BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the Self-Generation Incentive Program and Related Issues.	Rulemaking 20-05-012 (Filed May 28, 2020)

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JOINT APPLICATION FOR REHEARING OF DECISION 24-03-071 BY THE LEAPFROG POWER, INC., CPOWER, NOSTROMO ENERGY, INC., CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES, CALIFORNIA EFFICIENCY + DEMAND MANAGEMENT COUNCIL, OHMCONNECT, INC., QCELLS NORTH AMERICA, AND VOLTUS, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CALIFORNIA CONSTITUTION

CALIFORNIA COURT CASES

CALIFORNIA PUBLIC UTILITIES (P.U.) CODE)

CPUC DECISIONS

CPUC RULES OF PRACTICE AND PROCEDURE

BEFORE THE PUBLIC UTILITIES COMMISSION
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Leapfrog Power, Inc. ("Leap"), Enerwise Global Technologies, Inc., D/B/A CPower ("CPower"), Nostromo Energy, Inc. ("Nostromo"), Center for Energy Efficiency and Renewable Technologies ("CEERT"), the California Efficiency + Demand Management Council ("the Council"), OhmConnect, Inc. ("OhmConnect"), Qcells North America ("Qcells"), and Voltus. Inc. ("Voltus") (collectively "the Joint Parties") hereby jointly apply for Rehearing of Decision ("D.") 24-03-071. The statutory "date of issuance" of D.24-03-071 was March 22, 2024.[1] This Application for Rehearing is, therefore, timely filed and served pursuant to Public Utilities ("P.U.") Code Sections 1731 and 1732 and Rule 16.1 of the Commission's Rules of Practice and Procedure.[2] The Joint Parties also respectfully request that the Commission hold oral argument on this Application for Rehearing pursuant to Rule 16.3(a) of the Commission's Rules of Practice and Procedure.

[1] Applications for Rehearing are due within 30 days after the date the Commission "mails" its decision (Public Utilities ("P.U.") Code Section 1731(b)(1) and Rule 16.1(a) of the Commission Rules of Practice and Procedure). D.24-03-071 was mailed on, and marked with a "Date of Issuance" of, March 22, 2024.
[2] Pursuant to Rule 1.8(d) of the Commission's Rules of Practice and Procedure, Leapfrog Power, Inc., CPower, Nostromo Energy, Inc., Center for Energy Efficiency and Renewable Technologies, California Efficiency + Demand Management Council, OhmConnect, Inc., Qcells, and Voltus have authorized Megan M. Myers to sign on their behalf.

I.
BACKGROUND

Leap is a Demand Response Provider ("DRP") founded in 2017 and headquartered in San Francisco, California. The company provides demand response ("DR") services to residential, commercial, industrial, and agricultural customers throughout the state of California. Through its technology platform, Leap enables distributed energy resource ("DER") providers in California to provide grid flexibility, delivering revenue for their customers and integrating additional demand-side resources into the California electricity system. Leap believes that demand-side resources integrated into California's wholesale electricity market will play an increasingly important role in helping California achieve a resilient and zero carbon future. Leap is a registered DRP, as well as a registered Scheduling Coordinator, with the California Independent System Operator Corporation ("CAISO").

CPower is a DER aggregator operating throughout California and the United States, managing approximately 6.3GW of customers' demand side flexibility from over 17,000 customer sites in more than 60 wholesale and retail programs nationwide. CPower participates as an aggregator in programs ranging from emergency capacity demand response to load shifting to fast response frequency regulation.

Nostromo provides sustainable energy storage solution for commercial and industrial buildings that enables measurable reduction of carbon emissions and energy costs and increases resilience for the building and grid. Nostromo's clean, safe and highly efficient IceBrick® solution transforms how buildings manage their main use of energy, which is cooling. This solution stores energy during off-peak or surplus solar energy hours, when electricity's cost and carbon emission are low, so it can be used for cooling during peak demand hours, when

electricity's cost and carbon emissions are high. Nostromo already built a system that has reserved SGIP incentives under the TES guidance.

CEERT is a nonprofit public-benefit organization founded in 1990 and based in Sacramento, California. CEERT is a partnership of major private-sector clean energy companies, environmental organizations, public health groups and environmental justice organizations. CEERT designs and fights for policies that promote global warming solutions and increased reliance on clean, renewable energy sources for California and the West. CEERT is working toward building a new energy economy, including cutting contributions to global warming, and reducing dependence on fossil fuels. CEERT has long advocated before the Commission for increased use of preferred resources and for California to move towards a clean energy future.

The Council is a statewide trade association of non-utility businesses that provide energy efficiency, demand response, and data analytics services and products in California.[3] The Council's member companies employ many thousands of Californians throughout the state. They include energy efficiency ("EE"), DR, and DER service providers, implementation and evaluation experts, energy service companies, engineering and architecture firms, contractors, financing experts, workforce training entities, and energy efficient product manufacturers. The Council's mission is to support appropriate EE, DR, and DER policies, programs, and technologies to create sustainable jobs, long-term economic growth, stable and reasonably priced energy infrastructures, and environmental improvement.

OhmConnect is a third-party DRP founded in 2013 and headquartered in Oakland, California. The company provides DR services to residential retail electric customers in California pursuant to Electric Rules 24 (Pacific Gas and Electric Company ("PG&E") and

[3] Additional information about the Council, including the organization's current membership, Board of Directors, antitrust guidelines and code of ethics for its members, can be found at http://www.cedmc.org. The views expressed by the Council are not necessarily those of its individual members.

Southern California Edison Company ("SCE")) and 32 (San Diego Gas & Electric Company ("SDG&E")). Specifically, OhmConnect's no cost software service notifies households of impending DR events and pays them for their energy reductions. OhmConnect is registered to participate as a DRP in the wholesale electricity market operated by the CAISO and contracts to provide resource adequacy with load serving entities.

Qcells helps businesses and government organizations manage their energy costs and better meet sustainability goals through the design, financing, deployment, and operation of solar and energy storage resources. Qcells offers a full suite of solutions, including an intelligent Geli Energy Management System ("EMS"), to quantifiably reduce carbon emissions, enable resiliency, maximize a residential and commercial customer's bill savings, and unlock additional revenue from grid service programs to boost project value and incentivize and achieve decarbonization goals. Qcells operates its Geli EMS solution across the US and globally through commercial and industrial sites and residential virtual power plants ("VPPs"), enabling customers across several markets to achieve clean energy goals. With a heritage dating back to the origins of the modern solar industry, Qcells combines experience and expertise to deliver one-stop shop complete energy solutions, all backed by Fortune Global 500 company Hanwha Group.

Voltus is an aggregator of retail customers ("ARC") operating in all nine North American wholesale markets. Voltus enables retail electric customers to provide benefits the grid needs to operate efficiently by connecting behind-the-meter assets like flexible load and energy storage to wholesale energy, capacity, and ancillary service markets. To compensate these customers and itself, Voltus sources and secures market revenues for the provision of DR and distributed generation.

II.
INTRODUCTION

On March 22, 2024, the Commission issued D.24-03-071, which is the Decision Implementing Assembly Bill 209 and Improving Self-Generation Incentive Program Equity Outcomes, in Rulemaking ("R.") 20-05-012 (Self-Generation Incentive Program ("SGIP")). This decision contains an order that adopts a rule that is contrary to applicable law, fact, and policy, and wrongly imposes significant and unsupported adverse impacts on DR, particularly as it pertains to third-party and community choice aggregator ("CCA") DR programs.

Ordering Paragraph Number 21 requires that "Program Administrators for Self-Generation Incentive Program must ensure that incentive applicants are required to enroll in an approved qualified Demand Response program as described in Appendix E and Section 12.3 of this Decision."[4] Appendix E is a List of Qualified DR Programs for Meeting SGIP Requirement which states:[5]

PA (IOU, POU)	Program Name	Eligible Customers
PG&E	Capacity Bidding Program (CBP)	Residential, Commercial, Industrial, Agricultural
PG&E	Peak Day Pricing	Commercial, Industrial, Agricultural
PG&E	SmartRate	Residential
SCE	Capacity Bidding Program (CBP)	Residential, Commercial, Industrial, Agricultural
SCE	Critical Peak Pricing (CPP)	Commercial, Industrial, Agricultural
SCE	Critical Peak Pricing (CPP)	Residential
SDG&E	Capacity Bidding Program (CBP)	Residential, Commercial, Industrial, Agricultural
SDG&E	Critical Peak Pricing (CPP)	Commercial, Industrial, Agricultural
SDG&E	Time-of-Use Plus Pricing Plan	Residential
SDG&E	Time-of-Use Plus Pricing Plan	Commercial

By adopting this provision, the Commission improperly narrows the list of qualified DR programs that can participate in SGIP, fails to meet required legal standards for Commission

[4] D.24-03-017 (Ordering Paragraph 21), at p. 102.
[5] Appendix E to D.24-03-017.

decisions, and fails to follow previous Commission decisions. Furthermore, if enforced by the Commission, this requirement would negatively impact CCA and third-party Supply-Side DR programs that provide Resource Adequacy ("RA") capacity. This requirement also exacerbates the unequal treatment of third-party and CCA DR programs compared to the investor-owned utility ("IOU") DR programs by exclusively and discriminatorily focusing SGIP funds on IOU DR programs.

Furthermore, D.24-03-071 provides preferences to publicly-owned utilities ("POUs") as well. D.24-03-071 states:

> For SGIP participants in POUs, an SGIP approved qualified DR program is one in which (1) the storage device would shift onsite energy use to off-peak time periods or reduce demand from the grid by offsetting or lowering some or all of the customer's onsite energy demand, (2) the DR program is not a Reliability Demand Response Resource (RDRR) that is use limited; and (3) the load impact from the storage device can be accurately measured and evaluated.[6]

This again provides advantages to a utility program that are not offered to third-party or CCA programs.

In addition, D.24-03-071 arbitrarily limits customer choice based on the flawed premise that enrolling in third-party and CCA DR programs is "more complex,"[7] even though customers would be under no obligation to choose a supposedly more complex program.

As discussed in more detail below, in issuing this order, the Commission commits legal error in D.24-03-071 by failing to proceed in the manner required by law by not following its own rules and regulations, in violation of P.U. Code Section 1757.1.[8] In addition, adopting D.24-03-071 is contrary to law, is not supported by its findings of facts or conclusions of law,

[6] D.24-03-071, at p. 75.
[7] *Id.*, at p. 74.
[8] P.U. Code §1757.1(a)(2).

and violates parties' Constitutional rights by denying parties fair and reasonable notice and opportunity to be heard.

III.
APPLICABLE LAW AND STANDARDS FOR REVIEW

Rule 16.1(c) of the Commission's Rules of Practice and Procedure requires Applications for Rehearing to set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous. The purpose of an Application for Rehearing "is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[9]

Pursuant to P.U. Code Section 1757.1(a), the Commission commits legal error where it has "not proceeded in the manner required by law" in its decision or where its decision is "not supported by the findings," is an "abuse of discretion," or "violates" a party's State and U.S. Constitutional rights. P.U. Code Section 1705 further dictates that Commission decisions "shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision."

IV.
GROUNDS FOR REHEARING OF D.24-03-071

A. Summary

Pursuant to the above legal standards, the precise purpose of this Application for Rehearing is to "alert" the Commission to significant legal errors in D.24-03-071 and permit the Commission to grant rehearing to correct those errors expeditiously.[10] Specifically, by issuing D.24-03-071, the Commission "has not proceeded in the manner required by law" by failing to follow the law applicable to qualified DR programs that can satisfy SGIP's participation

[9] Commission Rules of Practice and Procedure, Rule 16.1(c).
[10] Commission Rules of Practice and Procedure, Rule 16.1.

requirements, including ignoring prior Commission decisions and by imposing an order that does not comply with or is contrary to applicable law, is not supported by the findings and conclusions, and results in abuse of discretion, and violates the Joint Parties' statutory and constitutional due process rights to their prejudice.[11] As supported by the law and record identified herein by the Joint Parties, these legal errors must be addressed and remedied by the Commission granting rehearing of D.24-03-071 to, at the least, reverse and eliminate the order in D.24-03-071 that wrongly limits the qualified DR programs that meet SGIP requirements.

B. D.24-03-071 Errs by Imposing DR Requirements that Are Contrary to Law.

1. Applicable Law.

Only the Legislature "has plenary power" to "confer additional authority and jurisdiction upon the [C]ommission."[12] Thus, applicable statute is the primary authority governing Commission action and, as relevant to Commission decision-making, requires the Commission to "proceed in the manner required by law," which extends to complying, not only with statute, but with procedures and legal standards adopted in the Commission's rules and decisions.[13] P.U. Code Section 1708 further confirms the significance of Commission decisional precedent by allowing the Commission to "rescind, alter, or amend any order or decision made by it" only after notice to all the parties and with an opportunity to be heard. The Commission has long recognized that this Section 1708 authority "should be exercised with great care and [is] justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues."[14]

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[11] P.U. Code §1757.1(a).
[12] Cal. Const., Art. XII, Section 5.
[13] *People v. City of Los Angeles* (2014) 229 Cal.App.4th 87; 99; *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1091-1092 (also, n.3).
[14] D.17-12-006 which is the Decision Denying Petition for Modification of Decision 14-08-057, issued in R.13-05-007 (Digital Infrastructure and Video Competition Act of 2006), at p. 9.

The Commission defines DR as "reductions, increases, or shifts in electricity consumption by *customers* in response to either economic signals or reliability signals."[15] Consistent with that definition, in D.16-09-056, the Commission recognized the singular role played by customers in "growing" DR to provide a carbon-free resource that can provide grid reliability, meet State clean energy policy goals; the decision also distinguished DR from generation resources.[16] D.16-09-056 determined that, to support DR's growth, the Commission plans "to continue offering a broad array of demand response options to customers, including the option of either the Utilities or third parties providing these services."[17]

Thereafter, in 2016, the Commission adopted the following goal in D.16-09-056: "Commission regulated demand response programs shall assist the State in meeting its environmental objectives, cost-effectively meet the needs of the grid, and enable customers to meet their energy needs at a reduced cost."[18] D.16-09-056 also states that "[u]tilities and third-party providers should fairly compete on a level playing field to vie for customers to enroll in their demand response programs."[19] In addition, D.16-09-056 adopted six (6) criteria for all Commission-regulated DR programs:

- Demand response shall be flexible and reliable to support renewable integration and emission reductions;
- Demand response shall evolve to complement the continuous changing needs of the grid;
- Demand response customers shall have the right to provide demand response through a service provider of their choice and Utilities shall support their choice by eliminating barriers to data access;

[15] *See, e.g.,* D.23-01-006 (Decision Approving Demand Response Auction Mechanism Pilot for Pilot 2024), adopted in Application ("A.") 22-05-002, et al. (2023-2027 DR Applications), at p. 2.
[16] D.16-09-056, at p. 51.
[17] *Id.*, at p. 56
[18] *Id.*, at p. 97 (Ordering Paragraph 7).
[19] *Id.*, at p. 52.

- Demand response shall be implemented in coordination with rate design;

- Demand response processes shall be transparent; and

- Demand response shall be market-driven leading to a competitive, technology-neutral, open-market in California with a preference for services provided by third-parties through performance-based contracts at competitively determined prices, and dispatched pursuant to wholesale or distribution market instructions, superseded only for emergency grid conditions.[20]

In the DR Applications proceeding ("A.") 22-05-002, et al., the Commission issued D.23-12-005 (Decision Directing Certain Investor-Owned Utilities' Demand Response Programs, Pilots, and Budgets for the Years 2024-2027) on December 20, 2023, which stated:

> The following DR programs are deemed as qualified to satisfy a potential DR enrollment requirement established by the Commission for an authorized program outside of the DR application and proceedings:
>
> 1. Economic supply-side market integrated DR programs counted for RA irrespective of whether the administrator is an IOU, CCA or third-party DRP.
>
> 2. Load modifying DR programs that satisfy the following two requirements:
>
>   a. The program is indirectly integrated with the CAISO energy market such that the program's dispatch signal is linked to the energy prices in the Day-Ahead or real-time market – operational domain.
>
>   b. The program's load impact is counted towards RA obligations directly or indirectly through a Commission-approved process (such as, via a process for reducing RA obligations by integrating the program's load impact with CEC's peak forecasts) – planning domain.
>
> 3. Any DR pilot authorized and designated by the Commission in a DR proceeding including R.22-07-005 as a "qualified" DR program eligible to meet the DR enrollment requirement.
>
> 4. Critical Peak Pricing or Peak Day Pricing. These options, which at this time do not meet requirement 2a above, shall be discontinued as a "qualified" DR program if they still do not meet requirements listed here when the dynamic rate(s) under consideration in R.22-07-005 (to comply with CEC adopted

[20] D.16-09-056, at pp. 97-98 (Ordering Paragraph 8).

> Load Management Standards (California Code of Regulations – Title 20, Article 5, §1623)) are made available to customers.[21]

This definition explicitly applied to incentive programs like SGIP.[22] In D.23-12-005, the Commission stated that:

> the above language is adopted to define what is a 'qualified' DR program for purposes of determining what DR programs customers should enroll in if the Commission requires such enrollment as an eligibility condition for a customer's participation in a non-DR program, ***such as SGIP in the example above***.[23]

Although this example referred to SGIP incentives for heat pump water heater (HPWH) customers, nothing in the order or the language of the definition identified that this definition was technology-specific.

Rather, D.23-12-005 is clear that this definition is applicable to all non-DR programs that have a DR participation requirement. Because SGIP is a non-DR program, this definition would apply to it regardless of whether it is providing incentives to HPWH or energy storage customers. Since these incentives are all part of the same program, there would be no difference in how this definition of "qualified" DR programs would be applied for either incentive.

However, just three (3) months after the issuance of D.23-12-005, the Commission directly contravened the provisions in that decision and significantly limited the number of DR programs that are available to SGIP participants. D.24-03-071 continues to contravene D.16-09-056 and D.23-12-005 by giving clear preference to IOU DR programs, to the detriment of third-party DR programs and CCA DR programs.

Further, by adopting D.24-03-071, the Commission has effectively rescinded, or at the very list amended, its definition in D.23-12-005 without providing any opportunity for stakeholders to respond or be heard. The amended definition the Commission ultimately

[21] D.23-12-005, at pp. 24-25.
[22] *Id*., at pp. 25-26.
[23] *Id*. (emphasis added).

established in D.24-03-071 was not present in the Proposed Decision that was put forward for stakeholder comment. The Proposed Decision stated that:

> "in D.23-12-005, the Commission provided a definition of "qualified" DR programs eligible to meet a DR program enrollment requirement as a condition of a customer receiving an incentive or rebate. We, therefore, adopt a requirement for AB 209 SGIP incentive recipients to enroll in a "qualified" DR program ***as defined in D.23-12-005*** (emphasis added).[24]

The Proposed Decision then identified a list of "qualified" programs, which it stated was "sub-set" of the full list of programs that could satisfy SGIP's new DR participation requirement.[25] At no point did the Commission indicate that the Proposed Decision was deviating from past precedent set in D.23-12-005. This change (and its justification) was not introduced until after stakeholders' opportunity to provide comments on the Proposed Decision had ended, leaving no opportunity for stakeholders to make their concerns heard before the Commission.

2. D.24-03-071 Errs in Failing to Proceed in the Manner Required by the Commission Decisions Governing the Treatment of DR Resources.

Despite the clear direction in D.16-09-056 that the Commission intends to grow DR by offering a broad array of DR options to customers, and that IOU DR programs and third-party DR should be treated equally,[26] D.24-03-071 contains an order that creates a bias towards customer enrollment in IOU DR programs that is not supported by law, fact, or policy. Further, this lack of competition will disadvantage DR generally and will wrongly provide a clear preference to IOU DR programs to the disadvantage of third-party and CCA DR providers.

To begin with, D.24-03-071 limits DR programs qualified to satisfy SGIP's participation requirement to IOU programs and similar POU programs. There have been no previous findings

[24] Proposed Decision in R.20-05-012, at p. 73.
[25] *Id.*, at p. 74.
[26] D.16-09-056, at pp. 51, 52, and 56.

of facts or conclusions of law, and no record has been established as to why the "qualified" DR programs adopted in the decision should be substantially more limited than what is allowed under the definition contained in D.23-12-005. Furthermore, limiting the DR programs that are qualified for SGIP creates customer confusion and existing third-party DR participants will be unable to qualify for an SGIP incentive without unenrolling from their current program. This is highly discriminatory and suppresses customer choice.

This confusion will be further compounded by the fact that eligibility for Heat Pump Water Heater ("HPHW") incentives will still refer to the "qualified" DR program definition established in D.23-12-005, creating two separate types of eligibility requirements within the same program.[27] D.23-12-004 orders that the new definition of qualifying DR program for the SGIP HPWH program for customers of electric IOU, regional energy networks, and CCAs is "[a]ny demand response program that meets the definition of a qualified program established by the Commission in the Demand Flexibility Rulemaking 22-07-005 or the IOU Demand Response Programs Application 22-05-002[.]"[28]

Finally, the more limited list of "qualified" programs established in D.24-03-071 only allows customers to access a state incentive if they enroll in a utility program. This essentially amounts to a subsidy for utility DR programs in California, because the SGIP technology incentive reduces the cost of the associated enabling technology, which creates an unlevel playing field between utility-run and third-party DR programs in direct contradiction to D.16-09-056. Although D.24-03-071 did allow for its list of "qualified" DR programs to be modified in the future, this can only be done if one of SGIP's Program Administrators (PAs) files a Tier 2

[27] D.23-12-004 (Decision Expanding Eligibility for the Heat Pump Water Heater Program), issued in this proceeding on December 21, 2023, at pp. 23-24 (Ordering Paragraph 1).
[28] D.23-12-004, at pp. 23-24 (Ordering Paragraph 1).

Advice Letter requesting a modification.[29] The decision identifies five PAs for SGIP, which are listed below.

1. Pacific Gas and Electric Company (PG&E)
2. Southern California Edison Company (SCE)
3. Los Angeles Department of Water and Power (LADWP)
4. San Diego Gas & Electric Company (SDG&E)
5. Southern California Gas Company (SoCalGas)[30]

Four of the five PAs are investor-owned utilities, and the fifth (LADWP) is a large publicly owned utility. These entities, then, have no incentive to expand the list of qualified programs to include third-party DR programs, and are unlikely to do so without an express directive from the Commission. It is the Commission's stated directive that third-party and utility DR programs compete for customers on a level playing field.[31] Instead, in D.24-03-071, the Commission provides a state incentive only to customers that enroll in utility DR programs, and it then puts utilities in charge of any future changes to this incentive's eligibility rules.

C. D.24-03-071's Limit on Qualified DR SGIP Programs Is Not Supported by Its Findings of Facts or Conclusions of Law.

Pursuant to Section 1705, a Commission decision must "contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision…." In applying this provision, the California Supreme Court has found:

> "Findings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning

[29] D.24-03-071, at pp. 74-76.
[30] *Id.*, at p. 2.
[31] D.16-09-056, at pp. 51, 52, and 56.

activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.'"[32]

The California Supreme Court has instructed that the required findings must include both those that include basic facts in support of the "ultimate finding" on the material issue, as well as the ultimate finding itself.[33]

D.24-03-071 does not contain a Finding of Fact or Conclusion of Law which supports limiting these programs. Instead, the decision simply provides arbitrary reasons for restricting this list which are not supported by the record. The Commission states that certain programs are "more complex to enroll and participate in, such as resource adequacy contracts by IOUs or CCAs" and are not permitted to participate.[34] There is no evidence and no Finding of Fact to support this contention that these programs involve a more complex enrollment process, as the relative complexity of these other programs was never established previously in the proceeding.

The only reference in D.24-03-071 that could support this conclusion are comments made by Southern California Edison Company ("SCE"). In its discussion of party comments, D.24-03-071 quotes SCE as stating that a DR requirement "could create a barrier to participation, particularly in the low-income customer segment where participation is already a challenge."[35] However, in the SCE comments that the decision references, SCE actually upholds that "[s]hould the Commission require recipients to enroll in a DR program, customers should be allowed to choose between all available options (e.g., supply-side demand response programs and load-

[32] *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 258-259 (citing five other California Supreme Court decisions in support, including *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337).
[33] *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273.
[34] D.24-03-071, at p. 74.
[35] *Id.*, at p. 73.

modifying demand response programs and rates)."[36] Contrary to the Commission's assertions in D.24-03-071, no evidence was established that RA contracts are more complex than other programs – even by those stakeholders that opposed a DR requirement overall.

Most of the discussion among parties in R.20-05-012 focused on whether SGIP participants should be required to be enrolled in *any* DR program, rather than in which particular DR program participants must enroll. There is scant discussion in D.24-03-071 about which DR programs are eligible. Instead of basing Ordering Paragraph 21 on a Finding of Fact or Conclusion of Law, the Commission unilaterally orders that only participants in utility DR programs are eligible to receive SGIP funds.

Ordering Paragraph 21 also directly conflicts with the Commission's stated intent in Section 12.3 to qualify DR "…programs where the battery, specifically, provides the load reduction"[37] and lacks a substantiating Finding of Fact. The Commission makes its intent clear that "…SGIP approved qualified DR programs must provide verifiable load drop using the storage device support[ed] by the SGIP incentive."[38] The decision lacks a substantiating Finding of Fact that non-utility DR programs cannot provide verifiable load drop using the storage device supported by the SGIP incentive, because this is not a fact.

Even accepting the Commission's premise that RA contracts are more complex than the Appendix E programs, such a supposed fact would not support the Commission's decision. Customers are free to choose among the available qualifying DR programs, including between programs that are more or less complex. Rather than reducing complexity, the Commission is

[36] SCE Opening Comments on Assigned Commissioner's Ruling Seeking Comments on Improving SGIP Equity Outcomes and AB 209 Implementation, submitted in this proceeding on December 2, 2022, at pp. 11-12.
[37] D.24-03-071, at p. 74.
[38] *Id*.

only limiting the customer's ability to balance the various attributes of each program and choose the one that works best for that particular customer.

D. By Imposing Ordering Paragraph 21 in D.24-03-071, the Commission Abused Its Discretion and Violated Statutory and Constitutional Rights of Due Process.

As discussed above, judicial review also extends to a Commission decision that "was an abuse of discretion" or that "violates" a party's State and U.S. Constitutional rights. Courts have interpreted the phrase "abuse of discretion" to mean that the "discretion" of a decision-maker is "not unlimited" and "'is not a whimsical, uncontrolled power, but a *legal discretion*, which is subject to the limitations of *legal principles* governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.'"[39]

Due process, including fair and reasonable notice and opportunity to be heard, is embedded not only in the federal constitution, but the California Constitution and P.U. Code Section 1708. Section 1708 requires that the Commission may only "rescind, alter, or amend any order or decision made by it" by further "order" of the Commission and only upon notice to the parties and opportunity to be heard. The courts have interpreted the phrase "opportunity to be heard" to mean "at the very least that party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal."[40] The Commission has further made clear that its authority to alter its decisions should also only "be exercised with great care and [is] justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues."[41]

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[39] *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; emphasis added.
[40] *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240, 244.
[41] D.17-12-006 which is the Decision Denying Petition for Modification of Decision 14-08-057, issued in R.13-05-007 (Digital Infrastructure and Video Competition Act of 2006) on December 21, 2017, at p. 9.

In the case of D.24-03-071, the Commission was required to follow the express mandate of Section 1708, allowing it to modify decisions regarding treatment of DR requirements only with notice and opportunity to be heard. But, here, D.24-03-071 modified previous direction in Commission decisions regarding eligible DR programs for non-DR incentive programs by limiting the kinds of DR programs that can satisfy DR participation requirements for SGIP energy storage customers. Not only was this modification made after all opportunities for stakeholder comment had ended, but it was also based on a justification that was not supported by the record in the proceeding. This contravenes both P.U. Code Section 1708's requirements that changes to precedent allow parties the opportunity to be heard, and that they be justified "only by extreme circumstances."

V.
REQUEST FOR ORAL ARGUMENT

Pursuant to Commission Rules of Practice and Procedure, Rule 16.3 allows an applicant seeking rehearing to seek oral argument.[42] Rule 16.3(a) states that:

> The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
>
> (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
>
> (2) changes or refines existing Commission precedent;
>
> (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or
>
> (4) raises questions of first impression that are likely to have significant precedential impact.[43]

[42] Commission Rules of Practice and Procedure, Rule 16.3(a).
[43] Commission Rules of Practice and Procedure, Rule 16.3(a)(1)-(4).

The Joint Parties respectfully request that the Commission schedule oral argument on this Application for Rehearing. This Application meets the requirements for the Commission to hold an Oral Argument where it clearly "raises issues of major significance for the Commission" demonstrating that D.24-03-071 "adopts new Commission precedent," "departs from existing Commission precedent without adequate explanation," "changes or refines existing Commission precedent" and "presents" law and conclusions that are controversial, complex and with an adverse impact on the public. Furthermore, the Joint Parties can present in further detail its arguments as to the broad and dangerous precedent the provision discussed above in D.24-03-071 and the impacts imposing these provisions will have on third-party and CCA DR providers. This information would materially assist the Commission in resolving this Application for Rehearing.

VI.
CONCLUSION

On the multiple grounds demonstrated in this Application for Rehearing, the Joint Parties respectfully request that the Commission grant rehearing of D.24-03-071 and reverse or modify Ordering Paragraph 21 to expand the list of qualified DR programs that can participate in SGIP.

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Respectfully submitted,

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