyPlus, LLC v. Nazrian*, 753 F. 3d 467, 476-77 (4th Cir. 2014)).
104 *Id*. at 1297.
105 *E. & J. Gallo Winery v. EnCana Energy Servs*., 2005 U.S. Dist. LEXIS 24240, at 26-27 (E.D. Cal. Sept. 30, 2005).
106 904 F. 3d 518 (7th Cir. 2018).
107 *Id*. at 523-24.

during the indeterminate window of time or forfeit the right to sell RA capacity to Commission-jurisdictional LSEs.

If challenged, it is highly likely that FERC will be successful in qualifying the Decision as being "tethered" to the wholesale market. In the same vein as the Maryland law, the Decision directly interferes with the wholesale market. The Decision's requirement of self-scheduling for import RA and potentially 24/7 "flow" not only forces out-of-state generators to bid into the CAISO market if they wish to participate in the California market, but to bid at such artificially low prices so as to guarantee that their bid is accepted. This requirement so disrupts the competitive price of energy on the market that it requires out-of-state generators to self-schedule energy as a price taker in the CAISO market. The Decision therefore has the "effect of disrupting competitive price signals" which will undoubtedly result in FERC assertion of jurisdiction in the matter with a high likelihood of success.

VII. RELIEF REQUESTED

CalCCA seeks rehearing of the Decision to correct the legal errors identified in this Application. The Commission should start from the premise that the new requirements are modifications of D.04-10-035 and D.05-10-042. Acknowledging this reality, it further should reopen the record to more fully examine the requirements and establish a phase-in schedule to avoid contract abrogation, as it did in D.05-10-042, including grandfathering existing import RA contracts. Finally, at a minimum, the Commission must correct its legal error with the following changes:

a. Clarify that "resource specific" RA contracts include all contracts that specify a resource ID, a portfolio of resources that will be available to meet the need for energy, or a Balancing Authority backed by operating reserves or are supplied by an Asset Controlling Supplier.

b. Clarify that non-resource-specific contracts must ensure delivery at a time consistent with CAISO operational needs.

Recognizing that compliance for 2020 must be shown by October 31, 2019, the Commission should delay implementation of the new requirements until the 2021 compliance year.

Respectfully submitted,

Evelyn Kahl
Counsel to the
CALIFORNIA COMMUNITY CHOICE ASSOCIATION

October 24, 2019

EXHIBIT A

Redline Comparison of September 6, 2019, Proposed Decision and Revised Proposed Decision

STATE OF CALIFORNIA

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

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09/06/19
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PM

September 6, 2019

Agenda ID #17718 Ratesetting

TO PARTIES OF RECORD IN RULEMAKING 17-09-020

This is the proposed decision of Administrative Law Judges Debbie Chiv and Peter V. Allen. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's October 10, 2019 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.
Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.
The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, ex parte communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ ANNE E. SIMON Anne E. Simon
Chief Administrative Law Judge

AES: gp2 Attachment

Decision **PROPOSED DECISION OF ~~ALTS~~ ALJS ALLEN AND CHIV**
(Mailed 9/6/2019)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

~~Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Annual Local and Flexible Procurement Obligations for the 2019 and 2020 Compliance Years.~~	~~Rulemaking 17-09-020~~
Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Annual Local and Flexible Procurement Obligations for the 2019 and 2020 Compliance Years.	Rulemaking 17-09-020

PROPOSED DECISION ~~CLARIFYING~~ AFFIRMING RESOURCE ADEQUACY IMPORT RULES

Summary

This decision ~~clarifies~~ affirms the requirements governing the use of energy imported into California to meet Resource Adequacy requirements, as set forth in Decision (D.) 04-10-035 and D.05-10-042.

This proceeding remains open.

1. Background

On July 3, 2019, an Assigned Commissioner's Ruling (ACR) was issued that invited parties to respond to questions about the use of energy imported into California to meet resource adequacy (RA) requirements. As provided in the ACR, Decision (D). 04-10-035 adopted the following qualifying capacity methodology.

> Qualifying capacity for import contracts is the contract amount, provided the contract:

1. Is an Import Energy Product with operating reserves,
2. Cannot be curtailed for economic reasons, and

3a. Is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission, or

3b. Specifies firm delivery point ([*i.e.*] not seller's ~~choice).[1]~~choice).[1]

Additionally, the ACR noted that D.05-10-042 stated that non-unit specific, liquidated damages (LD) contracts would be phased out of the RA program. The decision found that these contracts increase the likelihood of

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~~1 D.04-10-035 at 54 (adopting Section 5 of the Workshop Report on Resource Adequacy Issues at 21, available at: http://docs.cpuc.ca.gov/PublishedDocs/WORD PDF/REPORT/37456.PDF). Note that under Section 5, the methodology was outlined as follows:~~

> ~~QC = Contract Amount provided the contract:~~
>
> ~~1. Is an Import Energy Product with operating reserves~~
>
> ~~2. Cannot be curtailed for economic reasons~~
>
> ~~3a. Is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission OR~~
>
> ~~3b. Specifies firm delivery point (not seller's choice)~~

double-counting resources and are not subject to deliverability screens, concerns that have the potential to impact long-term grid ~~reliability.[2]~~ reliability.[2] However, in D.05-10-042, one category of non-unit specific LD contracts was deemed exempt from phase-out: LD contracts that met import deliverability requirements and demonstrated sufficient physical resources associated with them (*e.g.*, spinning reserves and firm energy delivery).

D.05-10-042 stated:

> Firm import LD contracts do not raise issues of double counting and deliverability that led us to conclude that other

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[1] D.04-10-035 at 54 (adopting Section 5 of the Workshop Report on Resource Adequacy Issues at 21, available at: http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/REPORT/37456.PDF). Note that under Section 5, the methodology was outlined as follows:

> QC = Contract Amount provided the contract:
>
> 1. Is an Import Energy Product with operating reserves
> 2. Cannot be curtailed for economic reasons
>
> 3a. Is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission OR
>
> 3b. Specifies firm delivery point (not seller's choice)

[2] *See* Qualifying Capacity Methodology Manual Adopted 2017 (R.17-09-020) at 3-5, available at: https://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442455533.

> LD contracts should be phased out for purposes of RAR [resource adequacy requirements]. We note that firm import contracts are backed by spinning reserves. Accordingly, we approve the exemption of firm import LD contracts from the sunset/phase-out provisions applicable to other LD contracts as adopted in Section ~~7.4.[3]~~ 7.4.[3]

~~2 See **Qualifying Capacity Methodology Manual Adopted 2017 (R.17-09-020) at 3-5, available at: https://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442455533.**~~
~~3 **D.05-10-042 at 68.**~~

In September 2018, the California Independent System Operator's (CAISO) Department of Market Monitoring (DMM) issued a special report on RA imports. In that report, the DMM stated that RA imports are only required to bid into the day-ahead market and that imports can bid at any price up to the $1,000 per megawatt hour (MWh) offer cap without further obligation to bid into the ~~realtime~~ real- time market if not scheduled in the day-ahead market or residual unit commitment process. DMM stated that the existing rules could allow a significant portion of RA requirements to be met by imports that may have limited availability and value during critical system and market conditions. For instance, RA imports could be routinely bid significantly above projected prices in the day-ahead market to help ensure they do not clear, thus relieving the imports of any further offer obligations in the real-time ~~market.[4]~~market.[4]

The CAISO raised similar concerns in its Resource Adequacy Enhancements stakeholder initiative, noting that:

> [T]he current RA import provisions may allow some RA import resources to be shown to meet RA obligations while also representing speculative supply (*i.e.,* no true physical resource or contractual obligation backing the RA showing) or

[3] D.05-10-042 at 68.

[4] DMM Special Report: Import Resource Adequacy (September 10, 2018) at 1-2, available at: http://www.caiso.com/Documents/ImportResourceAdequacySpecialReport-Sept102018.pdf.

~~4 **DMM Special Report: Import Resource Adequacy (September 10, 2018) at 1-2, available at: http://www.caiso.com/Documents/ImportResourceAdequacySpecialReport-Sept102018.pdf.**~~

being committed to other regions and double ~~counted.[5]~~counted.[5]

Based on this information, the ACR was issued to seek comments on the concern that load serving entities (LSE) may be relying on unspecified imports for RA in a manner that does not conform with the requirements set forth in D.04-10-035 and D.05-10-042. ~~The particular~~ At issue is ~~that~~ whether certain unspecified imports used to meet RA requirements ~~may not provide firm energy delivery, raising concerns as to whether these resources~~ qualify as "Energy Product[s]" that "cannot be curtailed for economic reasons," as required by D.04-10-035 and D.05-10-042. It is also unclear whether these unspecified RA contracts will be able to deliver energy when it is needed most.

2. Assigned Commissioner's Ruling

The ACR invited parties to respond to the following questions about the RA import contract rules and obligations:

1. Should Commission decisions (a) require RA import contracts to include the actual delivery of firm energy with firm transmission and (b) clarify that only a bidding obligation is deemed not sufficient to meet RA rules?
2. Do parties agree that firm transmission capacity is required in addition to firm energy? Please explain why or why not.
3. Should the Commission clarify its rules, or are existing decisions and requirements sufficient? If the former, please propose clarifying language ~~and/~~ and/or how such clarifications should be established.
4. If the Commission determines that RA import contracts with a bidding obligation, but without delivery of firm energy with firm transmission, do not qualify as RA,

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~~5 See **Resource Adequacy Enhancements Straw Proposal - Part 1 (December 20, 2018) at 9, available at: http://www.caiso.com/Documents/StrawProposalPartI-ResourceAdequacyEnhancements.pdf.**~~

how should these types of contracts be addressed going

[5] *See* Resource Adequacy Enhancements Straw Proposal – Part 1 (December 20, 2018) at 9, available at: http://www.caiso.com/Documents/StrawProposalPart1-ResourceAdequacyEnhancements.pdf.

forward? Should these contracts be disallowed for the balance of 2019, beginning in 2020, or at a later date?

5. How should LSEs document that their RA import resources meet the Commission's import rules? Examples may include, but are not limited to, LSEs providing attestations or certifications for each import contract or attestations from the import provider.
6. If necessary, how should Energy Division staff determine compliance?
7. If it is determined that the imports used by an LSE do not meet the Commission's firm energy requirements, does the existing RA penalty structure provide enough deterrence to prevent further transactions of this type? If not, what additional remedies or corrective measures should be imposed?

Opening comments were filed on July 19, 2019 by the following parties: Alliance for Retail Energy Markets (AReM), Bonneville Power Administration (BPA), Calpine Corporation (Calpine), California Community Choice Association (CalCCA), CAISO, California Large Energy Consumers Association (CLECA), DMM, Green Power Institute (GPI), Independent Energy Producers Association (IEP), Morgan Stanley Capital Group Inc. (MSCG), NRG Energy, Inc. (NRG), Pacific Gas and Electric Company (PG&E), Powerex Corp. (Powerex), Public Generating Pool (PGP), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE).

Reply comments were filed on July 26, 2019 by CAISO, CLECA, DMM, Middle River Power ~~EEC~~ LLC (MRP), MSCG, NRG, Powerex, Public

Advocates Office (Cal Advocates), SDG&E, Shell Energy North America (US), L.P. (Shell), and SCE.

3. Discussion

The Commission first notes that numerous parties comment that RA import contracts should not be required to include actual delivery of firm energy with firm transmission but rather, recommend one (or more) of the following:

(a) An alternative approach to the RA import rules, such as inclusion of an energy bid price or offer cap in import ~~contracts;[6]~~contracts;[6]

(b) That clarification of the RA imports rules should be delayed until a future phase of this proceeding or to await resolution in other stakeholder ~~processes;[7]~~ processes;[7] and

(c) That clarification of the RA import rules may be unnecessary ~~and/~~ and/or the concern is ~~overstated.[8]~~overstated.[8]

As a preliminary matter, the Commission reiterates the purpose behind the ACR, as stated in the ruling:

> [T]he Commission is concerned that some load serving entities (LSEs) may be relying on unspecified imports for RA in a manner that does not conform with the D.04-10-035 and D.05-10-042 requirements and could undermine the integrity of the RA program. Specifically, some unspecified imports used by LSEs to meet RA requirements may not provide firm energy delivery, which raises the question of whether these resources will be able to deliver energy to

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~~6 See, e.g., **Cal Advocates Reply Comments at 3, PG&E Comments at 3, SCE Comments at 3.**~~

~~7 See, e.g., **AReM Comments at 8, CalCCA Comments at 2, Calpine Comments at 3, CLECA Comments at 3, SDG&E Comments at 4, Shell Reply Comments at 3.**~~

~~8 See, e.g., **CalCCA Comments at 3, SDG&E Comments at 3, Shell Reply Comments at 1.**~~

the grid when it is needed ~~most.[9]~~most.[9]

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[6] *See, e.g.*, Cal Advocates Reply Comments at 3, SCE Comments at 3.

[7] *See, e.g.*, AReM Comments at 8, CalCCA Comments at 2, Calpine Comments at 3, CLECA Comments at 3, SDG&E Comments at 4, Shell Reply Comments at 3.

[8] *See, e.g.*, CalCCA Comments at 3, SDG&E Comments at 3, Shell Reply Comments at 1.

[9] ACR at 4.

Additionally, the ACR provides that "RA import resources that cannot perform if called upon thus amount to 'speculative supply~~/~~,' as described by ~~CAISO."[10]~~CAISO."[10]

In this decision, the Commission ~~seeks to clarify~~ affirms the RA import requirements, as set forth in D.04-10-035 and D.05-10-042. The Commission does not seek to delay ~~clarification~~ affirmation of the RA import requirements, or consider alternative approaches to the import RA rules at this time, although future processes for considering such proposals are discussed below. For these reasons, we decline to address comments based on the above recommendations at this time.

3.1. ~~Firm~~ Import Energy ~~Delivery~~Products That Cannot Be Curtailed for Economic Reasons

The first question posed in the ACR considers whether RA import contracts require actual delivery of firm energy, and whether a day-ahead bidding obligation alone should be sufficient to meet RA import rules.

Numerous parties respond that RA import contracts should not require

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~~9 ACR at 4.~~

~~10 Id. at 5.~~

actual delivery of firm energy, including AReM, BPA, Cal Advocates, Calpine, CAISO, CalCCA, MSCG, NRG~~, PG&E~~, PGP, Powerex, SDG&E, and Shell. Many of these parties generally contend that such a requirement will lead to inefficiencies in the market and increase costs for LSEs and customers. AReM states that this ~~must-~~must- flow requirement "would essentially force all RA Imports to offer into the CAISO energy market as a price taker and incur losses when the prices outside of the CAISO are higher, leading to higher customer ~~costs."~~costs."[11] ~~[11]~~SDG&E argues that these contractual arrangements should be governed by the tariff and resolved between

[10] *Id.* at 5.

[11] AReM Comments at 6.

the commercial entities involved in the ~~transaction.[12]~~transaction.[12] The CAISO states that contracts should not require actual energy delivery absent a CAISO market award, as this would render imports to be a "must-take" resource that would reduce flexibility of resources needed for the ~~grid.[13]~~ grid.[13] The CAISO adds that if the Commission elects to treat RA imports as "must-take" resources, the resources should be accounted for in the maximum cumulative capacity (MCC) buckets and align with identified reliability needs.

By contrast, a few parties comment that RA import contracts should require actual delivery of firm energy, including IEP, ~~Middle River~~PG&E, and SCE. IEP views RA imports without a firm energy delivery obligation as

~~11AReM Comments at 6.~~

~~12SDG&E Comments at 9.~~

~~13CAISO Comments at 2.~~

speculative ~~supply.[14] Middle River states that there appears to be no compelling reason as to why RA imports should receive different treatment from the standards for meeting RA requirements.[15]~~ supply.[14] SCE states that D.04-10-035 "correctly identified the requirements for an import to count as RA given the market conditions at the time" and that the requirements were "sufficient to prevent the double counting of resources while allowing ~~loadserving~~ load-serving entities to engage in economic energy transaction that will ~~reliable~~ reliably provide for energy and capacity to serve their load at that ~~time."[16]~~ time."[15]

As stated in the ACR, the Commission finds that D.04-10-035 and D.05-10-042 established the requirements for import contracts to count as RA and finds insufficient record for modifying those requirements at this time.

~~However, while we affirm the established import requirements, we recognize that it is necessary to clarify the requirements.~~

One of the goals of the RA program is to ensure that sufficient energy ~~capacity~~

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flows into California when the system is peaking in order to maintain grid reliability. As such, ~~it is reasonable that RA import contracts should be structured to require energy to flow during peak system periods. While RA import contracts should consist of energy flowing at all times covered by the contract, we find that "firm" energy should encompass energy delivery, at a minimum, during the Availability Assessment Hour (AAH)~~

~~14**IEP Comments at 3.**~~

~~15**MRP Reply Comments at 2.**~~

~~16**SCE Comments at 2.**~~

~~window (e.g.,~~we find that the import requirements in D.04-10-035 and D.05-10-042 are critical to the objectives of the RA program and affirm those requirements in this

[12] SDG&E Comments at 9.

[13] CAISO Comments at 2.

[14] IEP Comments at 3.

[15] SCE Comments at 2.

~~4:00 p.m. to 9:00 p.m.). Moreover, we clarify that "firm" energy does not mean energy~~ decision. In addition, we underscore that a contract for an import energy product that is available only when called upon in the CAISO's day-ahead market or residual unit commitment~~.~~ process does not qualify as an "energy product" that "cannot be curtailed for economic reasons."

In affirming the existing requirements for import RA contracts, we clarify that a non-resource-specific RA import is required to self-schedule into the CAISO markets consistent with the timeframe reflected in the governing contract. However, this requirement does not apply to resource-specific RA imports, including dynamically scheduled resources, since resource-specific imports have a physical resource backing the assigned RA capacity and therefore, do not carry the same concerns about speculative supply as with non- resource-specific imports.

Accordingly, the Commission affirms the requirements for RA import contracts established in D.04-10-035 and D.05-10-042~~-~~, with the clarification that ~~"firm" energy requires that energy delivery must flow, at a minimum, during the AAH window. Additionally, the~~ an "energy

product" that "cannot be curtailed for economic reasons" is required to be self-scheduled into the CAISO markets, consistent with the timeframe established in the governing contract. The Commission agrees with the CAISO that import RA resources should be accounted for in the current MCC ~~categories~~ buckets and align with identified reliability needs, ~~and we adopt this requirement here~~consistent with existing requirements.

To address comments regarding the inflexible nature of self-scheduled resources, we note that the CAISO's current Availability Assessment Hours (AAH) are 4:00 p.m. to 9:00 p.m. The Availability Assessment Hours are a set of five consecutive hours that correspond to the operating periods when high demand conditions typically occur and when availability of RA capacity is most critical to maintaining system reliability. In order to avoid the self-scheduling of imports during periods of negative pricing, the Commission encourages LSEs to

utilize the MCC buckets and self-schedule their resources during periods of high demand.

~~We recognize that~~ In addition to the MCC buckets, LSEs can manage the potential market inefficiencies that may result from ~~this type of firm energy requirement. For example, this may result in a potential self-scheduling of energy into the market at times of negative prices. However, requiring energy delivery during the AAH window, as opposed to a 24 x 7 bidding obligation, minimizes this concern in part because negative prices are unlikely to occur between 4:00 and 9:00 p.m. Further, LSEs rely on~~ self-schedules in other ways. For example, LSEs can opt to rely on RA imports to a lesser degree in ~~off~~ the Spring and other off- peak

months, when negative prices are more likely to occur. This would result in more reliance on resource-specific RA from within California rather than import RA energy products.

Lastly, the Commission acknowledges parties' broad range of responses to the questions raised in the ACR. At this time, we find insufficient record support to modify the requirements set forth in D.04-10-035 and D.05-10-042. However, the Commission will consider changes to and a deeper analysis of the current RA import rules in ~~a future~~ the next phase of the RA proceeding, including the ability for such resources to operate more flexibly in the CAISO market.

3.2. Firm Transmission Capacity

Another question posed in the ACR considers whether firm transmission capacity should be required in addition to firm energy. Several parties respond that all RA contracts should be backed by firm transmission during the delivery period, including BPA, Calpine, CAISO, IEP, Middle River, NRG, Powerex, and SCE. Powerex states that not including this requirement risks multiple suppliers relying on the same transmission capacity to schedule energy to multiple Balancing Authority Areas (~~BAA).[17]~~ BAA).[16] Calpine contends that firm transmission should be required to provide import RA capacity but that the current rules are

[16] Powerex Comments at 13.

unclear as to when firm transmission should be ~~secured.[18]~~ secured.[17]

~~17 **Powerex Comments at 13.**~~

~~18 **Calpine Comments at 2.**~~

SCE asserts that D.04-10-035 already imposes this requirement on ~~LSEs.[19]~~LSEs.[18]

Other parties state that RA import contracts should not require firm transmission, including AReM, CalCCA, MSCG, PG&E, and SDG&E. MSCG states that firm transmission capacity should not be required, as this would limit the pool of suppliers to only those who hold firm ~~transmission.[20]~~ transmission.[19] PG&E argues that such a requirement could lead to inefficiencies as the energy must
self-schedule into the CAISO market and would be delivered to the CAISO regardless of ~~cost.[21]~~ cost.[20] A few parties, such as BPA, Cal Advocates, CLECA, CAISO, and PGP, support requiring suppliers of RA imports to report the BAA from which the import is sourced.

In considering parties' comments, the Commission finds that D.04-10-035 and D.05-10-042 sufficiently provide the rules requiring transmission capacity for RA import contracts. ~~We do clarify that under the established requirements, the contracted energy product from the source balancing authority cannot be curtailed for economic reasons or bumped by a higher priority claim to thetransmission.~~ Accordingly, we affirm the requirements adopted in ~~D.04-~~D.04- 10-035:

> Qualifying capacity for import contracts is the contract amount, provided the contract: (1) is an Import Energy Product with operating reserves, (2) cannot be curtailed for economic reasons, and (3a) is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission or (3b) specifies

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~~19 **SCE Comments at 3.**~~

~~20 **MSCG Comments at 6.**~~

~~21 **PG&E Comments at 3.**~~

firm delivery point (i.e., not seller's choice).

[17] Calpine Comments at 2.

[18] SCE Comments at 3.

[19] MSCG Comments at 6.

[20] PG&E Comments at 3.

3.3. Compliance with Requirements for RA Import Contracts

In light of the ~~clarification and~~ affirmation of the RA import requirements in this decision, we consider how RA import contracts should be treated on a going forward basis. Many parties support grandfathering in existing contracts. However, we note that the requirements at issue date back to Commission decisions from 2004, and thus are not new requirements. Therefore, we find it unnecessary to grandfather existing contracts.

Many parties support the use of formal attestations or copies of contracts as sufficient documentation of compliance with the import requirements, including AReM, BPA, Cal Advocates, CalCCA, CAISO, Calpine, MSCG, NRG, PG&E, Powerex, and SCE. Most of these parties also support some level of review by the Commission's Energy Division to further ensure compliance, such as audits or review of attestations or contract language. The CAISO also recommends that Energy Division should compare the documentation provided with bidding behavior to verify ~~compliance.[22]~~compliance.[21]

The Commission agrees that in order to demonstrate compliance with the RA import requirements, LSEs subject to the RA program should provide

~~22 CAISO Comments at 4.~~

documentation as part of its annual and monthly compliance filings, in the form of either contract language or an attestation from the contracting import provider or the scheduling coordinator for the resource. The Commission also agrees that it is reasonable for Energy Division staff to review each contract or attestation, as well as review whether these resources ultimately ~~delivered~~ scheduled energy ~~to~~ into the CAISO markets, to verify compliance. Energy Division will use import ~~bidding and scheduling data (based on~~ data obtained from the CAISO~~)~~ to verify monthly compliance. The Commission directs

[21] CAISO Comments at 4.

Energy Division to report on the annual aggregated ~~bidding and scheduling~~ data in its annual RA report. Accordingly, we adopt these requirements here.

In terms of a penalty structure, numerous parties state that the existing penalty structure provides sufficient deterrence, including CLECA, Cal Advocates, CalCCA, MSCG, NRG, PG&E, SCE, Shell and SDG&E. The Commission agrees that the existing RA penalty structure is sufficient to deter violations of the import rules and we decline to modify the penalty structure at this time. ~~However, we note that should~~ Should Energy Division determine~~, ex post,~~ that ~~an~~ a non-specified import RA contract does not meet the qualifying capacity requirements as affirmed in this decision and prior Commission decisions~~.~~, Energy Division may refer this deficiency to the Commission's Consumer Protection and Enforcement Division.

4. ~~4.~~ Comments on Proposed Decision

The proposed decision of Administrative Law Judges (ALJs) Peter V. Allen and Debbie Chiv in this matter was mailed to the parties in accordance

with Section 311 of the Public Utilities (Pub. Util.) Code and comments were allowed under Rule 14.3. ~~Filed~~ Opening comments ~~on, and~~were filed on September 26, 2019 by AReM, BPA, CAISO, Calpine, Cal Advocates, CalCCA, City of San Diego, DMM, GPI, the Joint Environmental Parties, MRP, MSCG, PG&E, PGP, Powerex, SCE, SDG&E, Shell, and WPTF. Reply comments were filed on October 1, 2019 by American Wind Energy Association of California (AWEA-CA), Calpine, DMM, IEP, MRP, MSCG, PG&E, Powerex, and SDG&E.

All comments have been thoroughly considered. Significant aspects of the proposed decision that have been revised in light of the comments are mentioned specifically in this section. However, additional changes have been made to the proposed decision in response to comments that may not be discussed here. We

do not summarize every comment but rather, focus on major arguments made in which the Commission did or did not make revisions in response to party input.

Many parties' comments attempt to re-litigate and elaborate upon arguments that were raised in comments to the ACR, such as assertions that a firm energy requirement will lead to market inefficiencies and increase costs for LSEs and customers, that a decision on the import requirements should be postponed until a future phase or other stakeholder process, and that import RA resources should be subject to an alternative requirement. The Commission reiterates its conclusion that D.04-10-035 and D.05-10-042 (the 2004/2005 decisions) established the requirements for import contracts to count as RA and affirms the requirements in this decision.

Several parties, including AReM, CalCCA, Calpine, MSCG, and Shell, state that the Commission is not merely clarifying the import requirements

but changing the requirements, since the requirement for energy to flow during the AAH window did not exist in D.04-10-035 and D.05-10-042. The Commission intended to apply the 2004/2005 requirements more narrowly to peak system periods in response to comments to the ACR. However, we are persuaded that adding the requirement that energy flow during the AAH window could alter the integrity of the 2004/2005 decisions and be perceived as an additional requirement. Accordingly, we have modified the decision to remove the requirement that energy must flow during the AAH window.

A few parties, including AReM, CalCCA, Calpine, MSCG, and Shell, also contend that requiring firm energy to flow for import RA contracts is a wholly new requirement that did not previously exist. AReM and CalCCA argue that the 2004/2005 decisions do not include a definition of "firm energy" or "Import

Energy Product."[22] MSCG argues that the 2004/2005 decisions do not specifically require "firm *delivery* of energy during certain periods regardless of CAISO dispatch awards in order to satisfy import RA requirements."[23]

The Commission finds that parties have not provided credible support as to why the 2004/2005 decisions do not set forth the requirements for import contracts to count as RA. We are not persuaded by parties' attempts to parse or disregard the pertinent language of the 2004/2005 decisions. D.04-10-035 states that an import RA contract: "(1) is an Import Energy Product with operating reserves, (2) cannot be curtailed for economic reasons, and (3a) is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission or (3b) specifies firm delivery point (not seller's choice)." Reading the enumerated paragraph together, as intended, clearly delineates the requirements for an import contract to count as

an RA resource. To the extent that parties find the 2004/2005 decisions to be ambiguous, that should have been litigated in the proceeding leading up to D.04- 10-035 and D.05-10-042. However, to address concerns that the term "firm energy" is unclear, we have replaced the term with "energy product" that "cannot be curtailed for economic reasons," to mirror the existing requirements.

Calpine adds that "[t]he market has been operating for many years with the understanding that the provision of import RA capacity, consistent with the CAISO tariff, entails a must offer, not a must deliver, obligation. The Commission and Energy Division Staff has been aware of this practice and have

[22] AReM Comments on Proposed Decision at 2, CalCCA Comments on Proposed Decision at 3.

[23] MSCG Comments on Proposed Decision at 4.

not raised concerns until recently."[24] We again reiterate that this market "understanding" is and has been squarely at odds with the existing requirements. As stated in the ACR, the Commission and Energy Division staff became aware of the suspect bidding behavior (and the absence of self-scheduling of energy) following DMM's September 2018 RA import report. Energy Division staff issued its request for information in April 2019 to further evaluate the concern and the ACR was issued in July 2019. Historically, Energy Division staff did not obtain bidding and scheduling data for RA imports from the CAISO, unlike for in-state resources, and had no means to observe the suspect bidding behavior.

SCE comments that the existing import requirements should not apply

to resource-specific import RA since such resources have a physical resource backing the RA assigned to the resource, as opposed to non-specific resources that are not backed by a physical resource. The CAISO also has visibility into resource-specific import RA and requiring such resources to self-schedule may not provide the CAISO with necessary flexibility. Calpine, DMM and SDG&E support SCE's recommendation. The Commission agrees that it is unnecessary to apply the affirmed requirements to resource-specific RA and modifies the decision to reflect that.

SCE also comments that the decision should clarify that "a self-schedule in the CAISO market for non-resource specific RA import resources during the AAH window provides for the 'firm energy' required by the decision."[25] SCE notes that when a bid is submitted to the CAISO market, there is no guarantee of

[24] Calpine Comments on Proposed Decision at 3.

[25] SCE Comments on Proposed Decision at 4.

the delivery of energy without a CAISO market dispatch award and therefore, an LSE can only self-schedule the resource to meet the import requirement. We agree that clarification is necessary that a self-schedule into the CAISO market is sufficient to satisfy the requirements and have modified the decision as such.

Many parties reiterate arguments for grandfathering in existing contracts that do not satisfy the 2004/2005 requirements. Much of these arguments focus on a change to the 2004/2005 requirements, namely that requiring energy to flow during the AAH window constitutes a new requirement. The Commission is not persuaded to grandfather in contracts that are in violation of the Commission's existing requirements, particularly since the AAH

requirement has been removed, and declines to modify the decision.

A few parties, including CalCCA, Shell and MSCG, argue that requiring out-of-state RA resources to self-schedule into the CAISO markets impermissibly discriminates against out-of-state generators in violation of the U.S. Constitution and Senate Bill 100. The Commission disagrees. The RA program was developed pursuant to Pub. Util. Code Section 380 following the 2000-2001 energy crisis during which numerous suppliers engaged in physical and economic withholding.[26] The Commission thus acts under its authority as a state agency authorized under the California Constitution[27] to assure a reliable, adequate energy supply for the state. Also, the fact that resource-specific RA imports are exempt from the self-scheduling requirement further underscores the stated purpose of this decision and the RA program: to assure availability of generation that is under an RA contract when and where needed.

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[26] *See* D.04-10-035 at 3.

[27] California Constitution, Article XII, Section 1.

Moreover, due to the CAISO's market operation rules that contain distinct requirements for import resources versus in-state resources,[28] out-of-state generation is not and cannot be treated identically to in-state generation resources. Further, Pub. Util. Code Section 761.3 provides for Commission oversight of the operations and maintenance of in-state generation resources to assure safe and reliable supply of energy resources in California. As part of this oversight, the Commission developed General Order 167, which provides various recordkeeping, inspection, and standards of operation applicable only to in-state generation resources. There are no similar provisions for out-of-

state generation resources.

CalCCA, MSCG, and Shell also argue that requiring out-of-state generation to actually supply energy in California invades the Federal Energy Regulatory Commission's (FERC) regulatory jurisdiction. We disagree and find that the cases cited by parties are inapposite to our situation and ignore federal

[28] Under the CAISO's market operation rules, import resources under RA contract:

> "are not required to be resource specific or to represent supply from a specific balancing area. RA import resources are only required to be shown, and make offers as shown, at a specific intertie point in the CAISO's system. Import RA . . . does not have any further obligation to bid into the real-time market if not scheduled in the day-ahead integrated forward market or residual commitment process." Resource Adequacy - Revised Straw Proposal (July 1, 2019) at 39, available at: http://www.caiso.com/Documents/RevisedStrawProposal-ResourceAdequacyEnhancements.pdf.

In-state RA resources are not subject to the above requirement but rather, "have an ongoing must-offer obligation in the CAISO's Real Time markets, and are subject to both emergency recall and Exceptional Dispatch directions from the CAISO." *Id.* at 40. For out-of- state resources, the CAISO does not have the ability to issue an emergency recall, nor is there assurance that external non-resource-specific resources will respond to CAISO Exceptional Dispatch determinations. *Id.*

law. The Federal Power Act expressly provides for state authority to assure the reliability of long-term energy supply within their jurisdictions.[29]

The Commission is thus unpersuaded by parties' belated legal arguments.

To the extent parties believe the requirements of the 2004/2005 decisions impermissibly discriminate against out-of-state generators or intrude on FERC's jurisdiction, those legal challenges should have been raised in response to D.04- 10-035 and D.05-10-042.

CAISO summarizes market inefficiencies that may result from an RA must-flow requirement, including that such a requirement: would foreclose

the ability for RA imports to help the CAISO shape net-load ramping needs, would increase the need for flexible generation as inflexible supply increases, and could lead to a decrease in energy revenues for internal resources.[30] DMM expresses
concern that a large volume of self-schedules could result in market inefficiencies but states that limiting energy delivery to the AAH window will likely mitigate much of the CAISO's concerns. DMM supports the proposed decision as an interim measure that will help ensure reliability for RA imports during peak ramping hours while alternative solutions are being developed.

While we recognize the CAISO's concerns, we emphasize the Commission's purpose to ensure a reliable, adequate energy supply for the state and the RA program's purpose to ensure sufficient, reliable energy to maintain grid reliability during peak system periods – objectives which may not necessarily align with the CAISO's market inefficiency concerns. We acknowledge that market inefficiencies could result from the 2004/2005 decisions

[29] 16 U.S.C. § 824o(i)(3).

[30] CAISO Comments on Proposed Decision at 2.

and thus intend to work closely with the CAISO to consider and develop modifications to the existing RA import rules.

Finally, several parties recommend clarifications to the existing import RA requirements, such as the CAISO's proposal that the decision use NERC-accepted terminology to define standards and SCE's proposal to remove the term "spinning reserves" as outdated. We agree that proposals to update the terminology should be considered, but decline to modify the original decisions

at this time. We encourage parties to raise these proposals in the next phase of the proceeding that considers modifications to the import RA requirements.

~~_____ filed reply comments on_____..~~

~~5.~~

5. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and Peter V. Allen and Debbie Chiv are the assigned ALJs in this proceeding.

Findings of Fact

1. D.04-10-035 and D.05-10-042 established the requirements for import contracts to count as RA.

~~2. It is reasonable that RA import contracts should be structured to require energy to flow during peak system periods.~~

2. It is reasonable that non-resource-specific RA imports are required to self- schedule into the CAISO markets. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.

Conclusions of Law

1. The requirements for Resource Adequacy import contracts established in Decision 04-10-035 and Decision 05-10-042 should be affirmed.

~~2. "Firm" energy should encompass energy delivery that flows, at a minimum, during the Availability Assessment Hour window.~~

2. A contract for an import energy product that is available only when called upon in the CAISO's day-ahead market or residual unit commitment process should not qualify as an "energy product" that "cannot be curtailed for economic reasons."

3. For non-resource-specific RA imports, an "energy product" that "cannot be curtailed for economic reasons" should be self-scheduled into the CAISO

market consistent with the timeframe established in the governing contract. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.

4. ~~3.~~Import RA resources should be accounted for in the current MCC ~~categories~~ buckets and align with identified reliability needs.

5. ~~4.~~To verify compliance, each LSE subject to the RA program should provide documentation as part of its annual and monthly compliance filings, in the form of either contract language or an attestation from the contracting import provider or the scheduling coordinator for the resource. Energy Division should obtain and review monthly ~~bidding and scheduling~~ data for these contracts from the CAISO.

~~ORDER~~

O R D E R

IT IS ORDERED that:

1. ~~1.~~ The requirements for Resource Adequacy import contracts established in Decision 04-10-035 and Decision 05-10-042 are affirmed:

> Qualifying capacity for import contracts is the contract amount, provided the contract: (1) is an Import Energy Product with operating reserves, (2) cannot be curtailed for economic reasons, and (3a) is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission or (3b) specifies firm delivery point (*i.e.*, not seller's choice).

~~2. Firm energy requires that energy delivery flow, at a minimum, during the Availability Assessment Hour window.~~

2. For non-resource-specific Resource Adequacy (RA) imports, an "energy product" that "cannot be curtailed for economic reasons" shall self-schedule into the California Independent System Operator markets, consistent with the

timeframe established in the governing contract. This requirement shall not apply to resource-specific RA imports, including dynamically scheduled resources.

3. A contract for an import energy product that is available only when called upon in the California Independent System Operator's day-ahead market or residual unit commitment process does not qualify as an "energy product" that "cannot be curtailed for economic reasons," as required by Decision 04-10-035 and Decision 05-10-042.

4. ~~3.~~Import Resource Adequacy resources shall be accounted for in the current maximum cumulative capacity ~~categories~~ buckets and shall align with identified reliability needs.

5. ~~4.~~To verify compliance with the Resource Adequacy (RA) import requirements, each load-serving entity subject to the RA program shall provide documentation as part of its annual and monthly compliance filings, in the form of either contract language or an attestation from the contracting import provider or the scheduling coordinator for the resource. Energy Division shall review each contract or attestation to verify compliance, as well as review ~~bidding and scheduling~~ data obtained from the California Independent System Operator.

6. ~~5.~~Energy Division shall report on the annual aggregated ~~bidding and scheduling~~ data in its annual Resource Adequacy report.

7. ~~6.~~This proceeding remains open. This order is effective today.

Dated_____, 2019, at San Francisco, California.