Decision 20-03-016 March 12, 2020

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 GRANTING LIMITED REHEARING OF DECISION (D.) 19-10-021

In this Order, we dispose of the applications for rehearing of Decision (D.) 19-10-021 (Decision), filed by California Community Choice Association (CCCA), Powerex Corp., and the California Independent System Operator (CAISO). We have determined that good cause has been demonstrated to grant limited rehearing of the Decision, as outlined below.

I. BACKGROUND

Issued on October 17, 2019, D.19-10-021 sought to address the problem of "speculative supply" as outlined in a September 2018 CAISO report regarding Resource Adequacy (RA) imports. (D.19-10-021, p. 3.) According to CAISO, many RA import contracts have in the past represented fictitious capacity, or "speculative supply" that is not actually available to the energy market when it may be needed most. (D.19-10-021, p. 6.) As an example of how such fictitious capacity might be contracted for, the CAISO report indicates that RA imports can be routinely bid significantly above projected prices in the day-ahead market to help ensure that they do not clear, thus relieving the imports of any obligation to deliver capacity into the real-time market. (D.19-10-021, p. 3.) These contracts for fictitious capacity are viewed as a potentially significant problem by CAISO. With the tightening of energy markets, it is viewed as increasingly important

that RA contracts for imports represent actual capacity that can be called upon to deliver energy when it is needed most.

Based on concerns raised in the CAISO report, an Assigned Commissioner's Ruling (ACR) was issued in Commission Rulemaking (R.) 17-09-020, seeking comments on issues including whether RA import contracts should include the actual delivery of firm energy with firm transmission, and clarifying that only a bidding obligation is insufficient to meet RA rules. (D.19-10-021, p. 4.) In addition, the ACR sought comments on what sort of compliance structure, including additional remedies or corrective measures, should be imposed for violations of RA rules. (D.19-10-021, p. 5.)

In the Decision, we determined 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.'" (D.19-10-021, p. 8.) We affirmed "the requirements for RA contracts established in D.04-10-035 and D.05-10-042, with the clarification 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." (D.19-10-021, p. 9; see also D.19-10-021, p. 20 [Finding of Fact 2; Conclusions of Law 2 & 3].) We further clarified that non-resource-specific RA imports are required to self-schedule into the CAISO markets, whereas resource-specific RA imports are not, "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." (D.19-10-021, pp. 8-9.) As to penalties for violations of RA rules, the Decision states 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." (D.19-10-021, pp. 12-13.) Finally, the Decision states that "the Commission will consider changes to and a deeper analysis of the current RA import rules in the next phase of the RA proceeding, including the ability for such resources to operate more flexibly in the CAISO market." (D.19-10-021, p. 10.)

On October 24, 2019, just a week after the issuance of the Decision, CCCA filed an application for rehearing of D.19-20-021, as a well as a motion for stay of the Decision. On November 18, 2019, Powerex Corp. and CAISO also filed applications for rehearing of D.19-10-021.

Five responses were filed in support of CCCA's motion for stay by Shell Energy North America (US), L.P. (Shell), Western Power Trading Forum (WPTF), CAISO, Morgan Stanley Capital Group Inc. (Morgan Stanley), and Powerex Corporation.

Responses to the applications for rehearing of D.19-10-021 were filed by WPTF, Pacific Gas & Electric Co. (PG&E), Shell, Morgan Stanley, Southern California Edison Co. (SCE), and Calpine.

On December 23, 2019, in D.19-12-064, we issued a stay of D.19-10-021 on the ground that there is potential for harm to the parties in the event that the requirements of D.19-10-021 are modified in response to CCCA's application for rehearing of D.19-10-021. (See D.19-12-064.)

The three rehearing applications present the following allegations of error: 1) the Decision fails to provide findings or substantial evidence to support its conclusion that the import RA requirements it adopts are affirmations of D.04-10-035 (CCCA, CAISO, Powerex Corp.); 2) the Decision violates Public Utilities Code section 380 by exacerbating potential RA capacity shortfalls in 2021 (CCCA); 3) the Decision violates state and federal due process requirements (CCCA, CAISO, Powerex Corp.); 4) the Decision facially discriminates against out-of-state generators in violation of the United State Constitution and Public Utilities Code section 399.11(e) (CCCA, Powerex Corp.); and 5) the Decision encroaches on FERC jurisdiction by tethering the requirements to and directly and substantially impacting bidding and pricing in the CAISO energy markets (CCCA).

We have reviewed the allegations of error contained in the applications for rehearing filed by CCCA, CAISO and Powerex, and have determined that good cause exists to grant limited rehearing of D.19-10-021 on some of the issues raised in the rehearing applications. These issues are addressed below.

II. DISCUSSION

A. Limited rehearing of D.19-10-021 should be granted in order to clarify the self-scheduling requirement, provide parties an opportunity for comment, and provide evidentiary support for adoption of the new requirements contained in the Decision.

Rehearing applicants allege that the Decision violates state and federal due process requirements, and constitutes an unlawful taking by abrogating existing RA contracts. (CCCA Rehearing Application (Reh. App.), pp. 9-20; Powerex Reh. App., pp. 16-22; CAISO Reh. App., pp. 5-9.) Rehearing applicants further allege that the Decision's RA contracting requirements are unconstitutionally vague. (CCCA Reh. App., pp. 16-18.) Rehearing applicants also claim that the Decision provides no legal or factual basis for distinguishing between resource-specific and non-resource-specific RA imports. (CAISO Reh. App., pp. 2-5.) We grant limited rehearing as to certain of these issues, as discussed below.

1. Public Utilities Code Section 311(e) and Rule 14.1 of the Commission's Rules of Practice and Procedure

Rehearing applicants allege that the Decision violates Public Utilities Code section 311(e) and Rule 14.1 of the Commission's Rules of Practice and Procedure because substantive changes were made to the Proposed Decision (PD) without circulating the revised PD for another round of comments by the parties. Rehearing applicants are correct that changes were made to the original PD based on comments to the original PD submitted by the parties. The revised PD was posted on the Commission's website on the day before the Decision was voted out. The Decision specifically notes that the "self-scheduling" requirement contained in D.19-10-021 was suggested by SCE in its comments to the PD. (D.19-10-021, p. 16.)

Public Utilities Code section 311(e) provides that an "alternate" decision of the Commission is any substantive revision to a proposed decision that materially changes the resolution of a contested issue. (Pub. Util. Code, § 311(e).) An alternate must be subject to public review and comment before being voted on by the Commission.

Rule 14.1 of the Commission's Rules of Practice and Procedure provides that a substantive revision to a PD is not an "alternate proposed decision" if the revision does no more than make changes suggested in prior comments on the PD. (Commission Rules of Practice & Procedure, Rule 14.1(d).)

The Decision differs in two material respects from the PD. First, rehearing applicants point out that the PD did not expressly contain the self-scheduling requirement of D.19-10-021, but instead contained a requirement that "RA import contracts should be structured to require energy to flow during peak system periods." (Proposed Decision, September 6, 2019, at p. 13 [Finding of Fact 2].) The self-scheduling requirement was first suggested by SCE in its comments on the PD. (See D.19-10-021, pp. 16, 20 [Finding of Fact 2].) Second, the Decision differs from the PD in that it distinguishes between resource-specific and non-resource-specific imports, requiring only non-resource-specific imports to self-schedule in the CAISO markets. (See D.19-10-021, pp. 16, 20 [Finding of Fact 2].)

In this instance, and given the specific facts and posture of this proceeding, we have determined within our discretion that the combination of creating a distinction between resource-specific and resource-non-specific RA import contracts, and applying a self-scheduling requirement to one of these resources (resource-non-specific contracts), should be subject to comment by the parties. Thus, we grant limited rehearing of D.19-10-021 for the purpose of allowing comment by the parties on these two specific issues.

2. Whether the Decision is a clarification of past Commission decisions.

Rehearing applicants next allege that the Decision alters the standards articulated fifteen years ago in two Commission decisions, while characterizing this alteration as merely a clarification of existing standards. (D.19-10-021, p. 8.) In D.04-10-035, we indicated that qualifying capacity for import contracts must be an Import Energy Product with operating reserves, must be incapable of being curtailed for economic reasons, and is delivered on transmission that cannot be curtailed in operating

hours for economic reasons or bumped by higher priority transmission. (See D.04-10-035, p. 54 [Conclusion of Law 13] (adopting qualifying capacity formulas as set forth in Section 5 of the Workshop Report).) D.04-10-035 further notes that "[f]ailure of a resource to be deliverable undercuts the whole concept of resource adequacy." (D.04-10-035, p. 51 [Finding of Fact 14].)

In D.05-10-042, we stated that "[t]he obligation of suppliers to be available and perform is established through their contracts with LSEs." (D.05-10-042, p. 98 [Finding if Fact 5].) We further noted that "[i]t is necessary that RA resources be available to the CAISO when and where needed. It is consistent with that determination that all RA resources have an obligation to make themselves available to the CAISO in real time to the extent they are physically capable." (D.05-10-042, p. 98 [Finding of Fact 6].) D.05-10-042 also indicates that, "[b]ecause we are implementing a physical capacity-based RAR program, resources should only count to the extent that their capacity can be relied upon to perform." (D.05-10-042, p. 103 [Conclusion of Law 3].) Finally, D.05-10-042 addresses the issues of double counting and deliverability, noting that firm import LD contracts do not raise such issues, but that other LD contracts that are not firm import contracts should be phased out due to concerns about double counting and deliverability. (D.05-10-042, p. 68.) We noted that, in weighing the trade-off between business opportunities for suppliers and the reliability benefits of must-offer protocols, the Commission decides in favor of reliability. (D.05-10-042, p. 68.)

D.19-10-021 relies upon the above determinations in D.04-10-035 and D.05-10-042 and attempts to clarify these determinations by indicating that an "energy product" that "cannot be curtailed for economic reasons" (per the terms used in D.04-10-035) "is required to be self-scheduled into the CAISO markets, consistent with the timeframe established in the governing contract." (D.19-10-021, pp. 8-9; see also D.19-10-021, p. 20 [Finding of Fact 2].) The Decision further indicates that "[a] contract for an energy import contract that is available only when called upon in the CAISO's day-ahead market or residual unit commitment process" does not constitute an "energy

product" that "cannot be curtailed for economic reasons" within the meaning of D.04-10-035. (D.19-10-021, p. 20 [Conclusion of Law 2].)

After reviewing this allegation of error, we have determined that good cause has been established to grant limited rehearing as to this specific issue.

3. Evidentiary record

Rehearing applicants next allege that the Decision modifies the requirements contained in D.04-10-035 and D.05-10-042, without an evidentiary record to support such modifications. As alleged by rehearing applicants, since the self-scheduling requirement was proposed for the first time in SCE's comments on the PD (see D.19-10-042, p. 16), there was not an opportunity for the Commission or the parties to develop a record in support of the new self-scheduling requirement combined with the distinction between resource-specific and non-resource-specific RA imports, or to consider the possible ramifications of imposing both the self-scheduling requirement and the distinction between resource-specific and non-resource-specific RA imports for the first time in the revised PD, one day before the issuance of the Decision. For this reason, CAISO asks the Commission to reopen the record to establish RA import rules that are supported by the record in the proceeding, rather than "relying on a strained interpretation of prior Commission decisions." (CAISO Reh. App., p. 2.)

In support of its argument that the Decision lacks substantial evidence, CAISO points to a factual finding in the Decision, and alleges that this finding lacks evidentiary support within the current record. Finding of Fact 2 states:

> 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.

(D.19-10-021, p. 20 [Finding of Fact 2].) As to this finding, CAISO notes that, while there may be a basis to treat resource-specific imports differently than non-resource-specific imports, "there is no basis whatsoever for such a factual finding in the record of this proceeding." (CAISO Reh. App., p. 5.) CAISO further suggests that we should take

up the issue of the distinction between resource-specific and non-resource-specific RA imports by reopening the record in this proceeding:

> On rehearing, the Commission may find it is appropriate to limit resource adequacy imports to resource specific or dynamically-scheduled resources, but it should do so based on a fully formed record. The CAISO agrees such resources provide certain benefits because they provide visibility through telemetry; can be accounted for accurately; have an enforceable must offer obligation; and the CAISO can validate their commitment and marginal costs. The Commission should consider the facts fully and, if necessary, modify the resource adequacy import rules appropriately.

(CAISO Reh. App., p. 5.) CCCA also argues that the Decision lacks any evidentiary foundation for distinguishing between resource-specific and non-resource-specific RA imports. (CCCA Reh. App., pp. 6-8.)

Given the specific facts and posture of this proceeding, we have determined that good cause exists to grant limited rehearing as to this particular issue, in order to allow for the development of a factual record to support these determinations. We acknowledge that there is a successor proceeding, R.19-11-009, that is considering issues that may be pertinent to the record on limited rehearing, and that a future rehearing decision may incorporate the record from R.19-11-009.

4. Vagueness

CCCA alleges in its rehearing application that the Decision is impermissibly vague as to certain key terms and definitions, thus leaving RA importers uncertain as to what types of contracts are sufficient to meet the requirements of the Decision. (CCCA Reh. App., pp. 16-18.)

CCCA asserts that the Decision does not define "resource-specific" and "non-resource-specific" RA import contracts. This is an important distinction because only non-resource-specific importers are required to self-schedule per the requirements of D.19-10-021. CCCA also asserts that this terminology was not used in the 2004 and 2005 Commission decisions, so there is no point of reference with respect to what these

terms mean. In addition, CCCA argues that the Decision leaves open the question of when an import RA contract must self-schedule into the CAISO market. The Decision states that an energy product that cannot be curtailed for economic reasons must self-schedule into the CAISO markets consistent with the timeframe established in the governing contract. (D.19-10-021, pp. 8-9.) CCCA alleges that this requirement is vague and unclear as to the timeframe referenced, particularly if the contract itself does not specify a timeframe for self-scheduling. (CCCA Reh. App., p. 18.)

We have determined that good cause exists to grant limited rehearing as to this specific issue, in order to clarify these specific terms so that they are understood and able to be implemented by all RA importers and stakeholders.

III. CONCLUSION

For the reasons stated above, we have determined that good cause has been demonstrated to grant limited rehearing of D.19-10-021. The scope of this limited rehearing is described below.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.19-10-021 is hereby granted, as described below.
2. Limited rehearing is granted in order to allow party comments as to the self-scheduling requirement, and as to the distinction between resource-specific and resource-non-specific RA import contracts.
3. Limited rehearing is granted in order to augment the existing evidentiary record regarding the distinction between resource-specific and resource-non-specific RA import contracts, and to provide a sufficient evidentiary basis for this distinction.
4. Limited rehearing is granted in order to clarify certain specific terms used in D.19-10-021, including “resource-specific” and “resource-non-specific,” as well as to clarify the timeframe within which RA importers are required to self-schedule in the CAISO market.
5. The stay of D.19-10-021 ordered in D.19-12-064 shall remain in effect until this limited rehearing is completed. This stay includes Ordering Paragraph 2 of

D.19-10-021, which addresses the self-scheduling requirement and the distinction between resource-specific and resource-non-specific RA imports.

6. This proceeding remains open.

This order is effective today.

Dated March 12, 2020 at Sacramento, California.

MARYBEL BATJER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
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Commissioners