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

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| Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations. | R.21-10-002 |

# OPENING COMMENTS OF OHMCONNECT, INC. ON PROPOSED DECISION ADOPTING LOCAL CAPACITY OBLIGATIONS FOR 2024-2026, FLEXIBLE CAPACITY OBLIGATIONS FOR 2024, AND PROGRAM REFINEMENTS

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## SUBJECT INDEX OF RECOMMENDED CHANGES

The Commission should revise the Proposed Decision to remove the new requirement that, beginning with the qualifying capacity awards granted through the Load Impact Protocols (LIP) process for the 2024 Resource Adequacy compliance year, test performance failures will be considered when making qualifying capacity awards to non-investor-owned utility demand response (DR) resources procured by third-party DR providers under the LIP.

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# OPENING COMMENTS OF OHMCONNECT, INC. ON PROPOSED DECISION ADOPTING LOCAL CAPACITY OBLIGATIONS FOR 2024-2026, FLEXIBLE CAPACITY OBLIGATIONS FOR 2024, AND PROGRAM REFINEMENTS

## I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), OhmConnect, Inc. ("OhmConnect") respectfully submits these opening comments on the *Proposed Decision Adopting Local Capacity Obligations for 2024-2026, Flexible Capacity Obligations for 2024, and Program Refinements* ("Proposed Decision"), issued May 25, 2023.

At a time when state policy goals, such as the California Energy Commission's ("CEC") recent establishment of a 7,000 MW load shift goal to help reduce net peak electrical demand pursuant to Senate Bill 846, reflect the growing importance of the State's demand response ("DR") resources, this Proposed Decision would instead stifle the growth of DR. Moreover, the Proposed Decision unfairly punishes third-party demand response providers ("DRPs") and undermines a "competitive, technology-neutral, open-market" for all Commission-regulated DR programs.[1] While many aspects of the Proposed Decision require revision, OhmConnect focuses

[1] Decision ("D.") 16-09-056, at 98 (Ordering Paragraph ("OP") 8).

its comments to recommend that the Commission reject the proposal to modify Resource Adequacy ("RA") qualifying capacity ("QC") using historical performance test results.[2]

## II. THE USE OF PERFORMANCE TESTING TO DERATE QUALIFYING CAPACITY IS BASED ON FLAWED ARGUMENTS

Under Public Utilities Code section 1757(a), a Commission decision will be set aside if the decision's findings "are not supported by substantial evidence in light of the whole record." Here, the Proposed Decision relies on two flawed arguments to support the use of performance testing to derate DRPs' qualifying capacity: (1) the failure of DRPs to update their filings; and (2) comparative performance of investor-owned utility ("IOU") DR resources. These arguments paint a misleading picture of third-party DRP performance that is not based on the record.

### A. Energy Division Updates QC Values – Not DRPs

With respect to updating DRP filings, the Proposed Decision states that the "Energy Division also identifies that DRPs are not submitting an updated filing when the resource portfolio falls below the threshold of 20 percent or 10 MW less than the assigned [QC] value, as required by [D.] 20-06-031."[3] However, D.20-06-031 placed the onus of the biannual update of assigned QC value on the Energy Division and not on DRPs:

> In the compliance year, on a biannual basis, **Energy Division shall update qualifying capacity (QC) values** based on the actual customer enrollment volume associated with that resource in the California Independent System Operator's Demand Response Registration System. LIP results will be updated if QC values vary by more than 20 percent, or 10 MW, whichever is greater.[4]

In the same decision, the Energy Division was further directed to work with the Supply Side Working Group to address issues with the Load Impact Protocols ("LIP"); specifically, to "define the details of biannual qualifying capacity (QC) update process […] and re-evaluate the

[2] Proposed Decision, at 23 (OP 30).
[3] *Id.*, at 105.
[4] Decision (D.) 20-06-031, at 94 (OP 15(b)) (emphasis added).

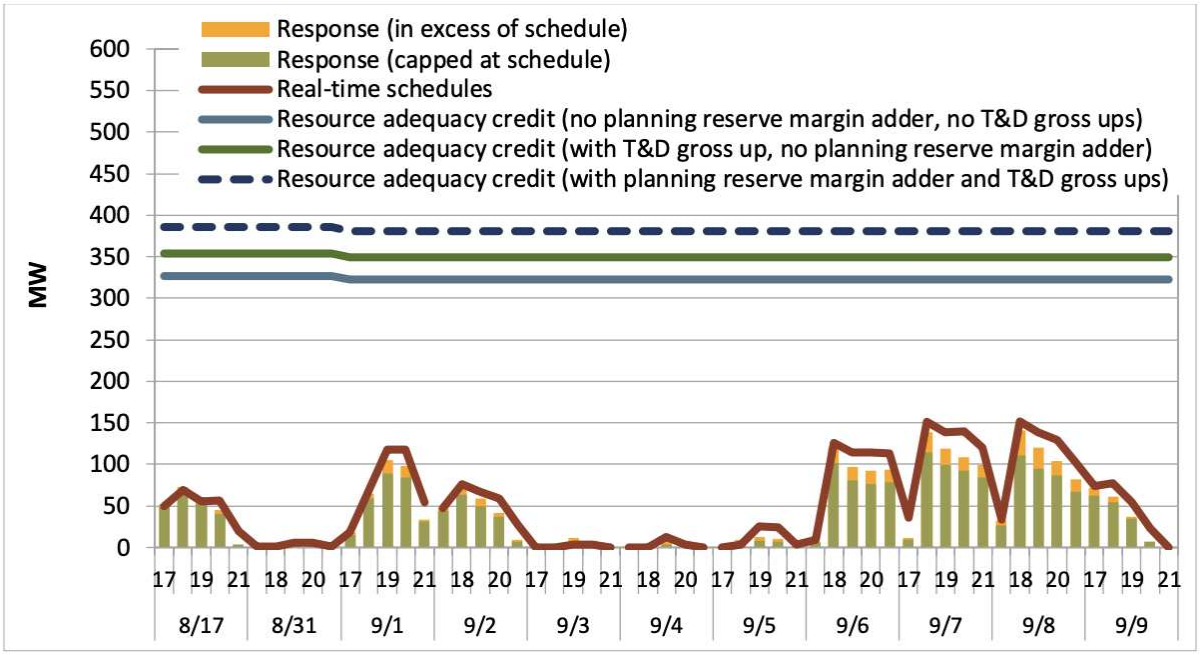
QC Update threshold (20 percent, 10 MWs) for potential future updates [and to] submit a recommendation into Track 4" of the same proceeding.[5] Later, the Commission requested that the CEC develop a new QC counting methodology via stakeholder working group in the 2021 Integrated Energy Policy Report and identify "[w]hether, and if so what, enhancements to intra-cycle adjustments to DR QC … are feasible and appropriate to account for variability in the DR resource in the month-ahead and operational space." [6] There is no evidence in the record of *any* established requirement that DRPs file an intra-cycle adjustment or report related to the 20 percent/10 MW threshold contemplated in D.20-06-031. To the contrary, D.20-06-031 clearly places the mandate to update QC values on the Energy Division using available CAISO data. Blaming DRPs for failing to submit an updated filing that is not required cannot serve as an appropriate basis for a determination to derate DRPs' QC values based on past testing.

### B. Comparing Offered Quantities of IOU DR Resources to Third-Party DR Resources Is Inappropriate When Penalties For Later Reducing Offered Quantities Are Different for IOUs and Third-Party DRPs

Similarly, the Proposed Decision also supports the determination for testing-based QC modification by misguidedly asserting that "IOU DR resources appear to have met a majority of the scheduled load reductions."[7] However, Figure 2.7[8] from the CAISO's Demand Response Issues and Performance 2022 Report, reproduced below, shows that the IOUs' proxy demand resources ("PDRs") generally performed in accordance with their CAISO energy market *schedules*, but that IOU PDRs do not offer their full RA capacity into the CAISO energy market.

[5] D.20-06-031, at 94-95 (OP 16).
[6] D.21-06-029, at 77-78 (OP 11).
[7] Proposed Decision at 107.
[8] California Independent System Operator Department of Market Monitoring. *Demand response issues and performance 2022* at 15-16 (2023), Demand-Response-Issues-and-Performance-2022-Report-Feb14-2023.pdf (caiso.com)

**Figure 2.7 CPUC-jurisdictional utility proxy demand response performance**




*Source: CAISO Department of Market Monitoring "Demand response issues and performance 2022," p. 16.*

Thus, a portion of IOU DR is credited towards RA without appearing on RA supply plans, which enables IOUs to reduce their offer quantities without incurring RA penalties. Third-party DRPs, however, are exposed to penalties for behaving in the same manner. For example, if mild weather was likely to impact short-term curtailment capabilities and third-party DRPs adjusted their offer quantities, the third-party DRPs risk CAISO RAAIM penalties. Thus, the utilization of *offered* quantities results in a flawed comparison of performance between IOU and third-party DRPs and also does not support the Proposed Decision's determination to derate DRPs' QC values based on past testing. The Commission should reject the Proposed Decision's determination as the evidence that supposedly supports the determination is demonstrably inaccurate.

## III. IT IS UNFAIR TO DERATE QUALIFYING CAPACITY BASED ON TESTING CONDUCTED PRIOR TO THE ISSUANCE OF THIS DECISION

The Proposed Decision states that the new rule "is effective beginning with the capacity awards granted through the LIP process for the 2024 RA compliance year. Derates will be applied so that they correspond to performance during test events for the relevant quarter."[9] Implementing this new rule in 2024 based on tests conducted in 2023 – before adoption of this Proposed Decision – violates basic considerations of equity and fair notice. The Due Process Clauses of the Fifth and Fourteenth Amendments protect "interests in fair notice and repose" that prohibit the Commission from imposing "retroactive" civil penalties.[10] The prohibition on retroactive penalties is rooted in "considerations of fairness" that are deeply-embedded in our legal tradition and expressed "in several provisions of our Constitution," and which "dictate that" regulated entities "should have an opportunity to know what the law is and to conform their conduct accordingly" *before* facing government sanction.[11] Due process requires that an agency provide "fair notice of what conduct is prohibited before a sanction can be imposed."[12] The Commission should not derate QC based on testing conducted prior to the issuance of this decision, because, at the time of testing, third-party DRPs did not have fair notice that the test results would be used in this manner.

Historically, testing has been primarily a reporting exercise without a specific results-based impact to QC. When testing was ordered in D.20-06-031, it was a reporting requirement

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[9] Proposed Decision at 107.
[10] *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265-66 (1994).
[11] *Id.*; *see also E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) ("'fundamental notions of justice that have been recognized throughout [American and English legal] history" disfavor retroactivity) (citation and internal quotation marks omitted).
[12] *Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n,* 142 F.3d 1179, 1182 (9th Cir.1998) (quoting *Newell v. Sauser,* 79 F.3d 115, 117 (9th Cir. 1996)). The fair notice doctrine "has now been thoroughly 'incorporated into administrative law.'" *General Elec. Co. v. U. S. EPA,* 53 F.3d 1324, 1329 (D.C. Cir. 1995).

that did not require concomitant modifications to QC based on the results. While testing results were required to be reported in the LIP, the results were not explicitly tied to a specific testing-related LIP QC adjustment process. Implementing a change in QC based on historical testing results denies third-party demand response due process by retroactively penalizing future QC and denies DRPs the opportunity to adjust their testing processes to mitigate the impacts of this newly implemented incentive. Any intra-cycle modification to the LIP approved QC should be phased in to allow DRPs the opportunity to adjust their testing approach.

## IV. CONCLUSION

The Commission should not use historical test results to modify future QC values and, if it chooses to do so, third-party DRPs should be provided sufficient advance notice so they have an opportunity to modify their testing approaches and use test results going forward only *after* this decision has been approved.

Respectfully submitted,

By: /s/_____

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# APPENDIX A

## Proposed Revisions to the Findings of Facts, Conclusions of Law, and Ordering Paragraphs

**Findings of Fact:**

None.

**Conclusions of Law:**

None.

**Ordering Paragraphs**

Strike Ordering Paragraph 30:

~~30. Beginning with the capacity awards granted through the LIP process for the 2024 Resource Adequacy compliance year, test performance failures will be considered when making capacity awards to non-investor-owned utility demand response (DR) resources procured by third-party DR providers under the Load Impact Protocols (LIPs). Derates will be applied so that they correspond to performance during test events for the relevant quarter. The average performance results of each quarter will inform the capacity awarded through the LIPs for the respective sub-load aggregation point.~~