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**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

March 29, 2021

Agenda ID # 19349

## TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-406:

This is the draft Resolution of Administrative Law Judge (ALJ) Hallie Yacknin resolving K.20-04-005, the Appeal of City of San Jose, administrator of San José Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Comments shall be served (but not filed) within 20 days of the date that the draft Resolution is noticed in the Commission's Daily Calendar, <http://docs.cpuc.ca.gov/SearchRes.aspx?DocTypeID=9&Latest=1>, as provided in Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments shall be served upon all persons on this proceeding's service list and on ALJ Yacknin at [hsy@cpuc.ca.gov](mailto:hsy@cpuc.ca.gov).

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

AES:gp2

Attachment

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

Resolution ALJ-406  
Administrative Law Judge Division  
[Date]

**RESOLUTION**

RESOLUTION ALJ-406. Resolves K.20-04-005, the Appeal of City of San Jose, administrator of San José Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division.

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**SUMMARY**

This resolution resolves San José Clean Energy's appeal of Citation No. E-4195-0074 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation No. E-4195-0074 cites and fines San José Clean Energy for failing to procure certain of its 2020 year-ahead system resource adequacy obligations. The appeal is denied, and this proceeding is closed.

**PROCEDURAL BACKGROUND**

The Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-0074 to the City of San José, administrator of San José Clean Energy (SJCE) for failing to meet its 2020 year-ahead system resource adequacy (RA) obligations in certain months.

SJCE filed an appeal of the citation on April 9, 2020.

Pursuant to the schedule agreed to by the parties, SJCE served direct prepared testimony and filed its opening brief on December 23, 2020; CPED served a documentary exhibit and filed its opening brief on January 27, 2021; and SJCE filed its rebuttal brief on February 17, 2021. Upon the parties' respective unopposed motions, the administrative law judge (ALJ) received into evidence SJCE's prepared testimony by ruling dated February 12, 2021, and CPED's documentary exhibit by ruling dated March 4, 2021, upon which the matter was submitted.

**FACTUAL BACKGROUND**

SJCE stipulates that it was deficient in meeting its obligations as identified in the citation and that the citation correctly calculates the penalties pursuant to the penalty

schedule adopted in Resolution E-4195 as modified by subsequent decisions. SJCE nevertheless appeals the citation on the basis that, given the totality of circumstances including its diligence in attempting to secure the required RA products and market constraints, the penalty is inequitable and unjustifiable.

SJCE asserts, and CPED does not contest, the following facts:

SJCE began its procurement efforts for 2020 in March 2019 and continued them after submitting its 2020 year-ahead RA compliance. Those efforts included issuing 10 solicitations, coordinating with four other Community Choice Aggregators (“CCAs”) to issue 13 joint solicitations, and submitting bids in response to 17 solicitations issued by other parties. In addition to participating in those solicitations, SJCE and ACES on behalf of SJCE, engaged in regular informal bilateral outreach to procure RA for delivery in 2020.

SJCE accepted terms and conditions for some of its purchases that it considers to be difficult. In addition, because many sellers would only sell RA for the summer months to buyers who bought RA for multiple months, SJCE over-procured volumes of RA in all months (other than those in which it was deficient) in order to procure the RA for the months in which it was needed.

As of the October 31, 2019, compliance deadline for meeting its 2020 year-ahead RA, SJCE had not met its year-ahead system RA obligations for two specific months. After it was cited for this non-compliance, SJCE continued its efforts to purchase its system RA obligations for those months. As a result of those efforts, SJCE met its year-ahead and month-ahead system RA obligation for one of the months by the month-ahead compliance deadline for that month, thereby incurring purchase costs for its year-ahead system RA obligation on top of the amount of the citation for that month. For the other month, SJCE met its month-ahead (but not year-ahead) system RA obligation by the month-ahead compliance date for that month.<sup>1</sup>

## **DISCUSSION**

SJCE argues that the penalty should be excused or reduced based on consideration of the five factors identified in Decision (D.) 98-12-075 for assessing fines: (1) the severity of the offense, (2) the entity’s conduct, (3) the entity’s financial resources, (4) the role of

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<sup>1</sup> SJCE notes that the draft Resolution ALJ-382 issued in mid-June 2020, which would deny SJCE’s appeal of the citation for its 2019 deficiencies and did not credit SJCE for subsequently closing the deficiencies ahead of the month-ahead deadlines. SJCE states that it therefore concluded that purchasing volumes to cover the shortfalls for which it had been cited would make its customers pay twice for that capacity (*i.e.*, citation cost plus the cost of purchasing the RA). The Commission adopted Resolution ALJ-382 on September 10, 2020.

precedent, and (5) the totality of circumstances in the public interest.<sup>2</sup> SJCE also argues that the Commission should excuse or reduce the assessed penalty due to the prevailing market conditions at the time of the violations.<sup>3</sup> We address these arguments below.

### 1. Market Conditions

SJCE asserts that the Commission should excuse noncompliance when market conditions render it commercially impracticable to procure system RA, arguing that the Commission has endorsed this principle by its statement in D.04-10-035 committing “to ensure that LSEs are not placed in a position whereby they would have to pay any price to acquire the capacity needed for their RA obligations” and confirming this statement in subsequent decisions implementing the RA requirements program.<sup>4</sup> To the contrary, none of these decisions endorse the principle that commercial impracticability due to market conditions alone excuses compliance with RA requirements. Rather, the decisions uniformly emphasize that, while the Commission will act to protect ratepayers from the failure of the market due to market power, tight market conditions alone are not reason to excuse compliance with RA compliance.

In D.04-10-035, as it endorsed the overriding importance of maintaining grid reliability through resource reserve requirements, the Commission committed to protect ratepayers, not from the legitimate costs of achieving that goal amid market scarcity, but from unreasonable costs that stem from the abuse of market power:

At the same time, we cannot neglect our other primary public duty: protection of ratepayers from excessive charges. Increasing supply will cost money, and ensuring reliability does not come cheap. We understand the need to provide mechanisms to pay competitive market costs to new and continuing suppliers. However, we will not “pay any price” or require utilities to sign contracts that meet these requirements at any cost. The memories of the 2000-2001 energy crisis are still fresh in our minds, and the fallout and tremendous costs of that time continue on. We recognize that there is a difference between competitive market costs and prices that arise from the exercise of market power.<sup>5</sup>

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<sup>2</sup> As SJCE notes, this standard is comparable to the four factors considered by California courts in determining whether a fine is unconstitutionally excessive. (SJCE opening brief, p.22.)

<sup>3</sup> As it is not clear under which of the five factors this consideration would fall, we address it as a stand-alone factor.

<sup>4</sup> SJCE opening brief, p.6.

<sup>5</sup> D.04-10-035 at 15.

In D.05-10-042, where the Commission rejected a party's request for a waiver process, it did so on the basis that it was not needed to protect against market failure and market power.<sup>6</sup>

In D.06-06-064, where the Commission adopted a waiver process for local RA requirements, it did so on the basis that it is necessary to mitigate market power.<sup>7</sup>

The Commission reiterated this principle most recently in D.19-06-026, where it declined to extend the local waiver process to system or flexible RA. While the Commission recognized that "a tightening RA market may necessitate system and flexible RA waivers for circumstances beyond the control of an individual LSE," it reiterated that the determination of whether such waivers are appropriate requires consideration of market power issues such as potential gaming by generators that may, for example, withhold capacity during more expensive peak months.<sup>8</sup>

SJCE nevertheless argues that the Commission should extend the local RA waiver program to system RA requirements and excuse compliance where an LSE actively pursued all commercially reasonable efforts to acquire the resources and either (1) received no bids, (2) received bids above a specified price threshold, or (3) at unreasonable terms, on the basis that "[t]here is no logical reason why this standard should not also apply to a consideration of SJCE's System RA deficiencies."<sup>9</sup> To the contrary, the Commission should not extend the local RA waiver program to a consideration of SJCE's system RA deficiencies because there is no showing that system RA market conditions are the result of market power abuses by generators and because extending the local RA waiver program to SJCE's system RA deficiencies in this citation appeal would in effect countermand the Commission's prior decisions implementing the RA requirements without notice to the stakeholders in violation of Pub. Util. Code § 1708.<sup>10</sup>

## 2. Severity of the offense

SJCE argues that the harm caused by its failures in meeting its 2020 year-ahead system RA obligations by the October 31, 2019 compliance reporting deadline was not severe

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<sup>6</sup> D.05-10-042 at 66.

<sup>7</sup> D.06-06-064 at 71.

<sup>8</sup> D.19-06-026 at 18.

<sup>9</sup> SJCE opening brief, p.7.

<sup>10</sup> Pub. Util. Code § 1708. "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

because SJCE eventually acquired resources to meet all of its month-ahead requirements and some of its year-ahead requirements and because CAISO did not have to engage in backstop procurement as a result of its deficiencies.<sup>11</sup>

However, SJCE's deliberate failure to meet its system RA requirements harmed the regulatory process. SJCE rejected bids that would have met its system RA obligations.<sup>12</sup> It did so deliberately on the basis of market conditions, notwithstanding the Commission's express rejection of a waiver process based on market conditions. The harm to the regulatory process by SJCE's deliberate disregard of the Commission directive, regardless of the practical effects or effects on the public, is properly accorded a high level of severity.<sup>13</sup>

### 3. Entity's conduct

SJCE argues that the penalty should be adjusted in recognition of its continued procurement efforts after the compliance deadline. SJCE argues that it acted responsibly by funding new resources to add capacity rather than resigning itself to a penalty when it could find no commercially reasonable RA.<sup>14</sup>

However, SJCE rejected bids that would have met its system RA obligations.<sup>15</sup> It did so deliberately on the basis of market conditions, notwithstanding the Commission's express rejection of a waiver process based solely on market conditions. Where, as here, an entity's failure to meet its regulatory requirements was deliberate, not inadvertent, it is an aggravating factor.<sup>16</sup>

### 4. Entity's financial resources

SJCE argues that the penalty should be adjusted in order to avoid SJCE having to raise the price of electricity for its customers in violation of the Commission's "other primary duty [is the] protection of ratepayers from excessive charges."<sup>17</sup> SJCE argues that penalty schedule set forth in Resolution E-4195 (as modified by subsequent decisions) upon which the penalty is based serves no legitimate purpose because it will not provide an incentive to SJCE to change its procurement practices and will not improve

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<sup>11</sup> SJCE opening brief, pp. 15-16.

<sup>12</sup> Testimony of J. Sole at 4-7; Mark Thomas at 4, 7; Anthony Zimmer at 4-5.; CPED Exhibit.

<sup>13</sup> D.98-12-075, App. A, p.8; 1998 Cal. PUC LEXIS 1018, \*73.

<sup>14</sup> SJCE opening brief, p.17.

<sup>15</sup> Exhibit (Ex.) CPED-1-C.

<sup>16</sup> D.98-12-075, App. A, p.9; 1998 Cal. PUC LEXIS 1018, \*74.

<sup>17</sup> SJCE opening brief, p.18, citing to D.04-10-035 at 15.

the RA market conditions.<sup>18</sup> SJCE argues that the penalty schedule is unfairly based on the load-serving entity's RA shortfall, which is in turn based on the load that it intends to serve using clean energy in furtherance of the State's energy goals.<sup>19</sup>

SJCE's arguments do not inform our consideration of its financial resources, the purpose of which is "to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources."<sup>20</sup> Indeed, SJCE asserts that the unadjusted penalty will *not* achieve the objective of deterrence.<sup>21</sup>

Likewise, SJCE's arguments on the merits of the penalty schedule adopted in Resolution E-4195 (as modified by subsequent decisions) and of a waiver based on market conditions do not inform our consideration of this factor.

#### 5. Role of precedent

SJCE claims that D.10-04-033, which approved a settlement of an RA penalty, serves as precedent in reducing the amount of an RA penalty on the basis that "the harm was not so severe because the LSE was able to cure the deficiency and backstop procurement was not necessary."<sup>22</sup> This misstates the decision, which instead states, "The severity of the alleged violations would have been high *if [the LSE] had not adequately procured resources* and backstop procurement had been required. In that case, the full fine as recommended by [CPED] would have been justified and reasonable."<sup>23</sup> D.10-04-033 distinguished the facts underlying the settlement, which are that the way in which the load-serving entity completed its February 16, 2006, RA compliance filing led Commission staff to erroneously conclude that it had not timely procured its 2008 year-ahead system RA obligation, when in fact it had.<sup>24</sup> Here, in contrast, SJCE did not timely procure its 2008 year-ahead system RA obligation.

SJCE also claims that D.12-02-030, which also approved a settlement of an RA penalty, serves as precedent for reducing the penalty for an LSE's failure to procure sufficient system RA.<sup>25</sup> In that proceeding, however, the LSE was in fact in compliance with its

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<sup>18</sup> SJCE opening brief, pp. 18-19.

<sup>19</sup> SJCE opening brief, p.19.

<sup>20</sup> D.98-12-075, App. A, p.10; 1998 Cal. PUC LEXIS 1018, \*75-76.

<sup>21</sup> SJCE opening brief, p.18. ("Nor will imposing a large fine on SJCE change its already-extensive procurement practices.")

<sup>22</sup> SJCE opening brief, p.16.

<sup>23</sup> D.10-04-033 at 11, emphasis added.

<sup>24</sup> D.10-04-033 at 8, 11.

<sup>25</sup> SJCE opening brief, p.21.

procurement obligations, but had made reporting errors that resulted in violations.<sup>26</sup> Here, in contrast, SJCE admits that it did not procure sufficient RA.

SJCE argues that D.15-04-024, in which the Commission assessed a fine against Pacific Gas and Electric Company for violations related to the 2010 San Bruno gas line explosion, the Commission “reduced the fine called for by the applicable penalty schedule.”<sup>27</sup> To the contrary, the San Bruno gas line explosion fine was not calculated using a penalty schedule but rather on the range of fines that may be imposed pursuant to Pub. Util. Code § 2107.<sup>28</sup> Here, in contrast, the Commission established a penalty schedule as part of the RA requirements program and has determined that the penalty for failure to meet system RA requirements shall not be waived for reasons of market conditions.

#### 6. Totality of circumstances

Based on the totality of the facts, law and applicable Commission orders and precedent, we find that the citation appeal should be dismissed.

### **COMMENTS**

The draft resolution was served on the parties for public review and comment in accordance with Pub. Util. Code § 311(g)(1), Article 14 of the Commission’s Rules of Practice and Procedure, and Rule 18 of Resolution ALJ-377. Comments were received on DATE by DATE.

### **FINDINGS OF FACT**

1. SJCE rejected bids that would have met its system RA obligations on the basis that it considered their terms to be commercially impracticable.
2. SJCE eventually acquired resources to meet all of its month-ahead requirements and some of its year-ahead requirements after the October 31 deadline for doing so.
3. A lesser penalty will not achieve the objective of deterring SJCE from failing to meet its year-ahead system RA obligations on the basis of market conditions.

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<sup>26</sup> D.12-02-030 at 4-5.

<sup>27</sup> SJCE opening brief, p.21.

<sup>28</sup> D.15-04-024 at 79.

**CONCLUSIONS OF LAW**

1. The Commission's RA program does not permit the waiver or reduction of a penalty for system RA deficiencies on the sole basis that tight market conditions render costs and terms commercially impracticable.
2. Waiving or reducing SJCE's penalty for system RA deficiencies on the basis that tight market conditions render costs and terms commercially impracticable would in effect countermand the Commission's prior decisions implementing the RA requirements without notice to the stakeholders in violation of Pub. Util. Code § 1708.
3. The harm to the regulatory process by SJCE's deliberate disregard of the Commission directive, regardless of the practical effects or effects on the public, is properly accorded a high level of severity.
4. Although SJCE's continued efforts to add capacity after it failed to meet its 2020 year-ahead system RA obligations is a mitigating factor, SJCE's deliberate failure to meet its 2020 year-ahead system RA obligations is an aggravating factor.
5. A lesser fine will not achieve the goal of deterring SJCE from system RA deficiencies.
6. The Commission precedent cited by SJCE for reducing an RA penalty are materially distinguishable on its facts.
7. The citation appeal should be dismissed.
8. The proceeding should be closed.

Therefore, **IT IS ORDERED** that:

1. The Appeal of City of San Jose, administrator of San José Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division, is dismissed.
2. The violations and penalties in Citation E-4195-0074 are affirmed.
3. City of San Jose, administrator of San José Clean Energy (SJCE) must pay the penalty of \$1,116,149.48, 45 days from the date of issuance of this resolution, by check or money order payable to the State of California's General Fund and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. SJCE shall write on the face of the check or money order "For deposit to the General Fund per Resolution ALJ-406."
4. Citation Appeal (K.)20-05-006 is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, the following Commissioners voting favorably thereon:

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Rachel Peterson  
Executive Director



**N O T I C E**

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