

Decision **PROPOSED DECISION OF ALJ CHIV (Mailed 3/18/2022)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Oversee the Resource Adequacy
Program, Consider Program
Refinements, and Establish Forward
Resource Adequacy Procurement
Obligations.

Rulemaking 19-11-009

**DECISION DENYING PETITION FOR MODIFICATION
OF OHMCONNECT, INC.**

Summary

This decision denies the petition for modification of Decision 20-06-031, filed by OhmConnect, Inc.

Rulemaking 19-11-009 is closed.

1. Background

The Commission issued Decision (D.) 20-06-031 on June 30, 2020. That decision adopted local capacity requirements for 2021-2023, flexible capacity requirements for 2021, and multiple refinements to the Resource Adequacy (RA) program. One refinement adopted in D.20-06-031 was the modification to the Maximum Cumulative Capacity (MCC) Buckets to limit the proportion of a load-serving entity's (LSE) RA obligations that can be met with use-limited resources.

Specifically, the Commission adopted a 8.3% cap on the demand response (DR) bucket.¹

On September 9, 2021, OhmConnect, Inc. (OhmConnect) filed a petition for modification of D.20-06-031, and Motion for Leave to File Under Seal the Declarations of John Anderson, Jack Hays, and Franklin Fuchs. The motion for confidential treatment was granted on September 21, 2021.

Responses to the petition were filed on October 11, 2021 by: California Efficiency + Demand Management Council and CPower (collectively, Joint Parties); East Bay Community Energy (EBCE); Leapfrog Power, Inc. (Leap); Pacific Gas and Electric Company (PG&E); Redwood Coast Energy Authority, San Diego Community Power, and San Jose Clean Energy (collectively, Joint CCAs); and San Diego Gas and Electric Company (SDG&E). OhmConnect was granted leave to file a reply by the Administrative Law Judge (ALJ) and filed a reply on October 25, 2021.

2. Standard of Review

Public Utilities (Pub. Util.) Code § 1708 gives the Commission authority to “rescind, alter, or amend any order or decision made by it.” Modifying an existing decision, however, is an extraordinary remedy that must be carefully applied to keep with the principles of res judicata since “Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed.”²

The Commission has consistently held that a petition for modification is not a substitute for legal issues that may be raised in an Application for

¹ D.20-06-031 at Ordering Paragraph 19.

² 1980 Cal. PUC LEXIS 785, 24; *see also* 2015 Cal. PUC LEXIS 278, 7.

Rehearing.³ The Commission “will not consider issues which are simply re-litigation of issues that were decided in [the original decision].”⁴ However, as permitted under Rule 16.4 of the Commission’s Rules of Practice and Procedure (Rules), allegations of new or changed facts may be raised in a petition for modification if properly supported by the appropriate declaration or affidavit.

A petition for modification must be filed within one year of the effective date of the decision proposed to be modified, and if past one year, the petition “must also explain why the petition could not have been presented within one year of the effective date of the decision.”⁵ If the Commission determines a late submission is not justified, it may issue a summary denial of the petition on that ground.⁶

3. Summary of Petition

In support of its petition, OhmConnect cites Governor Newsom’s Emergency Proclamation that was issued on July 31, 2021. OhmConnect specifically cites to the Proclamation’s statement that:

The California Public Utilities Commission is requested to exercise its power to expedite Commission actions, to the maximum extent necessary to meet the purposes and directives of this proclamation, *including by expanding and expediting approval of demand response programs* and storage and clean energy projects, to ensure that California has a safe and reliable electricity supply through October 31, 2021, to reduce strain on the energy infrastructure, and to ensure increased

³ See 2011 Cal. PUC LEXIS 483, 4.

⁴ *Id.*

⁵ Rule 16.4(d) of the Commission’s Rules of Practice and Procedure.

⁶ *Id.*

clean energy capacity by October 31, 2022.⁷ (Emphasis in petition.)

Based on this Emergency Proclamation, OhmConnect argues that the Commission must increase the DR bucket cap from the 8.3% cap that was adopted in D.20-06-031.

OhmConnect raises several issues with the 8.3% cap. OhmConnect states that because the 8.3% cap is a per-LSE cap, if one LSE does not procure DR resources, the unused amount is not available to another LSE; thus, OhmConnect believes that the effective cap is lower than 8.3%. In addition, OhmConnect states that not all DR has an equal opportunity to be counted under the cap because the DR bucket encompasses both investor-owned utility (IOU) and third-party DR provider resources. As LSEs in an IOU's territory are allocated a portion of an IOU DR portfolio's RA value as a credit against the LSE's obligation, that credit is counted first towards the DR cap. OhmConnect argues that IOU DR capacity is thus given preference over third-party DR capacity when filling an LSE's cap. Lastly, OhmConnect states that a third-party DR provider cannot determine which LSEs are potential buyers for DR as many LSEs use intermediaries or brokers.

Several parties support OhmConnect's petition, including EBCE, Leap, Joint CCAs, and Joint Parties. PG&E and SDG&E oppose the petition on multiple grounds.

⁷ Emergency Proclamation at Ordering Paragraph (OP) 13.

4. Discussion

4.1. Rule 16.4(b) Requirements for a Petition for Modification

Under Rule 16.4(b), a petition for modification must concisely state the justification for the requested relief, and any allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

The new or changed fact cited by OhmConnect is the following italicized statement in the Emergency Proclamation:

The California Public Utilities Commission is requested to exercise its power to expedite Commission actions, to the maximum extent necessary to meet the purposes and directives of this proclamation, *including by expanding and expediting approval of demand response programs and storage and clean energy projects*, to ensure that California has a safe and reliable electricity supply through October 31, 2021, to reduce strain on the energy infrastructure, and to ensure increased clean energy capacity by October 31, 2022.⁸ (Emphasis in petition.)

In opposing the petition, PG&E and SDG&E argue that the petition fails to assert a new or changed fact because the above-cited statement was set to expire on October 31, 2021.⁹ PG&E contends that the cited statement “does not contemplate a large expansion of DR on a sustained and forward-looking basis, which is what the Petitioner is requesting.”¹⁰ SDG&E adds that the Proclamation cannot be interpreted to require the Commission “to expand *all* DR programs

⁸ Emergency Proclamation at OP 13.

⁹ SDG&E Response to Petition at 6, PG&E Response to Petition at 6.

¹⁰ PG&E Response to Petition at 6.

without regard for whether doing so would actually serve to increase energy stability and improve safety and reliability of the energy supply.”¹¹

In its reply, OhmConnect states that the concluding sentence in Ordering Paragraph 13 references “to ensure increased clean energy capacity by October 31, 2022.”¹² OhmConnect argues that “[w]hile specific aspects of the proclamation were intended to serve grid reliability during the summer of 2021 the proclamation clearly also directs actions to bring additional resources online through the summer of 2022 and beyond.”¹³

The Commission agrees with PG&E and SDG&E that the portion of the Proclamation cited by OhmConnect in its petition – that the Commission expand and expedite approval of demand response programs – expired on October 31, 2021. Thus, we do not find that the cited section can be interpreted to warrant an expansion of the DR MCC bucket cap, as is requested in the petition. While OhmConnect’s reply cites to a different excerpt of the Proclamation – to ensure increased clean energy capacity – that expires on October 31, 2022, that excerpt does not reference expansion of demand response programs and was not the cited basis for the petition in the first place.

Even without the expiration date, we agree with parties that the Proclamation’s request to expand and expedite approval of demand response programs cannot be reasonably interpreted to warrant broadly lifting the cap on all DR programs to 11.3%, without consideration of the impact of such an increase on grid reliability.

¹¹ SDG&E Response to Petition at 4.

¹² OhmConnect Reply to Responses at 10.

¹³ *Id.*

The Commission concludes that Petitioner has failed to assert new or changed facts under Rule 16.4(b) that would warrant the requested modification to a Commission decision.

4.2. Rule 16.4(d) Requirements for a Petition for Modification

Under Rule 16.4(d), a petition for modification must be filed within one year of the decision and if more than one year has elapsed, “the petition must also explain why the petition could not have been presented within one year of the effective date of the decision.” If the Commission determines the late submission is not justified, it may issue a summary denial of the petition.

In opposing the petition, PG&E and SDG&E state that OhmConnect has failed to explain why the petition could not have been presented within one year and that the concerns cited by Petitioner were known in the year following the issuance of D.20-06-031.¹⁴

The Commission agrees that the petition provides insufficient justification as to why it could not have been presented within one year of the effective date of the decision. In reviewing the declarations in support of the petition (that have been granted confidential treatment), the majority of the noted events occurred during the one-year period following the effective date of D.20-06-031.

The Commission finds that Petitioner fails to meet the requirements of Rule 16.4(b) and Rule 16.4(d) in submitting its petition for modification. Accordingly, the petition is denied.

5. Conclusion

The Order Instituting Rulemaking (OIR) that opened the successor RA proceeding, Rulemaking (R.) 21-10-002 indicated that “R.19-11-009 is

¹⁴ PG&E Response to Petition at 6, SDG&E Response to Petition at 9.

resolved for the purposes of Public Utilities Code Section 1701.5(a) requirements but will remain open to address a Petition for Modification filed on September 9, 2021 by OhmConnect, Inc.”¹⁵ In denying this petition, there are no further issues to be addressed in R.19-11-009, and accordingly, this proceeding is closed by this decision.

6. Comments on Proposed Decision

The proposed decision of ALJ Debbie Chiv 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 by California Efficiency + Demand Management Council (CEDMC) on April 7, 2022. No reply comments were filed.

CEDMC comments that Ordering Paragraph 13 of the Emergency Proclamation could not have expired on October 31, 2021 because the final directive of the paragraph refers to October 31, 2022. The decision does not find that Ordering Paragraph 13 expires on October 31, 2021; rather, the decision states that specific directive cited by OhmConnect as the basis for its petition expires on October 31, 2021.

CEDMC argues that the decision did not consider the allegations of new or changed facts cited by OhmConnect. We disagree. The Commission considered the provision cited by OhmConnect as the basis for the petition and concluded that the cited section cannot be reasonably interpreted to warrant an increase in the DR bucket cap, recently adopted by the Commission in D.20-06-031, particularly without consideration for whether such a change is necessary. The Commission also considered the confidential declarations filed in support of the

¹⁵ OIR for R.21-10-002 at Ordering Paragraph 9.

petition and found that the majority of events occurred during the one-year period following the effective date of D.20-06-031.

Moreover, as CEDMC notes, IOUs were directed to procure incremental, RA-eligible demand response for 2022 and 2023 deliveries in D.21-12-015.¹⁶ The Commission, in that decision, did not subject this incremental DR procurement to the 8.3% cap.¹⁷ Given this procurement directive, other avenues exist for RA-eligible DR procurement not subject to the cap, thereby allowing additional DR growth above and beyond the 8.3% cap established in D.20-06-031.

No substantive changes were made to the proposed decision in response to comments.

7. Assignment of Proceeding

Alice Reynolds is the assigned Commissioner and Debbie Chiv is the assigned ALJ in this proceeding.

Finding of Fact

1. Rule 16.4(d) requires that a petition for modification be filed within one year of the decision proposed to be modified. If more than one year has elapsed, the petition must explain why the petition could not have been presented within one year of the effective date of the decision.

2. Rule 16.4(b) requires that any allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

Conclusions of Law

1. The petition for modification failed to satisfy the requirements of Rule 16.4(b) and 16.4(d).

2. The petition should be denied.

¹⁶ CEDMC Comments on Proposed Decision at 3.

¹⁷ D.21-12-015 at Ordering Paragraph 13.

3. Motions made in this proceeding that are not expressly ruled upon are deemed denied.

4. The proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. OhmConnect, Inc.'s petition for modification of Decision 20-06-031 is denied.

2. Rulemaking 19-11-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.