

COM/MGA/lil

Date of Issuance 6/29/2021

Decision 21-06-033 June 24, 2021

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Implement Senate Bill 237 Related to
Direct Access.

Rulemaking 19-03-009

**DECISION RECOMMENDING AGAINST FURTHER
DIRECT ACCESS EXPANSION**

TABLE OF CONTENTS

<u>Title</u>	<u>Page</u>
DECISION RECOMMENDING AGAINST FURTHER	1
DIRECT ACCESS EXPANSION	1
Summary	2
1. Background	5
1.1. Senate Bill (SB) Requirements	5
1.2. Summer 2020 Reliability Events and the Need for New Capacity Resources	7
2. The Direct Access Staff Report	8
2.1. September 2020 Staff Report Assessment and Recommendations	8
2.2. Comments on the September Staff Report	9
2.3. Final Staff Report	10
2.4. Discussion of Party Comments on the September Staff Report	11
2.4.1. Discussion of Impacts of Direct Access Expansion on Reliability	11
2.4.2. Discussion of Impacts of Direct Access Expansion on Long-Term Contracting	13
2.4.3. Discussion of the Power Content Label	16
2.4.4. Discussion of the Proposed Recommendations	18
3. Commission Findings Pursuant to Section 365.1(f)	19
4. Conclusion	22
5. Comments on Proposed Decision	22
6. Assignment of Proceeding	23
Findings of Fact	27
Conclusions of Law	28
ORDER	29

Appendix A – Final Staff Report

DECISION RECOMMENDING AGAINST FURTHER DIRECT ACCESS EXPANSION

Summary

This decision contains the Commission's recommendation to the Legislature against further expansion of the Direct Access program at this time. Public Utilities Code Section 365.1 requires that recommendations to reopen Direct Access be supported by the following findings:

- (A) The recommendations are consistent with the state's greenhouse gas emission reduction goals.
- (B) The recommendations do not increase criteria air pollutants and toxic air contaminants.
- (C) The recommendations ensure electric system reliability.
- (D) The recommendations do not cause undue shifting of costs to bundled-service customers of an electrical corporation or to direct transaction customers.

After review of the Commission Staff Report¹ attached to this decision, the Commission concludes that at this time, expansion of Direct Access to all non-residential customers would present an unacceptable risk to the state's long-term reliability goals. Further, based on the current procurement practices of Direct Access providers, we are unable to ensure that expansion of Direct Access would not result in increased greenhouse gas emissions, criteria air pollutants, and toxic contaminants when compared to maintaining the current cap on Direct Access. Therefore, we cannot recommend expanding Direct Access at this time.

The Commission considers electric system reliability against the backdrop of two recent grid reliability events.

¹ The Staff Report is attached as Appendix A. The original report was released on September 28, 2020 and has been revised based on party comments and updated data. The attached Staff Report is not being circulated for comment. Parties may, however, file comments on the proposed decision.

On August 14 and 15, 2020, the California Independent System Operator was forced to institute unplanned rotating electricity outages in California during an extreme heat wave in the western United States. The August 2020 rotating outages confirmed that the state's reliability issues are acute and immediate; however, these challenges are also long-term and structural.

It is essential that the state's grid be fully prepared and able to avoid outages resulting from insufficient resources. The February 2021 outages in Texas, where direct access providers serve all retail customers, further underscore the dangers of insufficient available generation resources. Texas and other states experienced a weather-related power crisis that led to extended power outages and skyrocketing energy prices. Although the root cause of the Texas outages is still under review, the damage to the health and safety of Texas residents, as well as the Texas economy, is evident. It is especially concerning because advocates of direct access in California have cited Texas as an example of a successful, fully-competitive retail market. We do not attribute these reliability events to ESPs or any other specific group of retail providers. However, the events raise concerns about grid reliability in a fragmented retail market. This decision finds that expansion of Direct Access would further fragment the market, which in turn could exacerbate the planning and related activities necessary to ensure grid reliability.²

The Commission's Integrated Resource Planning (IRP) proceeding is charged with forecasting California's future generation needs so that the state

² For example, increased retail options mean that customers will be able to frequently switch between providers in an unpredictable manner for years to come. As a result, it will not be possible to know the load of individual LSEs in the long-term. This in turn makes it difficult for LSEs to finance the new build generation that is needed to keep the grid reliable.

can continue to reduce greenhouse gas emissions from the electricity sector while preventing reliability events. Currently, IRP forecasts that retirement of once-through-cooling plants as well as increased electric load from building electrification and transportation electrification will lead to capacity deficits. These capacity deficits could be significant and will require new generation resources to be built. This means that in the coming years load serving entities will need to invest in these new generation resources through long-term contracts to ensure grid reliability. Reopening Direct Access would significantly complicate the state's near-term and long-term efforts to ensure grid reliability for all ratepayers if individual load serving entities lose load due to load migration and are unable to enter into long-term commitments for new generation.

The Commission views grid reliability as one of its top priorities. The Staff Report issued for comment in September 2020 recommended expanding Direct Access at a rate of ten percent each year. However, after considering the reliability events and the IRP forecasts for additional generation, the Commission is recommending against expansion at this time. Expanded Direct Access would result in further fragmentation of the market and raises serious electric system reliability concerns. These reliability concerns, coupled with Direct Access providers' primary reliance on unspecified power sources,³ form the basis for the Commission's recommendation against expansion of Direct Access.

³ The Final Staff Report describes "unspecified system power" as "power purchased by LSEs on CAISO day ahead or real-time markets that cannot be tied to specific generation source. Reliance on unspecified system power, which is generally cheaper and requires no long-term contracting, has been a source of competitive advantage for ESPs by allowing them to avoid higher costs and commitments of long-term contracts." (Final Report at 13).

1. Background

1.1. Senate Bill (SB) Requirements

This proceeding was initiated in 2019 to implement SB 237 (Hertzberg),⁴ which concerns direct transactions between electricity suppliers. Direct transactions are also known as Direct Access or “DA.” Direct Access is an electric service option that allows retail customers to buy electricity from a competitive non-utility entity called an Energy Service Provider (ESP). Direct Access became available to customers as part of energy deregulation enacted by Assembly Bill (AB) 1890 (Brulte) in 1996. Originally, Direct Access was intended to be a choice available to all customers. However, in the wake of the 2001 energy crisis the state capped the amount of load that can be served by Direct Access providers and limited new enrollment to non-residential customers.

In Phase 1 of this proceeding, the Commission addressed the SB 237 mandate for the Commission to increase the maximum allowable kilowatt-hour (kwh) annual limit for direct access transactions by 4,000 gigawatt hours and apportion the increase among the service territories of the large investor-owned utilities (IOUs), which are Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE). On May 30, 2019, the Commission issued Decision (D.) 19-05-043 resolving the Phase 1 issues.

SB 235 also added Section 365.1 of the Public Utilities Code requiring the Commission to provide recommendations (the Direct Access Recommendations) and findings (the Required Findings) to the Legislature. The Direct Access Recommendations must address:

⁴ Stats. 2018, Ch. 600, amending Public Utilities Code (Pub. Util. Code § or Section) § 365.1. All further statutory references are to the Pub. Util. Code §§ unless otherwise specified.

implementing a further direct transactions reopening schedule, . . . for all remaining nonresidential customer accounts in each electrical corporation's service territory.⁵

The Required Findings, to be considered when developing the Direct Access Recommendations, are:

- (A) The recommendations are consistent with the state's greenhouse gas (GHG) emission reduction goals.
- (B) The recommendations do not increase criteria air pollutants and toxic air contaminants.
- (C) The recommendations ensure electric system reliability.
- (D) The recommendations do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers.⁶

On December 19, 2019, the assigned Commissioner issued an Amended Scoping Memo for Phase 2.

In 2019, Energy Division staff began preparing the recommendations and the assessment of the statutory provisions for the Commission's consideration. This process started with a series of comments filed on the record in fall 2019. In January 2020 staff facilitated a workshop to obtain stakeholder input regarding the Commission's recommended schedule for Direct Access expansion. Later in January 2020 parties served informal written comments.

The workshop and informal comments formed the foundation of the Report Providing an Assessment of Expansion of Direct Access (Staff Report) issued by ruling on September 28, 2020 to allow parties' input. Parties filed fifteen sets of comments on October 16, 2020 and nine sets of reply comments on October 26, 2020. Commission staff updated the Staff Report by updating certain

⁵ Section 365.1(f)(1).

⁶ Section 365.1(f)(2).

data, and responding to comments filed by the parties. The Final Staff Report is attached to this decision and this proceeding is submitted as of the date of the Final Staff Report (May 7, 2021).

1.2. Summer 2020 Reliability Events and the Need for New Capacity Resources

In August 2020 and early September 2020, the Western United States experienced an unprecedented heat wave and the California grid experienced several electricity shortages and rotating outages. The first heat wave continued August 14 through 19 with the potential for more extreme electricity shortages. The state took many actions to reduce load and increase available generation and as a result California Independent System Operator (CAISO) did not need to call for additional rotating outages.⁷ The CAISO footprint experienced another period of high temperatures and demand over the 2020 Labor Day weekend, especially on Sunday, September 6 and Monday, September 7. The CAISO was again able to avoid rolling outages. The Final RCA credits “considerable conservation from the public” for decrease in expected demand.⁸

The Final RCA was issued by the Commission, together with the CAISO, and the California Energy Commission (CEC). The Final RCA determined that short-term, medium-term, and long-term actions are needed to address resource adequacy (RA) and market practices to reduce the risk of future events. The

⁷ The Final Root Cause Analysis of the August 2020 Outages (Final RCA) issued on January 13, 2021, states that, “Although August 14 and 15 are the primary focus of this Final Analysis because the rotating outages occurred during those days, August 17 through 19 were projected to have much higher supply shortfalls. If not for the leadership of the Governor’s office to mobilize a statewide mitigation effort and significant consumer conservation, California was also at risk of further rotating outages on those days.” Final RCA, Executive Summary.

⁸ Final RCA at 36.

Final RCA sets out actions to be completed in set time periods so that the state will be “better prepared for extreme climate change-induced weather events and other operational challenges facing our evolving power system.”⁹

In the near-term, the Commission has already begun to order additional procurement to address the reliability in summer 2021 and beyond. For example, D.21-02-028 orders PG&E, SCE, and SDG&E to contract for capacity to serve peak and net peak demand in the summer of 2021.

In the Integrated Resource Planning (IRP) proceeding, a recent analysis estimated a shortfall of approximately 7,500 megawatts (MW) of effective capacity by 2026¹⁰ and the IRP 2020 Reference System Plan assumes a long-term need for procurement of 25,000 MW.¹¹ In addition, LSEs are still in the process of fulfilling a 2019 Commission decision in the IRP proceeding that ordered procurement of 3,300 MW of new generation.¹²

2. The Direct Access Staff Report

2.1. September 2020 Staff Report Assessment and Recommendations

The September 2020 Staff Report was made available by ruling on September 28, 2020. As required by Section 365.1, the Staff Report provided an assessment of the potential impacts that reopening Direct Access would have on the Required Findings. At that time, the Staff Report proposed that the Commission’s Direct Access Recommendation be subject to demonstration by

⁹ Letter to Governor Newsom at beginning of Final RCA.

¹⁰ See, February 22, 2021 Administrative Law Judge’s Ruling Seeking Feedback on Mid-Term Reliability Analysis and Procurement Requirements at 22. This ruling was issued in Rulemaking 20-05-003.

¹¹ Staff Report.

¹² D.19-11-016.

the Energy Service Providers (ESPs) of compliance with IRP, Renewables Portfolio Standard (RPS) and RA procurement obligations.

The Staff Report issued in September also recommended that the following legislation be adopted:

- Set an initial re-opening schedule of increments of no more than ten percent of eligible non-residential load per year.
- Condition each annual expansion on Commission review and approval of compliance with IRP, RA and RPS requirements, as subject to Commission approval.
- Order annual expansion to take place on a schedule that will allow LSEs the ability to fully comply with RA requirements.
- Raise the Direct Access cap by no more than ten percent of non-residential load per year in order to minimize planning disruptions associated with load departure and allow the Commission and market actors sufficient time to develop the regulatory and market structures needed to ensure long-term resource development in a disaggregated retail market.

2.2. Comments on the September Staff Report

Fifteen sets of opening comments were filed on October 16, 2020 and nine sets of reply comments were filed on October 26, 2020. Parties that represent Direct Access providers or consumers are collectively referred to in this decision as the “Direct Access Parties” and include Alliance for Retail Energy Markets (AReM), California Large Energy Consumers Association (CLECA), the Energy Producers and Users Coalition (EPUC), the California Manufacturers and Technology Association, the Energy Users Forum, Commercial Energy of California (Commercial Energy), Direct Access Customer Coalition (DACC), Renewable Energy Buyers Alliance (REBA), Vistra Energy Corp., Western Power Trading Forum (WPTF), NRG Energy, Inc. (NRG), Shell Energy of North

America (Shell Energy), The Regents of the University of California (University of California), and jointly by Advanced Energy Economy/Advanced Energy Buyers Group (AEE/AEBG). Comments were also filed by the California Public Advocates Office (Cal Advocates), California Community Choice Association (CalCCA), PG&E, SDG&E, SCE, and The Utility Reform Network (TURN). Generally, Direct Access Parties disagreed with the recommendation and findings, arguing for an accelerated reopening schedule; Cal Advocates, TURN, CalCCA and other parties generally agreed with the concerns raised in the Staff Report and urged caution in reopening Direct Access.

In their comments, parties expressed concerns with specific elements of the assessment in the Staff Report, as well as its conclusions and recommendations. Staff has responded to these comments and updated the data and analysis in the Final Staff Report accordingly. The Final Staff Report is attached to this decision. Below we discuss party comments related to the Staff Report recommendations.

2.3. Final Staff Report

The Final Staff Report is attached as Appendix A to this decision. Because the actual Direct Access Recommendations will be adopted by a decision of the Commission, the Final Staff Report does not include the staff's proposed recommendations.

The Introduction¹³ to the Final Staff Report summarizes its assessment using the following language:

- Large-scale generation resources are needed because the state has a major capacity shortfall over the next decade. The CPUC has ordered 3300 MW of new generation to be built by 2023 and estimated that an additional 7500 MW is needed by 2026.

¹³ Staff Report at 4.

- The load migration that would be enabled by reopening Direct Access leaves all LSEs uncertain about future load, making it challenging for any LSE, including the CCAs and IOUs, to build the large-scale generation resources the state needs to ensure reliability in the future.
- While ESPs have recently begun to secure contracts for generation resources; ESPs' lack of track record in building new generation resources, system reliability would be at increased risk if ESPs were to serve a significant portion of the states' load.
- Except for a few notable exceptions, most ESPs' procurement practice is to primarily rely on CAISO system power to meet all energy needs beyond their RPS requirements. The GHG emissions factor for CAISO system power is slightly higher than gas generation.
- If past procurement indicates future outcomes, then load migration from IOUs or CCAs to ESPs may lead a net decline in RPS procurement, relative to maintaining the current cap on Direct Access, which may increase GHG emissions and increase criteria air pollutants and toxic air contaminants.
- Shortfall in generation capacity drives up the cost of energy for all customers adversely impacting all ratepayers.¹⁴

2.4. Discussion of Party Comments on the September Staff Report

2.4.1. Discussion of Impacts of Direct Access Expansion on Reliability

Broadly speaking, the Direct Access Parties disagree with the premise in the original Staff Report that an increase in Direct Access would pose a risk to maintaining reliability and argue that any reforms to RA procurement should be

¹⁴ Final Staff Report at 4.

considered independently of reopening Direct Access. Shell Energy was most critical of the Staff Report, asserting that,

Staff's recommendations have nothing to do with customer choice, and everything to do with a desire to maintain Commission control over the levers of energy and capacity procurement.¹⁵

Shell Energy then asserts that the proposed recommendations are based on an unsubstantiated concern that ESPs are incapable of meeting their RPS, RA, IRP and GHG emission requirements. Further, Shell Energy states that if an LSE fails to comply with its RPS or RA procurement obligation and cannot provide a reasonable justification for noncompliance, a penalty structure is already in place.

CalCCA, TURN and Cal Advocates disagree with the Direct Access Parties. TURN is against any expansion of Direct Access until the state's resource planning, reliability, and renewable energy goals can be reconciled with an increasingly fragmented retail market. Cal Advocates is concerned that the schedule proposed in the September Staff Report will create challenges with procurement, and recommends further Direct Access expansion be delayed until the next or the subsequent IRP cycle, at a minimum, to support procurement planning certainty in the IRP.¹⁶

We underscore here that the Commission has an obligation to protect customers and ensure Californians' access to safe and reliable utility infrastructure and services at fair and reasonable rates. To meet this statutory obligation, the Commission must ensure system reliability before considering

¹⁵ Shell Energy Opening Comments at 2.

¹⁶ TURN Opening Comments at 1; Cal Advocates Opening Comments at 12.

enhancements to customer choice. In the past two decades since deregulation began, meeting the state's resource needs has become increasingly complicated with market fragmentation and high penetration of renewables. Although the state has an RA program with local, system and flex capacity compliance requirements, California is still facing a major reliability challenge with the current level of market fragmentation, which includes nearly 40 LSEs serving load in the CAISO territory. The RA proceeding is currently exploring significant structural changes and refinements to the RA program to ensure ratepayer value and to secure a generation fleet to meet California's needs, in part due to this fragmentation.¹⁷

2.4.2. Discussion of Impacts of Direct Access Expansion on Long-Term Contracting

Long-term contracts are critical to new capacity being built at a large scale to meet reliability shortfalls, including those discussed above.

The Staff Report highlighted the challenge that LSEs would face in securing long-term contracts to meet the requirements of SB 350 (de León, 2015), which mandates that 65 percent of each LSE's RPS procurement be derived from contracts of ten or more years by 2024.¹⁸ Commercial Energy responded to these concerns stating that the fear that ESPs cannot contract for renewable power on a long-term basis is not supported. Commercial Energy¹⁹ contends that Direct

¹⁷ Rulemaking 19-11-009, Track 3.

¹⁸ As noted in the Staff Report, in informal comments in 2020 Shell and Direct Energy announced solar projects of 200 MW and 250 MW. In addition, AReM included a table showing that as of August 1, 2020 the long-term RPS contracts entered into by the largest ESPs would cover a significant share of the load for these ESPs. The Staff Report did not include this table because it has not been verified.

¹⁹ It is worth noting that Commercial Energy did not meet its RPS requirements for Compliance Periods 2011-2013 or 2014-2016, resulting in penalties. At this time, compliance for the 2017-2020 period for all LSEs is still under review.

Access entities are making the arrangements and investments necessary to be in compliance with the 65 percent requirement now that it is required for all LSEs; Commercial Energy states that the Commission will be able to confirm this in the coming year as the Phase 1 expansion of Direct Access takes place.²⁰

TURN, on the other hand, agrees with the Staff Report's assessment on the impacts of expansion of Direct Access on all LSEs' ability to develop new resources. TURN states that Direct Access providers typically have very short-term customer commitments (often just one year in duration). Given the short-term commitments identified by TURN, the Commission believes that the ability of ESPs to enter long-term resource commitments will be frustrated.²¹

We cannot predict with certainty whether ESPs will meet their obligations to comply with SB 350 by 2024. However, we have determined that ESPs do not have a track record of relying on long-term contracts to meet a significant proportion of their energy needs. The Final Staff Report illustrates the ESPs' current procurement practices, showing that contracted energy comprises a small fraction of their current procurement.²²

Given the ESPs' past pattern and practice of procuring new generation resources, and considering the significant and complex reliability challenges before us, the Commission believes that expanding customer choice at this time

²⁰ Commercial Energy Opening Comments at 4. The Final Staff Report relies on the most currently available verified RPS compliance data; that data does not include RPS tracking of long-term contract compliance because the 65% requirement did not apply to past compliance periods. Long-term RPS contracts are discussed in the *2020 California Renewables Portfolio Standard Annual Report*, dated November 2020, in the subsection titled "Progress in Long-Term Contracting" at pages 32-34.

²¹ TURN Opening Comments, Attachment A (TURN Informal Opening Comments, January 21, 2020).

²² Final Staff Report at 20.

is not justified.²³ This is particularly relevant given the current need for a high level of new capacity investment to meet system needs.²⁴

Furthermore, TURN and CalCCA have also raised concerns regarding the ability of CCAs to remain financially viable and maintain their own long-term contracts if there is a significant risk that load will migrate to Direct Access following expansion. The Final Staff Report quotes CalCCA as stating that,

The mismatch between the duration developers need in a contract for a new project, and the length of time an LSE can be confident of having a given load at a given price is a structural impediment to new project development in any market with retail competition.²⁵

As CalCCA clarifies, power purchase agreements (PPAs) for new construction are long-term, generally fifteen years or more, and a developer needs to know its counterparty will be able to stand behind a PPA for the duration of the contract. If Direct Access is reopened, CCAs could lose a significant percentage of load, which could undermine the long-term contracts that CCAs have already entered into and make it difficult for CCAs to secure financing for future long-term contracts to meet reliability needs.

Given that the reliability of California's energy future depends on LSEs contracting to build significant volumes of new resources, and given that CCAs are currently responsible for at least half of this capacity, the risk presented by the unpredictable load migration that would result from expanded Direct Access is unacceptable at this time.

²³ *Id.*

²⁴ As of June 2021, the Commission is considering a recommendation in the IRP proceeding for 11.5 GW by 2026.

²⁵ Final Staff Report at 20.

2.4.3. Discussion of the Power Content Label

Staff Report's assessment of the GHG emissions examines the LSEs' current procurement practices as reported to the California Energy Commission in the Power Content Label (PCL).²⁶ Electricity from transactions that are not traceable to a specific generation source are counted as unspecified. As shown in Figure 3 of the Final Staff Report, the most recently available PCL is for 2019 and shows that unspecified power accounts for approximately 70 percent of the ESP power mix; the remainder is sourced from renewables. In comparison, the CCA class and the IOUs procured more than 50 percent of their power from GHG-free resources according to the 2019 PCL.

In comments on the September 2020 Staff Report, AReM objected to the use of the PCL as an indicator of RPS compliance, stating that SB 237 does not require ESPs to meet a higher RPS standard of compliance than is required by law.

The LSEs submit a GHG emissions profile with their integrated resource plans in R.20-05-003. These plans represent the LSEs' projected energy resource mix to meet their 2030 GHG emission reduction targets, but they are not obligated to achieve these goals at this time. As a result, they do not represent GHG emissions of committed procurement. For this reason, the Staff Report focused on the PCL for its analysis.

The Staff Report acknowledges that all LSEs' portfolios are shifting significantly at this time. The SB 350 mandate that 65 percent of each LSE's RPS

²⁶ Each LSE is required to report its mix of power sources under contract to the CEC annually. The CEC uses this information to assess the statewide energy mix and GHG emissions intensity. The current PCL requirements were introduced by AB 1110 (2016, Ting) and were recently implemented by the CEC.

procurement be derived from contracts of ten or more years by 2024 will require ESPs to procure new renewables.

While the PCL data has a number of limitations for assessing the GHG impacts of Direct Access expansion, it does support the conclusion that, other than meeting their minimum RPS requirements, most ESPs rely on unspecified generation sources to meet their energy needs. We cannot predict whether ESPs will meet the new, long-term, procurement requirements for RPS. But CCAs and IOUs collectively have exceeded RPS procurement requirements and have contracted for a larger proportion of energy-only contracts for renewables procurement. Even if the ESPs do meet their RPS compliance requirement for long-term contracts, past procurement indicates that their portfolios will have a higher emissions profile than the portfolios of other LSEs.

While AReM is correct that SB 237 does not require ESPs to meet a higher standard of RPS compliance than is required by law, the Commission is required to consider consistency with state GHG emission reduction goals. The state has set minimum targets, but the state's goals do not set a maximum for reduction. Based on the Staff Report, the Commission finds it is likely that the ESPs will meet their renewables requirements, but that load migration from IOUs or CCAs to ESPs may lead a net decline in RPS-eligible and GHG-free procurement relative to maintaining the current cap on Direct Access.

Several Direct Access Parties, including REBA, NRG, AEE and AEBG argue that ESPs can offer products that enable their large commercial and industrial customers to achieve a sustainability or energy management goals and that this allows Direct Access providers to implement energy management tools that help grid needs – such as demand response programs.

We do not have specific information to support this claim. While Direct Access Parties have provided anecdotes²⁷ about innovative programs that can reduce load at peak system times, they did not show how these programs impact the ESPs load or emissions overall. Because ESPs claim confidentiality for the majority of their activities we do not have insight into the extent to which customer arrangements support sustainability goals.

A few ESPs, such as the University of California and 3 Phases Renewables, Inc. (3 Phases) have demonstrated themselves to be leaders in development of new renewables. However, the data reported to the CEC for the PCL shows that as a group ESPs have primarily relied on unspecified power.²⁸ This approach gives ESPs a competitive price advantage, since by relying on system power ESPs can offer their customers lower prices than other LSEs.

2.4.4. Discussion of the Proposed Recommendations

Direct Access Parties interpreted the Staff Report's reopening recommendation as requiring ESPs as a whole be in complete compliance with all requirements for RA, RPS, and IRP. Direct Access Parties argue that it is unreasonable to treat ESPs as a group. Direct Access Parties would prefer that compliance be assessed on an individual ESP basis; compliant ESPs would be

²⁷ For example, AEE/AEBG asserts that customers are able to pursue large-scale renewable projects that would not be possible without the ability to sign bilateral contracts through direct access. As an example of this, AEE/AEBG cites the Apple, Inc. 130 MW power purchase agreement (PPA) with First Solar for 130 MW of the California Flats project in Monterey County. AEE/AEBG Opening Comments on Proposed Decision at 9.

²⁸ Staff Report at 13. Data source: Power Source Disclosure reported by the California Energy Commission. Unspecified power is usually CAISO system power or the Western Electricity Coordinating Council (WECC) system power.

allowed to expand while non-compliant ESPs would not be able to participate in the expansion.

Given the record before us, we are not prepared to recommend reopening Direct Access to all non-residential customers at this time. This is not a matter of choosing to reward or punish a subset of companies in the electricity sector. Instead, we make this recommendation because allowing additional Direct Access expansion will lead to unpredictable load migration which will continue as long as customers have the ability to switch to a Direct Access provider and between Direct Access providers. This in turn could further destabilize the state's energy system.

3. Commission Findings Pursuant to Section 365.1(f)

Section 365.1(f) requires the Commission to make the Required Findings in developing the Direct Access Recommendations to further reopen Direct Access programs.

A. The recommendations ensure electric system reliability.

In consideration of the concerns raised in the Staff Report and the urgent reliability challenges that the state faces, the Commission cannot find that expansion of Direct Access will ensure electric system reliability. The existing uncertainties around procurement planning raised by the August 2020 energy shortage and the February 2021 power crisis in Texas have required California agencies to take a deeper look at reliability issues.

Although the immediate cause of the Texas reliability events was extreme weather that the Texas grid had not prepared for, and Texas electricity markets are governed by a different regulatory regime, the massive outage showed what can happen if regulatory oversight is too limited. Even when wholesale power prices reached their cap of \$9,000 per MW hour, customer load reduction was not

sufficient to avert outages. Some customers who did have power experienced extreme rate and bill impacts. An extreme example of the bill impacts was felt by customers of Griddy, a Texas direct retail provider that charges customers the wholesale price as a passthrough, encouraged customers to switch providers during the outage to avoid paying the \$9,000 wholesale rate. Ironically, in the comments filed in this proceeding in 2020, Direct Access Parties, such as NRG, pointed to the Texas energy market as a model of a fully competitive market; clearly, the Texas model now serves as a warning to proceed with caution, careful planning, and continuing evaluation of the effectiveness of planning structures given changing market and weather conditions. To ensure electric system reliability, the Commission recommends not opening Direct Access to additional load at this time.

B. The recommendations are consistent with the state's greenhouse gas (GHG) emission reduction goals.

ESPs' current procurement practices may indicate that load migration from IOUs or CCAs to ESPs could lead to a net decline in RPS procurement relative to the current forecast, which could lead to a net reduction in GHG emission reductions compared to not reopening Direct Access.²⁹ The Staff Report relies on the ESPs' 2019 PCL to determine that approximately 70 percent of the ESPs' energy resource are from unspecified power. California Air Resources Board has determined that unspecified power has a GHG emissions content that is slightly higher than natural gas generation.

The Direct Access Parties state that they intend to comply with the new RPS obligation to secure at least 65 percent of their RPS resources through

²⁹ Staff Report at 4.

long-term contracts by 2024. This is the deadline pursuant to statute. However, the IOUs and CCAs have consistently procured RPS resources in excess of state requirements. Thus, allowing additional load to migrate to Direct Access would likely result in increased GHG emissions compared to the status quo.

We conclude that we cannot find that reopening Direct Access would be consistent with the state's GHG emission reduction goals and therefore cannot recommend reopening at this time.

C. The recommendations do not increase criteria air pollutants and toxic air contaminants.

The Commission does not regulate criteria air pollutants and air contaminants directly. Limits for criteria air pollutants and air contaminants are addressed outside of the Commission as part of the air permits issued to individual generating facilities. In light of this, the Commission is not making an affirmative finding that expansion would – or would not – increase criteria air pollutants and toxic air contaminants.

However, we cannot ensure that reopening Direct Access would not increase criteria air pollutants and toxic air contaminants. The Commission notes that ESPs rely primarily on unspecified power from the CAISO energy market and that most criteria pollutants and toxic air contaminants are the result of unspecified power transactions. Increased reliance on unspecified power could result in an increase in criteria pollutants and toxic air contaminants.

D. The recommendations do not cause undue shifting of costs to bundled-service customers of an electrical corporation or to direct transaction customers.

As discussed above, the Commission has determined that it cannot make all of the Required Findings necessary to recommend Direct Access expansion. The potential for undue cost-shifting, and the mechanisms for preventing

cost-shifting to bundled-service customers, is addressed through various Commission processes such as the annual Energy Resource Recovery Account (ERRA) proceedings for each of the large IOUs. These processes are complex and evolving. Because the Commission has already determined that it cannot recommend expansion of Direct Access, it is not necessary for this decision to make a specific finding regarding cost-shift in an expanded Direct Access. Also, we note that, according to the Staff Report, Direct Access expansion could result in cost increases for all customers if the expansion results in capacity constraints and reliability events caused by underinvestment in new resources.

4. Conclusion

The Commission interprets section 365.1 to require that all four Required Findings can be made. As discussed above, the energy market in California is in flux and highly fragmented. The record demonstrates a wide range of complexities and potential risks that could result from reopening, especially in terms of electric reliability. Due to this high level of uncertainty, the Commission cannot meet the four Required Findings and therefore cannot recommend a schedule to expand Direct Access that meets these requirements.

To fulfill the Commission's primary responsibility in ensuring grid reliability, implementing the state's ambitious GHG and air quality goals, and encouraging the construction of long-term renewable generation resources, the Commission recommends that the Legislature not expand Direct Access at this time.

5. Comments on Proposed Decision

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice

and Procedure. Comments were filed on June 3, 2021 by Commercial Energy; jointly by DACC, CLECA, EPUC, and REBA (collectively, the Joint DACC Parties); jointly by AReM, 3 Phases, and University of California (collectively, the Joint AReM Parties); Shell Energy; AEE/AEBG; WPTF; TURN; CalCCA; Cal Advocates; and jointly by SCE and PG&E. Reply comments were filed on June 8, 2021 by the Joint DACC Parties, Shell Energy, and the Joint AReM Parties.

This decision has been modified as necessary to respond to party comments. In the sections below we address the legal arguments made by parties supporting a recommendation to expand Direct Access.

5.1. Decision Fulfills the Requirements of SB 237

Several parties assert that the Proposed Decision does not comply with the statutory language of Senate Bill (SB) 237.³⁰ Specifically, the Joint DACC Parties posit that we are not reading “shall” as contained in the statute as mandatory.³¹ A similar argument is made by the Joint AReM Parties,³² Shell Energy,³³ AEE/AEBG,³⁴ and WPTF.³⁵

These parties mis-read the statute. SB 237 requires that the Commission “shall provide recommendations to the Legislature on implementing a further direct transactions reopening schedule”³⁶ and, in this decision, the Commission is providing a recommendation on further direct transactions reopening: do not do

³⁰ E.g., Joint DACC Parties Opening Comments on Proposed Decision at 3-6.

³¹ *Id.* at 4-6.

³² Joint AReM Parties Opening Comments on Proposed Decision at 2-3.

³³ Shell Energy Opening Comments on Proposed Decision at 4.

³⁴ AEE/AEBG Opening Comments on Proposed Decision at 3-4.

³⁵ WPTF Opening Comments on Proposed Decision at 3-4.

³⁶ Stats. 2018, Ch. 600, amending Section 365.1.

so. That these parties disagree with the recommendation is of no moment; the legislative directive is satisfied when the Commission makes its recommendation.

The Joint DACC Parties also argue that SB 237 provides an “express and mandatory” directive to the Commission to suggest a phase-in period.³⁷ A comparable argument is made by the Joint AReM Parties,³⁸ Shell Energy,³⁹ and AEE/AEBG.⁴⁰ SB 237 states that the Commission “shall provide recommendations to the Legislature on . . . the phase-in period over which the further direct transactions shall occur”⁴¹ Thus, these parties have confused the second ‘shall’ to be a requirement to recommend a phase-in period for expanded Direct Access without considering that the recommendation could be, and is, not to have a phase-in period. In other words, we were asked for our recommendation regarding the phase-in period and that recommendation is to not have a phase-in period (because we cannot recommend reopening at all).

In addition, as specifically pointed out by the Joint DACC Parties, our Supreme Court compels us to:

consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 382, 388 [20 Cal. Rptr. 2d 523, 853 P.2d 978].)⁴²

³⁷ Joint DACC Parties Opening Comments on Proposed Decision at 3.

³⁸ Joint AReM Parties Opening Comments on Proposed Decision at 2-3.

³⁹ Shell Opening Comments on Proposed Decision at 4.

⁴⁰ AEE/AEBG Opening Comments on Proposed Decision at 3-4.

⁴¹ Pub. Util. Code § 365.1(f)(1).

⁴² Joint DACC Parties Opening Comments on Proposed Decision at 5.

The Joint DACC Parties, however, fail to mention the remainder of the statute requiring the Commission's recommendation regarding expansion of Direct Access be based on requisite "find[ings]."⁴³ Pursuant to *DuBois*, we must consider the portion of the statute seeking a recommendation along with the portion of the same statute that requires the recommendation be based on those "find[ings]." Thus, reading these two portions together implies that we cannot make a recommendation without also making the necessary "find[ings]," which the Joint DACC Parties fail to acknowledge.

Further, the Joint DACC Parties argue that "the Proposed Decision would in fact impose the loss of a private right" ⁴⁴ To the contrary, this decision does not impose any restrictions on any private rights. Instead, it simply makes a recommendation to the Legislature as required by SB 237.⁴⁵ Since the Legislature can accept or reject that recommendation no private right is won or lost by issuance of this decision.

Finally, assuming, *arguendo*, we are being asked 'how' to expand Direct Access in Section 365.1 (f)(1) [as opposed to if DA should be expanded], that 'how' must not violate the "find[ings]" listed in Section 365.1(f)(2)(A) - (D). Therefore, another way to view our application of the statute is to acknowledge that we cannot say 'how' to expand Direct Access [make recommendations] if we find the 'how' in conflict with the listed items.

5.2. Dormant Commerce Clause

The Joint DACC Parties argue that by not expanding Direct Access, the Proposed Decision discriminates against ESPs and thereby violates the dormant

⁴³ Pub. Util. Code § 365.1(f)(2).

⁴⁴ Joint DACC Parties Opening Comments on Proposed Decision at 5.

⁴⁵ Pub. Util. Code § 365.1(f)(1).

Commerce Clause. According to the Joint Direct Access Parties, ESPs are mainly located out-of-state.⁴⁶ The Joint DACC Parties assert that the Proposed Decision will favor in-state IOUs and CCAs over out-of-state ESPs—a “*per se* violation of the dormant Commerce Clause.”⁴⁷

However, in making this argument, the Joint DACC Parties do not cite to any case law to support a finding that the present case would violate the dormant Commerce Clause. Instead, the Joint DACC Parties only refer to an Application for Rehearing filed by CalCCA, in a different Commission proceeding, which the Joint DACC Parties acknowledge presents a “different factual situation.”⁴⁸

The dormant Commerce Clause is made up of three analytical frameworks:

First, a state rule that facially discriminates against other states in order to protect local economic interests will generally be found invalid. Second, when a state rule does not facially discriminate against out-of-state economic interests a state enactment “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Third, a state rule must not regulate extraterritorially.⁴⁹

A violation of the dormant Commerce Clause requires that at least one of these frameworks be implicated. However, in their comments, the Joint DACC Parties do not identify this analytical framework nor do they indicate which of the three frameworks they believe the Proposed Decision violates. Thus, the

⁴⁶ Joint DACC Parties Opening Comments on Proposed Decision at 7-8.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 8-9. We also note no citation to evidence that ESPs are mainly out-of-state.

⁴⁹ D.07-01-039 at 205-06 (quoting *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142).

Joint DACC Parties fail to demonstrate that the Proposed Decision violates the dormant Commerce Clause.

We have no information to indicate, and do not believe, that any of the analytical frameworks of the dormant Commerce Clause are violated by this decision.

6. Assignment of Proceeding

Martha Guzman Aceves is the assigned Commissioner and Jeanne M. McKinney is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. California experienced rotating outages in Summer 2020 due to capacity and reliability challenges.
2. The Final Root Cause Analysis of the 2020 outages identifies near-, mid-, and long-term actions that need to be taken to ensure readiness for summer reliability.
3. The Commission has ordered 3,300 MW of new generation to be built by 2023 and is considering additional procurement for 2026. According to modeling in the IRP, entities under the Commission's jurisdiction will need to build as much as 25,000 MW of new GHG-free resources.
4. Construction of new generation resources requires financing; and such financing is typically obtained by showing long-term customer commitments.
5. Without long-term load certainty, LSEs cannot demonstrate the long-term customer commitment to support or enter into the long-term power purchase agreements necessary to finance construction of new generation.

6. Direct Access customers generally enter into short-term agreements with ESPs; as a result, ESPs primarily fulfill their obligations through short-term contracts, or unspecified power purchased on the CAISO energy market.

7. Expanding Direct Access will allow significant ongoing load migration between LSEs, which will cause further fragmentation of the electricity market.

8. If there is significant load migration between LSEs, CCAs and ESPs will have difficulty financing the new generation resources needed for system reliability and for GHG emissions reduction goals.

9. ESPs' power purchases consist largely of unspecified power, which the California Air Resources Board has determined has higher GHG emissions and particulate pollutants than the power mix used by IOUs and CCAs.

10. As of 2019, the power mix for each type of LSE is as follows: IOU power mix is 64.4 percent GHG-free; CCAs are 79.1 percent GHG-free, and ESPs are 30.6 percent GHG-free.

11. To comply with SB 350, each LSE must procure 65 percent of its RPS compliance resources through long-term contracts of ten years or more by 2024.

12. If ESPs continue to rely on unspecified power, as shown in Figures 3 and 6 of the Final Staff Report, load migration due to Direct Access expansion will result in increased GHG emissions.

13. The Commission does not directly regulate criteria air pollutants and toxic air contaminants.

14. If an LSE fails to procure new generation required for reliability or GHG-reduction, electricity costs could increase for all customers.

Conclusions of Law

1. Expanding Direct Access will create unacceptable risks to electric system reliability.

2. Expanding Direct Access is not consistent with the state's GHG emission reduction goals.

3. Because the Commission has determined that it cannot make the Required Findings as to reliability and GHG emission reduction goals, the Commission cannot recommend expanding Direct Access.

4. Because the Commission is recommending against Direct Access expansion based on two of the four Required Findings, it is not necessary for the Commission to make a determination on the remaining Required Findings.

O R D E R

IT IS ORDERED that:

1. As required by Public Utilities Code Section 365.1, the Commission is making this recommendation to the Legislature. The Commission recommends that the Legislature not expand Direct Access transactions.

2. The Executive Director shall submit to the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel copies of this decision containing the Commission's recommendations pursuant to Public Utilities Code Section 365.1, including a one-page summary of its contents, in accordance with the instructions set forth in Government Code 9795.

3. Rulemaking 19-03-009 is closed.

This order is effective today.

Dated June 24, 2021, at San Francisco, California.

MARYBEL BATJER

President

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE HOUCK

Commissioners