

Decision .21-05-036 May 20, 2021

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies, Processes, and Rules to Ensure
Reliable Electric Service in California in the
Event of an Extreme Weather Event in 2021.

R.20-11-003

ORDER DENYING REHEARING OF DECISION (D.) 21-02-028**I. INTRODUCTION**

D.21-02-028, *Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Seek Contracts for Additional Power Capacity for Summer 2021 Reliability*, directed and authorized Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) to contract for capacity that is available to serve peak and net peak demand in the summer of 2021 and seek approval for cost recovery in rates. (D.21-02-028 at p. 1.) The Decision outlines the parameters and timelines to be adhered to when seeking approval from the California Public Utilities Commission (Commission or CPUC). (*Ibid.*)

The California Environmental Justice Alliance, Union of Concerned Scientists, and Sierra Club (Joint Parties) filed an Application for Rehearing (rehearing application) on March 11, 2021 and Protect Our Communities Foundation (PCF) and Californians for Renewable Energy (CARE) each filed their separate applications on March 19, 2021. A number of responses to the rehearing applications were timely filed.

PCF's rehearing application argues that: 1) the Decision is not supported by substantial evidence, 2) the Decision exceeds the Commission's authority, 3) the Decision is not supported by the findings, and 4) the Commission was required to hold a hearing.

The Joint Parties' rehearing application argues that 1) the Commission acted in excess of its powers, 2) the Decision is not supported by substantial evidence, 3) the Decision is not supported by the findings, and 4) the Commission's order violated the Joint Parties' procedural rights.

CARE's rehearing application argues that the Decision 1) violates the Bagley-Keene Open Meeting Act, and 2) violates CARE's procedural and substantive rights to due process of law.

II. DISCUSSION

A. PCF Application for Rehearing.

1. The Preliminary Root Cause Analysis is a part of the record.

PCF argues that the record does not contain any evidence regarding the cause of the blackouts because the Preliminary Root Cause Analysis (PRCA) report is not a part of the record. (PCF Rehg. App. at p. 9.) PCF refers to CPUC Rules of Practice and Procedure 13.9 and claims that we were required to take official notice of the document to enter it into the record and could not do so. (*Ibid.*) PCF also expressed concern about whether the CPUC, California Energy Commission (CEC), and California Independent System Operator (CAISO) "each officially adopted the PRCA" for publication. (*Ibid.*) PCF's arguments are not persuasive.

Public Utilities Code section 1701 states that the Commission is not bound by the technical rules of evidence, but instead is bound by the Public Utilities Code and its own Rules of Practice and Procedure. CPUC Rules of Practice and Procedure Rule 13.9 states that official notice *may* be taken of such matters as may be judicially noticed under Evidence Code section 450. (Emphasis added.) Rule 13.9 does not require the Administrative Law Judge (ALJ) to take official notice of the CPUC's own reports or ones it jointly prepares with other state agencies.

Regarding whether the PRCA was a part of the record of the proceeding, ALJs regularly refer to staff reports in their filings, for example, a filing requesting comments on a staff report. The ALJ might not take official notice of these reports, yet

the reports and the information within them are a part of the record. While reports are sometimes attached to a ruling, here we based the Order Instituting Rulemaking (OIR) in large part on the PRCA and we included an electronic link to the report. The December 11, 2020 *ALJ Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021* (December 11 Ruling) discussed the PRCA and asked parties to comment on the PRCA's proposed action to expedite the regulatory and procurement processes to develop additional resources that can be online by 2021.

Here, the *Assigned Commissioner's Scoping Memo and Ruling* stated that "[t]he record shall be composed of all filed and served documents and shall include evidence received at a hearing if a motion for hearing is granted." (*Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo) at p. 5.) The record certainly includes the OIR that referred to the PRCA extensively, the December 11 ruling, and numerous other documents that were filed and served in this proceeding that refer to and cite sections of the PRCA. The PRCA was a major point of discussion in the proceeding including comments made by PCF.

PCF's concerns about whether the PRCA was officially adopted by the CPUC, CEC, and CAISO, in relation to its arguments about official notice, amount to concerns that the document could not be trusted to be an official action taken by the CPUC. Although the ALJ did not take official notice of the PRCA, staff reports can be considered "official acts" that qualify for official notice under Evidence Code section 452 subdivision (c). (*Childs v. Cal.*, 144 Cal. App. 3d 155, 162.) Additionally, unlike many staff reports relied upon in Commission proceedings, the PRCA was signed by Marybel Batjer, the President of the Commission, as well as by the Chair of the Energy Commission and the President and Chief Executive Officer of the CAISO. It was drafted at the direction of the Governor of California and provided to him, and was presented to the California State Assembly Committee on Utilities and Energy during a hearing conducted on October 21, 2020. (OIR at pp. 7-8.) The PRCA has been vetted and can easily be accepted as an official action taken by the CPUC.

PCF's concerns about official notice and the validity of the PRCA are unfounded. PCF has not shown that the ALJ was required to take official notice of the PRCA or that the PRCA was not a part of the record of the proceeding. Furthermore, PCF has not shown that its due process rights have been violated because the PRCA was not officially noticed. PCF had notice of the PRCA as it was the basis of the OIR and had an opportunity to comment on it. Therefore, PCF's arguments are unpersuasive.

2. The Decision is based on substantial evidence.

PCF argues that the Decision is not supported by substantial evidence because the Commission's "presumed cause of the August 2020 blackouts lacks evidentiary support" resulting in an "unsupported" determination to order more procurement. (PCF Rehg. App. at p. 8.) PCF's claim lacks merit.

In reviewing the Commission's factual findings, review is limited to whether those findings are "supported by substantial evidence in light of the whole record." (*Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.App.4th 641, 649.) Accordingly:

[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency. [Citations] (*Id.*)

"When conflicting evidence is presented from which conflicting inferences can be drawn, the [PUC's] findings are final.' [Citation.]" Therefore, "the Commission's findings are almost always treated as "conclusive" [citation]...." (*Pacific Gas & Electric v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 839.)

The record of this proceeding contains ample support for the Decision. First, as the Decision notes, the PRCA identified actions that could be taken to address factors that contributed to the August 2020 rotating outages. (D.21-02-028 at p. 2.) Those actions included "expedit[ing] the regulatory and procurement processes to

develop additional resources that can be online by 2021.” (D.21-02-028 at p. 2, citing PRCA at p. 15.) This rulemaking is a direct result of that determination.

The December 11, 2020 ruling solicited comments from the parties on parameters we could set for procurement to meet potential need for summer 2021. That ruling noted that some parties opening comments on the OIR indicated that there may be a need for additional capacity to be procured by summer 2021. (*E-mail Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021* at p. 3.) Following submittal of party comments, President Batjer issued an Assigned Commissioner Ruling (ACR) directing the large electric investor-owned utilities (IOU) to seek contracts for capacity for the net peak demand in summer 2021 and summer 2022, it set parameters for procurement, and set guidance for submitting contracts for approval. The Decision states that although approaches for decreasing demand to improve reliability are not in the Decision, they are actively being considered in the proceeding. (D.21-02-028 at p. 4.)

The Decision goes on to cite to comments received in response to the December 11, 2020, ruling and in response to the OIR. It notes that “[n]umerous parties supported the Commission moving forward with a procurement process to secure capacity resources for the summer of 2021.” (*Ibid.*) Specifically, the CAISO, Southern California Edison, and the Independent Energy Producers (IEP) all supported procurement and each party expressed the need for an expedited timeline. (*Id.* at pp. 4-6; *Comments of the California Independent System Operator Corporation on Order Instituting Rulemaking Emergency Reliability*, November 30, 2020, at pp. 8-9; *California Independent System Operator Corporation Response to Ruling Proposals and Questions*, December 18, 2020, at p. 1 and 3; *Southern California Edison Company’s (U 338-E) Comments on Order Instituting Rulemaking to Establish Policies, Processes, and Rules to Ensure Reliable Electric Service in California in the Event of an Extreme Weather Event in 2021*, November 30, 2020, at pp. 13-14; *Southern California Edison Company’s (U 338-E) Response to E-Mail Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of*

2021, December 18, 2020, at p. 1 and 2; *Comments of the Independent Energy Producers Association*, November 19, 2020, at p. 2.)

The Decision also notes that other parties expressed support with some conditions. Those parties included the California Energy Storage Alliance, Golden State Clean Energy, PG&E, and Vistra. (D.21-02-028 at p. 7; *Comments of the California Energy Storage Alliance on the E-Mail Administrative Law Judge's Ruling Directing Parties to Serve and File Response to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021*, December 18, 2020; *Golden State Clean Energy, LLC Response to E-Mail Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021*, November 18, 2020; *Response of Pacific Gas and Electric Company (U 39 E) to the Email Ruling Directing Parties to Respond to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021*, December 18, 2020; *Response of Vistra Corp.*, December 18, 2020.) Such conditions included temporary procurement approaches for gas generation facilities and conducting additional analyses. (D.21-02-028 at p. 7; *Comments of the California Energy Storage Alliance on the E-Mail Administrative Law Judge's Ruling Directing Parties to Serve and File Response to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021* at p. 2; *Response of Pacific Gas and Electric Company (U 39 E) to the Email Ruling Directing Parties to Respond to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021* at p. 3)

The Decision notes that the determination to order procurement is based on the PRCA and party comments which pointed to a number of causes for the blackouts and a number of solutions, but all agree that there is a reliability problem and blackouts could occur again in summer 2021. (*Ibid.*) Therefore, we determined that action must be taken immediately to ensure resources are available for summer 2021. (*Ibid.*)

The Decision stated that we are exercising our “policy prerogative” to pursue a variety of strategies to increase supply and reduce demand. The ordered

procurement is a strategy that requires an accelerated timeframe due to long lead times, and we would address demand-side measures in a future decision. (*Ibid.*)

The Decision cites D.19-11-016, stating that the procurement ordered here is consistent with the “least regrets” approach in D.19-11-016 given the imminence of 2021 system reliability needs. (*Id.* at p. 10.) That decision noted that “procurement of resources is not an exact science” and discussed the challenges of balancing the risk of unnecessary ratepayer costs by over-procuring versus the risk of electricity shortages by under-procuring. (*Id.* at p. 10, citing D.19-11-016 at p. 33.) In D.19-11-016, party analysis showed a potential system reliability shortfall of 5,500 megawatts (MW) in 2021. (*Ibid.*, citing D.19-11-016 at p. 11.) However, we ultimately directed 3,300 MW of procurement with at least 50 percent to come online by August 2021. (*Ibid.*, citing D.19-11-016 at p. 80.) D.19-11-016 did not address or consider the August 2020 blackouts because it was issued on November 13, 2019, well before August 2020.

D.21-02-028 is based upon record evidence and concluded that more procurement may be needed for summer 2021 given the determination in the PRCA that more resources are needed and party comments supporting procurement. Also, ordering procurement is reasonable as an extension of the procurement ordered in D.19-11-016 considering the 3,300 MW procurement ordered in D.19-11-016, with at least 50 percent online by August 2021, compared to party analysis in that proceeding indicating a potential system reliability shortfall of as large as 5,500 MW in 2021. (D.21-02-028 at p. 10.) Moreover, D.19-11-016 did not take the events surrounding the August 2020 blackouts into consideration when determining procurement levels for 2021, since it was issued well before then. The Decision noted evidence that more resources are needed for 2021 and that, in exercising our policy prerogatives, we are pursuing both measures to increase supply and reduce demand in this proceeding, though this decision addressing supply-side procurement measures was issued first.

Additionally, the Decision was based on party comments stating that to acquire procurement that is potentially available by summer 2021, it is necessary to act quickly and that there is not time to perform further analysis. It is reasonable to conclude

that timing constraints make it necessary to address this procurement before addressing demand response alternatives, taking a “least regrets” approach to authorizing procurement to see what can be procured, if anything, given the self-limiting nature of the market within the given timeline.

Addressing PCF’s arguments more specifically, PCF states that we needed to determine that demand exceeded supply in August 2021 in order to conclude that ordering additional procurement would assist in preventing future blackouts. (PCF Rehg. App. at p. 10.) However, the PRCA does conclude that the climate change-induced extreme heat storm across the western United States resulted in the demand for electricity exceeding the existing electricity resource planning targets. (PRCA at p. 3; OIR at pp. 5-6.)

PCF also implies that it was CAISO mismanagement of the grid that caused the August blackouts, not demand exceeding supply. (PCF Rehg. App. at pg. 11.) Regarding this point, the Decision states that the PRCA “identified several actions that will address the contributing factors that caused the rotating outages” and that those actions include developing additional resources that can be online by 2021. (D.21-02-028 at p. 2, citing PRCA at p. 15.) Despite PCF’s insistence, the record shows multiple factors that contributed to the outages. Furthermore, the Decision cites multiple party support for additional procurement.

The Decision also noted TURN’s comments on the December 11 ruling arguing that CAISO’s improvement of the residential unit commitment (RUC) process should remove much of the need for additional capacity procurement. (*Id.* at p. 8, citing *Comments of the Utility Reform Network on ALJ Ruling Concerning a Procurement Proposal*, December 18, 2020.) TURN stated in its comments that it “understands that a number of other factors contributed to the situation unfolding on August 14-15, including under-scheduling by LSEs [load serving entities] and unanticipated fossil plant outages.” (*Id.* at p. 3.) Therefore, TURN did not argue that changes to the RUC would address all of the areas of concern that contributed to the outage.

Furthermore, the Decision states that the PRCA and “party comments to this proceeding have pointed to a number of causes for the outages, as well as an array of solutions.” (D.21-02-028 at p. 9.) And it concludes that “there is little disagreement that a problem exists and that there is a risk that outages could occur again in the summer of 2021.” (*Ibid.*) Despite PCF’s arguments to the contrary, we are not required to wait until all parties reach consensus on an issue to act, but can utilize the tools available including both increasing supply and reducing demand. As noted in the Decision, citing D.19-11-016, procurement of resources “is not an exact science.” (D.21-02-028 at p. 10, citing D.19-016 at p. 33.) A delay would be especially detrimental under the circumstances where the timeline for procurement is extremely short and there is a distinct possibility of future blackouts in summer 2021. PCF does not explain what timeline would allow for us to perform additional, time intensive analysis, while ensuring procurement could be secured in time for summer 2021 if the additional analysis deemed it necessary. We would be remiss in our regulatory responsibility if we did not act quickly under these circumstances.

For all of the reasons outlined above, PCF’s arguments regarding a lack of substantial evidence are unpersuasive.

3. The *Oakley* decision is not applicable.

PCF very briefly argues that the Decision is not supported by substantial evidence because it relies in part on the PRCA which it argues is “uncorroborated hearsay evidence.” (PCF Rehg. App. at p. 10.) PCF cites *The Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal. App 4th 945, (*Oakley* case) for support. PCF’s argument lacks merit.

First, PCF has not established how a report that the CPUC published with two other agencies qualifies as uncorroborated hearsay. Accordingly, this proceeding is not analogous to the one in *Oakley*. In *Oakley*, the court held that a Commission decision was not supported by substantial evidence when based solely on a declaration from an executive of the CAISO and a petition the CAISO had filed with a federal agency, both of which were disputed. (*The Utility Reform Network v. Public Utilities Commission*

(2014) 223 Cal. App 4th 945, 949.) The CAISO was not a party to the proceeding and the executive and the authors of the petition did not testify in the Commission hearings. (*Ibid.*) The court found that a decision cannot be based solely on disputed, uncorroborated hearsay evidence in the situation before it, where the entity or authors were not available for cross-examination. (*Ibid.*)

Here, the facts are different. The Decision is not based solely on the CAISO's uncorroborated position made in a filing before a different (federal) agency, it is based on the PRCA, comments from parties that support procurement, and the level of procurement ordered in D.19-11-016. The Decision also is supported by the procurement timing constraints mentioned by parties to the proceeding that do not allow for a "wait and analyze" position. Furthermore, it is indisputable that the rolling blackouts occurred in summer 2020 during an extreme heat event¹ due to a lack of sufficient supply under the circumstances.

It is true that there were no hearings where an individual was cross-examined in relation to the PRCA. However, in a very active proceeding with a large number of parties, PCF and the Utility Consumers' Action Network were the only two parties that requested a hearing. Both requests were properly denied as explained below. In the *Oakley* proceeding there was a hearing, but CAISO was not a party to the proceeding and the authors of the documents were not cross-examined. Here, CAISO is a party and could have been cross-examined if PCF had made the showing required by the scoping memo.

Additionally, the claim that the PRCA is "uncorroborated" is even more questionable given that the report was jointly prepared by the CPUC, CEC, and the

¹ The PRCA notes that "[f]rom August 14 through 19, 2020, the Western United States as a whole experienced an extreme heat storm, with temperatures 10-20 degrees above normal. During this period, California experienced four out of the five hottest August days since 1985; August 15 was the hottest and August 14 was the third hottest. This heat event was the equivalent of the hottest year of 35. The only other period on record with a similar heatwave was July 21–25, 2006, which included three days above the highest temperature in August 2020." (PRCA at p. 2.)

CAISO.² The PRCA is not the declaration of a non-party witness or a petition filed in another proceeding, but instead is a report published by three California agencies at the direction of Governor Newsom, and presented to Governor Newsom and the California State Assembly Committee on Utilities and Energy. It is hard to imagine better entities to corroborate the facts of this report other than the three state agencies with direct knowledge of the situation.

Finally, unlike the hearings held in *Oakley* where PG&E was asking for approval to acquire a new gas-fired power plant, we now regularly base decisions on Commission staff analysis and party comments that are not subject to evidentiary hearings in proceedings such as this one that involve system-level procurement policy. For example, D.19-11-016 approved incremental procurement of system-level resource adequacy capacity of 3,300 MW of procurement for reliability purposes. Multiple rounds of comments were solicited in that proceeding and no hearing was held.³

For all of the reasons stated above, PCF's arguments are unpersuasive.

4. The Decision did not violate PCF's right to due process.

PCF argues that the proceeding process "failed to conform to statutory and constitutional requirements," but does not cite to a legal provision that supports its claim. (PCF Rehg. App. at p. 16.)

"Under the federal Constitution, 'Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332 ...) (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 283.)

² "The Commission generally allows hearsay evidence if a responsible person would rely upon it in the conduct of serious affairs." *Re Landmark Communications, Inc.* (1999) 84 Cal.P.U.C.2d 698, 701.

³ PCF argues that only one set of comments in the proceeding presented evidence because it was the only set that was verified. (PCF Rehg. App. at p. 11.) We regularly rely on comments for our record, particularly for policy decisions. Rule 6.2 allows us to give unverified factual assertions the "weight of argument."

The California Supreme Court has held that general ratepayer interests do not constitute the life or liberty interests that fall within the constitutional due process protections. (*Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288, 292.) Rehearing applicants are generally impacted as utility customers, but here their specific utility service is not at issue. Although PCF may have statutory and administrative rights, they do not have constitutional due process rights in this procurement proceeding.

Regarding how we conduct proceedings, it is well-established that determinations concerning how to organize Commission proceedings are entirely within our discretion. Pursuant to the California Constitution, “Subject to statute and due process, the commission may establish its own procedures.” (Cal. Const., art. XII, § 2.) This has been interpreted by the California Supreme Court, which has held there is:

...a strong presumption of the correctness of the findings and conclusions of the commission which may choose its own criteria or method of arriving at its decisions, even if irregular, provided unreasonableness is not “clearly established....

(*Pacific Telephone and Telegraph Co. v. Public Utilities Com.* (1965) 62 Cal. 2d 634, 647.) Thus, absent some violation of law, it is for the Commission to decide how to organize its proceedings.

Public Utilities Code Section 1701.1(a) provides that “[t]he commission shall determine whether each proceeding is a quasi-legislative, an adjudication, or a ratesetting proceeding and, consistent with due process, public policy, and statutory requirements, determine whether the proceeding requires a hearing.

In D. 05-11-029, we stated that we have previously addressed the issue of whether and when due process considerations require evidentiary hearings. In *Re Competition for Local Exchange Service*, D.95-09-121, 1995 Cal. PUC LEXIS 788, at *13-*14, we stated:

Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.

The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing. (Citing *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal. 3d 288, 292.)

In the instant case, the scoping memo required that parties that believed an evidentiary hearing was necessary must file a motion requesting a hearing. (Scoping Memo at p. 5.) The motion was required to “identify and describe (i) the material issues of disputed fact, (ii) the evidence the party proposed to introduce at the requested hearing, and (iii) the schedule for conducting the hearing.” (*Ibid.*) The motion was also required to “state a justification for hearing and what the moving party would seek to demonstrate through hearing.” (*Ibid.*)

PCF and the Utility Consumers’ Action Network both filed requests for a hearing. The ALJ issued a ruling on January 22, 2021, denying both motions. (*E-mail Ruling Denying January 21, 2021 Motions of Protect Our Communities Foundation and Utility Consumers’ Network Seeking Evidentiary Hearing*, January 22, 2021). The ALJ ruling denied the motions because the moving parties did not demonstrate both that a valid factual dispute exists and how the evidentiary hearing would resolve the dispute. (*Id.* at p. 4.)

Regarding the portion of PCF’s motion relevant to the Decision, PCF only provides a general citation to the PRCA, does not provide a specific page number or citation to wording in the document, and alleges that somehow the PRCA implies that problems with CAISO’s market rules have been resolved. (*The Protect Our Communities Foundation Motion for Evidentiary Hearings*, January 21, 2021, at p.10.) PCF also implies this about the *Final Root Cause Analysis* (FRCA), released on January 13, 2021, which was not commented on by parties in relation to the Decision or relied upon by the Decision due to the timing of its release. (*Ibid.*) PCF’s motion did not show that a factual dispute exists regarding the PRCA or how a hearing would resolve it. Therefore, hearings were not required.

PCF also alleges that we were required to hold an evidentiary hearing pursuant to Public Utilities Code sections 728, 729, and 761. (PCF Rehg. App. at pp. 17-18.) However, PCF has not shown how those sections apply to the facts of the Decision. In fact, they do not since two have to do with rates and one involves reviewing a public utility's practices whereas the Decision focuses on developing procurement policy.⁴ Therefore, PCF's argument is not persuasive.

5. The findings support the Decision.

PCF argues that we were required to make a finding that "demand exceeded supply" in order to have adequate support in the Decision to order additional fossil fuel procurement. (*Id.* at p. 8.) PCF also argues that the finding that the CAISO initiated the blackouts "[a]s a result of the prolonged heat event..." was erroneous. (*Id.* at 9.) PCF is incorrect.

"[T]he PUC's findings and conclusions are sufficient if they provide 'a statement which will allow us a meaningful opportunity to ascertain the principles and facts relied upon by the [PUC] in reaching its decision.' (*Toward Utility Rate Normalization*, supra, 22 Cal. 3d at p. 540.) In other words, 'a complete summary of all proceedings and evidence leading to the decision' is not required. (*Ibid.*)" (*Clean Energy Fuels Corp. v. Public Utilities Com.*, 227 Cal. App. 4th 641, 659, citing *Toward Utility Rate Normalization v. Public Utilities Com.*, 22 Cal. 3d 529, 540.)

Regarding PCF's alleged need for a finding that demand exceeded supply, multiple findings address the need for procurement resulting from the extreme heat event. The Decision's fourth finding specifically refers to the analysis by the CPUC, CEC, and CAISO in the PRCA and how it "identified several actions that will address the contributing factors that caused the August 2020 rotating outages." (D.21-02-028 at p. 15, Finding of Fact (FOF) 4.) Notably, the PRCA did state that "[t]he climate change-induced extreme heat storm across the western United States resulted in the demand for electricity exceeding the existing electricity resource planning targets. The existing

⁴ In D.19-11-016, 3,300 MW of procurement was approved without conducting hearings.

resource planning processes are not designed to fully address an extreme heat storm like the one experienced in mid-August.” (PRCA at pp. 3-4.) Finally, the Decision’s fifth finding stated that there “is a need for incremental physical resources that can address grid needs during the system peak and net peak periods for summer 2021 to prevent similar service interruptions to the August 2020 rotating outages.” (D.21-02-028 at p. 15, FOF 5.)

Also, PCF is incorrect to argue that the finding that the blackouts were the result of the prolonged heat event is erroneous. For example, the PRCA stated that:

[i]n terms of electricity supply, conventional thermal generation (such as natural gas) operates less efficiently in extreme heat. California also typically relies on imported power during peak demand times, but because the rest of the Western United States was also experiencing extreme heat, California could rely on fewer imports than usual.

Also due to the effects of heat and drought over time, the availability of hydroelectric power in California in 2020 was below normal. (PRCA at pp. 2-3.)

The Decision, relying on the PRCA, explains that the heat event “led to a variety of circumstances that ultimately required the CAISO to initiate rotating outages in its balancing authority to prevent wide-spread service interruptions.”

(D.21-02-028 at pp. 1-2.) Although PCF may disagree with the result of the Decision, that is not enough to invalidate it. The record supports the Decision and its findings.

PCF also alleges that the fourth and fifth findings lack an evidentiary basis.⁵ (PCF Rehg. App. at p. 12.) Here, PCF makes broad statements about how these findings “lack any evidentiary basis” without providing any detailed analysis of how this may be true. (*Ibid.*) As explained above and in the discussion of substantial evidence, the PRCA and party comments support our findings and the Decision.

⁵ PCF also alleges that the third and fourth findings misdescribe the PRCA. (PCF Rehg. App. at pp. 11-12.) These two arguments are completely unsupported and meritless.

6. The Decision does not violate state statutes related to greenhouse gas emissions.

PCF argues that we exceeded our authority by authorizing the procurement of natural gas resources.⁶ (*Id.* at p. 13-14.) PCF briefly cites numerous statutory provisions but does not explain in detail how we violated them and particularly how the statutory provisions cited prohibit us from ordering procurement of natural gas. PCF's arguments are not persuasive.

For example, PCF argues that the Decision violates Public Utilities Code section 380 subdivision (b)⁷, which requires us to “ensure the reliability of electrical service in California while advancing, to the extent possible, the state’s goals for clean energy, reducing air pollution, and reducing emissions of greenhouse gases.” (*Id.* at p. 14.)

The title of the OIR is “Emergency Reliability,” and it is in response to the August 2020 rolling blackouts and is focused on preventing a similar event from happening in the future. The Decision is consistent with the requirement in section 380 subdivision (b) to “ensure reliability” by moving quickly to order additional procurement prior to summer 2021 given the extremely short time period to get resources in place, including any necessary construction and permitting. Meanwhile, the proceeding has also focused on demand response programs later in the proceeding since they typically require a shorter time period to implement compared to procurement. Demand response programs assist in reducing demand for energy thereby reducing emissions “to the extent possible.” Public Utilities Code section 380 subdivision (b).

In another example, PCF argues that we violated the loading order. (PCF Reh'g. App. at p. 14.) PCF is incorrect. The loading order mandates that energy efficiency and demand response be pursued first, followed by renewables, and lastly

⁶ PCF also alleges that we violated Public Utilities Code section 345.5, which only applies to the CAISO. (PCF Reh'g. App. at p. 14.) Since that statute does not apply to us, it is not addressed here.

⁷ Unless otherwise noted, all code references are to the Public Utilities Code.

clean fossil generation. (D.12-01-033 at p. 51; <https://www.cpuc.ca.gov/irp/>.) Nothing in the loading order states that demand response must be addressed on a calendar date that occurs prior to the calendar date when procurement is addressed in an emergency reliability proceeding, such as this one, where time is of the essence. As the Commission noted, as a policy prerogative it is pursuing all available supply and demand response procurement available on this short timeframe, such that *all* resources in each category are pursued under the Decision.

Additionally, the Decision includes energy efficiency which appears first in the loading order alongside demand response programs. (D.21-02-028 at p. 11.) Finally, PCF has not shown that, as a whole, our procurement decisions violate the loading order when taking into account the large number of programs and proceedings at the CPUC that reduce California's use of fossil fuels. For those reasons, PCF's argument regarding the loading order is not persuasive.

In a third example, PCF argues that the Decision violates section 454.52 subdivision (a)(1)(I) which requires that, in relation to filing their Integrated Resource Plans (IRP), we ensure load service entities (LSE) "[m]inimize localized air pollutants and other greenhouse gas emissions, with early priority on disadvantaged communities...." (PCF Rehg. App. at p. 14.) We are not currently reviewing an IRP in this proceeding where it would assess whether an LSE has, as a whole, "[m]inimized localized air pollutants and other greenhouse gas emissions, with early priority on disadvantaged communities...." Therefore, PCF's argument lacks merit.

7. The Decision did not adopt the same procurement parameters as D.19-11-016.

PCF argues that certain procurement requirements in D.19-11-016 related to once-through-cooling plants were also adopted in the Decision simply because the Decision states that it is "consistent with" D.19-11-016. (PCF Rehg. App. at pp. 15-16; D.21-02-028 at p. 10.) First, it is not clear from PCF's rehearing application exactly how the page citations it refers to from D.19-11-016 would apply to the Decision. Second, the Decision stated that it was consistent with D.19-11-016 since both decisions endorsed a

least regrets approach to procurement. (D.21-02-028 at p. 10.) However, the Decision did not adopt the parameters for procurement included in D.19-11-016, but instead adopted its own specific parameters. (*Id.* at pp. 10-12.) Therefore, PCF's argument that the procurement parameters in the Decision are somehow restricted by the parameters in D.19-11-016 is unpersuasive.

8. The Decision does not duplicate other proceedings.

PCF argues that the scope of this proceeding duplicates other proceedings at the Commission thereby violating statutory directives. (PCF Rehg. App. at pp. 16-17.) PCF claims that the Decision violated Public Utilities Code section 454.52 subdivision (d) which requires that the Integrated Resource Plan processes of the Commission "incorporate, and not duplicate, any other planning processes of the [C]ommission." PCF makes many general arguments related to this claim, but does not provide any specific, viable analysis showing that the Decision duplicates items covered in another proceeding.⁸ Therefore, PCF's argument is unpersuasive.

9. The Decision did not violate California laws related to minimizing impacts on ratepayer bills and assuring that rates are just and reasonable.

PCF argues that the Decision violates statutory authority because it will result in unjust and unreasonable rates and impacts on ratepayer bills will not be minimized. (PCF Rehg. App. at pp. 14-15.) PCF claims that the Decision is not supported by substantial evidence thereby making any rates set in future proceedings, that are impacted by the policies in the Decision, unjust and unreasonable. (*Ibid.*)

As discussed earlier, there was substantial evidence to support ordering additional procurement in an emergency situation, with a short timeline for procurement, while also adding a demand response component. Therefore, PCF's arguments are unpersuasive.

⁸ Rule 16.1 section (c) of our Rules of Practice and Procedure states the following:

[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.

B. Joint Parties' Application for Rehearing.

Many of the arguments the Joint Parties make are similar to those posed by PCF. For example, the Joint Parties argue that the Decision is not supported by substantial evidence and violates our authority by allowing procurement of fossil fuels. (Joint Parties Reh. App. at p. 2.) As described earlier in response to PCF's arguments, the Decision is supported by substantial evidence in the form of the PRCA, party comments, and the potential need for additional procurement shown in D.19-11-016. The Joint Parties also reason that gas plants had a high forced outage rate during the August 2020 outages, therefore their use would not increase reliability. (*Id.* at p. 7.) However, that fact can reasonably be interpreted as justifying a need for more gas plants in order to shore up that resource in the portfolio. Finally, neither PCF nor the Joint Parties have shown that we cannot legally order fossil fuel procurement in the form of energy efficiency improvements. Although they may disagree with the Decision, it is not unlawful.

The Joint Parties also expressed concern that we failed to "quantify the need" for additional procurement.² (Joint Parties Reh. App. at p. 4.) The Decision notes that PG&E supported conducting additional analyses. (D.21-02-028 at p. 7.) Possibly, more study of the issue would have aided in a quantification. However, the Decision shows that parties are concerned about the timeline for getting procurement resources online for summer 2021 and many expressed concerns about whether it would even be possible. (*Id.* at pp. 5-6, 8-9.) For example, SCE did not believe it was likely that expanded capacity would be able to come online by summer 2021 if procurement efforts did not start until a final decision was approved in May 2021. (*Id.* at p. 5.) CAISO recommended that we order expedited procurement "as soon as possible." (*Id.* at pp. 4-5, citing *Comments of the California Independent System Operator Corporation on Order*

² Confusingly, the Joint Parties argue that there was no evidence of a need for procurement, but yet in the same rehearing application state that CAISO's analysis in testimony did show that there was a need. (Joint Parties Reh. App. at p. 4 and 9.) To clarify, the CAISO testimony the Joint Parties refer to was served after the Proposed Decision was filed and was not relied upon in the Decision.

Instituting Rulemaking Emergency Reliability at pp. 8-9.) And IEP suggested that we authorize an all-source procurement by the end of 2020 while Middle River Power believed that “construction of new resources that can be online by the summer of 2021 is not practicable given the complexities of sourcing, permitting, and construction.” (D.21-20-028 at pp. 6 and 8-9, citing *Comments of the Independent Energy Producers Association*, November 30, 2020, at p. 2, *Middle River Power, LLC Response to Administrative Law Judge December 11, 2020 E-Mail Ruling*, December 18, 2020.) Given those concerns, we may exercise our authority to move quickly with the understanding that there is no time to waste, the market for the procurement we are requesting is already extremely limited, and a procurement cap is not necessary given that the market is already self-limiting due to the timeline.

Moreover, we have the ability to add to our procurement requirements over time. For example, in D.21-03-056, we noted that in response to D.21-02-028 over 500 MW were procured. (D.21-03-056 at p. 48.) D.21-03-056 went on to explain that it is implementing a 2.5% incremental resource procurement for the three large electric IOUs above the planning reserve margin (PRM):

[g]iven the tightness of the market at this time, coupled with the fact that we are directing PG&E, SCE, and SDG&E to perform almost all of the expedited procurement being authorized in this proceeding versus spreading the requirement to all LSEs, the most practical and expeditious method to implement a 17.5% PRM that supports the goal of meeting net peak demand is to continue to require all LSEs to meet their 15% system RA [resource adequacy] PRM requirement and direct PG&E, SCE, and SDG&E to target a minimum of 2.5% of incremental resources that are available at net peak through the efforts authorized in this proceeding [including in D.21-02-028]. For 2021, 2.5% of the average CPUC jurisdictional share of CAISO peak load for the peak summer months per the California Energy Commission’s 2019 Integrated Energy Policy Report forecast for the year 2021 results in a minimum incremental procurement target of 450 MW for PG&E, 450 MW for SCE, and 100 MW for SDG&E.” (D.21-02-036 at p. 74.)

As shown above, we regularly build upon policy created in previous decisions with the benefit of additional time.

Also similar to PCF, the Joint Parties argue that the Decision is not supported by substantial evidence because it relies “almost entirely” on disputed, uncorroborated hearsay evidence. (Joint Parties Reh. App. at p. 6.) Here, the Joint Parties fail to establish that the PRCA is uncorroborated hearsay. Also, the Joint Parties admit that support for ordering procurement is not based entirely on the PRCA. As discussed above, we also rely on party comments and a previous Commission decision. Therefore, the Joint Parties arguments lack merit.

1. The Decision was not ambiguous and it was not legal error to include fossil fuel generation.

The Joint Parties argue that the Decision is ambiguous because it claims that there is an internal conflict between the terms “incremental” and “efficiency improvements” in the Decision where it allows for “[i]ncremental capacity from existing power plants through efficiency upgrades.....” (Joint Parties Reh. App. at p. 8.; D.21-02-028 at p. 11.) The Joint Parties argue that the definition of efficiency is to use less energy to perform the same task and by adding the term incremental a conflict is created. This argument is not clearly stated and lacks merit. The Decision is clear that large IOUs can procure incremental capacity from existing power plants through efficiency upgrades. This direction means what it says. The incremental capacity must come from implementation of efficiency upgrades and not expansion of capacity by other means. The Joint Parties claim that the conflict they allege is on display in the advice letters, but the advice letters show there is no confusion. The IOUs have submitted advice letters that include incremental capacity from efficiency upgrades as the Decision provided.

In addition to this argument, the Joint Parties claim that the Decision commits legal error alleging that it creates a loophole for new fossil fuel infrastructure in conflict with California’s climate goals and air quality requirements. (Joint Parties Reh. App. at p. 8.) The Joint Parties list a number of state statutes related to greenhouse gas emissions, but do not demonstrate that we violated them. (*Id.* at pp. 10-12.) As

explained earlier in response to PCF, we have authority to order this procurement, which is consistent with the loading order, and reasonable under the circumstances.

2. The Decision's use of a Tier 1 advice letter is not legal error.

The Joint Parties argue that they will be prejudiced by the lack of evidentiary hearings to challenge fossil fuel procurement because the Decision allows procurement to proceed by Tier 1 advice letter for all procurement ordered by the Decision, except for utility-owned generation which requires a Tier 2 advice letter. (Joint Parties Rehg. App. at p. 13; D.21-02-028 at p. 11.) The Joint Parties claim that if their application for rehearing is not granted they will have no opportunity to protest fossil fuel procurement in an evidentiary hearing. (Joint Parties Rehg. App. at p. 13.) They also argue that using a Tier 1 advice letter improperly delegates discretionary procurement review to staff. (*Ibid.*)

The Joint Parties claim that they will have no opportunity to protest fossil fuel procurement in an evidentiary hearing is incorrect. (*Ibid.*) In fact, the Joint Parties had an opportunity to request a hearing in this proceeding and did not. Notwithstanding that failure to request a hearing and waiver, in D.02-02-049, a decision involving advice letters and delegation of authority, we stated that “[i]f an advice letter and/or protest raise a disputed issue of material fact, an evidentiary hearing in a formal proceeding is required.” (D.02-02-049 at p. 16.) Here, the Joint Parties have an opportunity to protest the advice letters and, if they believe an issue of material fact is raised, request an evidentiary hearing. Therefore, the Joint Parties arguments that they will have no opportunity to protest fossil fuel procurement in an evidentiary hearing are without merit and are rejected.

Additionally, the Joint Parties are incorrect when arguing that we unlawfully delegated discretionary procurement review to staff. (Joint Parties Rehg. App. at p. 13.) In accordance with General Order (GO) 96-B, Energy Industry Rule 5.1(4), matters appropriate for Tier 1 advice letters include a “Contract that conforms to a Commission order authorizing the Contract, and that requests no deviation from the

authorizing order (e.g., a gas storage Contract in exact conformity with Decision 93-02-013).” Additionally, GO 96-B, General Rules, Rule 7.1 states the following:

The reviewing Industry Division may reject without prejudice an advice letter due to defective service or omitted contents. Notwithstanding the Industry Division’s acceptance of an advice letter for submittal, a defect or omission that becomes apparent during review of the advice letter may require rejection of the advice letter without prejudice if the utility fails, upon request, to promptly cure the defect or omission.

In this circumstance, if an advice letter does not meet the specific criteria set in the Decision it would be rejected. Therefore, the use of a Tier 1 advice letter is not legal error.

C. CARE Application for Rehearing

1. Decision 21-02-028 did not violate the Bagley-Keene Open Meeting Act.

CARE alleges that we violated the Bagley-Keene Open Meeting Act by not giving proper 10-day notice as required by Government Code section 11125(a). (CARE Rehg. App. at p. 2.) CARE argues that because we revised the proposed decision after the 10-day notice was provided, and then adopted the revised proposed decision, the original notice was no longer valid. (*Ibid.*) CARE is incorrect.

Government Code section 11125(a) requires that the Commission provide notice of its meeting to persons who request that notice 10 days in advance of the meeting. Under Government Code section 11125(b), the notice must include a “brief general description” of each agenda item that “generally need not exceed 20 words.” On February 1, 2021, we published a notice that included a brief general description consistent with the Bagley-Keene requirements that provided the following:

40 Expedited Capacity Procurement for the Summer of 2021

PROPOSED OUTCOME: Directs and authorizes Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to contract for capacity that is available to serve peak and net peak demand in the summer of 2021 and seek approval for cost recovery in rates.

Outlines the parameters and timelines these three large electric investor-owned utilities must adhere to in seeking approval from the Commission for the capacity contracts.

This notice was provided 10 days before the February 11, 2021, Commission Meeting as required by Government Code section 11125(a). After opening and reply comments were received, the proposed decision was revised in response to comments to add firm imports to the procurement options, consistent with our Rules of Practice and Procedure. This change did not trigger a requirement to reissue the notice since Government Code section 11125(b) only requires a brief general description of the agenda item, not a detailed account.¹⁰ Therefore, CARE's arguments alleging invalid notice are without merit.

2. CARE's due process arguments are not persuasive.

CARE objects to the Decision on the basis that it violates CARE's "procedural and substantive rights to due process of law to pursue our Complaint at the Federal Energy Regulatory Commission (FERC) and on the basis that FERC and CPUC do not share concurrent jurisdiction over any wholesale 'contract affecting such rate' during the pendency of our complaint at FERC." (CARE Rehg. App. at p. 3, citing 16 U.S.C. § 824e(a).) However, CARE does not explain how the Decision has prevented it from pursuing a complaint at FERC and by extension how the Decision, which does not set wholesale rates, violates its procedural and substantive rights to due process. The Decision involves procurement portfolio design which is well within our jurisdiction to implement. Therefore, CARE's arguments lack merit and are unpersuasive.

III. CONCLUSION

For the reasons stated above, we have determined that good cause has not been demonstrated to grant rehearing of D.21-02-028.

¹⁰ California Government Code Section 11125(b) states: "The notice of a meeting of a body that is a state body shall include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session. A brief general description of an item generally need not exceed 20 words."

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.21-02-028 is denied.
2. This proceeding, R.20-11-003, remains open.

This order is effective today.

Dated May 20, 2021 at San Francisco, California.

MARYBEL BATJER

President

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE L. HOUCK

Commissioners