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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

September 14, 2022

Agenda ID #20948

**TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-424:**

This is the draft Resolution of Administrative Law Judge (ALJ) Debbie Chiv resolving K.21-08-001. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

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

You may serve comments on the draft resolution. Comments shall be served (but not filed) within 20 days of the date that the draft Resolution was mailed and published on the Commission's website [link], as provided in Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments shall be served upon all persons on this proceeding's service list and on ALJ Chiv at [dbb@cpuc.ca.gov](mailto:dbb@cpuc.ca.gov).

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

AES:sgu

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

Resolution ALJ-424  
Administrative Law Judge Division  
[Date]

**RESOLUTION**

RESOLUTION ALJ-424. Resolves the Appeal K.21-08-001 of Citation E-4195-100 by Commercial Energy.

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**SUMMARY**

This resolution resolves Commercial Energy of Montana Inc.'s d/b/a Commercial Energy of California's (Commercial Energy) appeal of Citation No. E-4195-100 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation E-4195-100 cites and fines Commercial Energy for failing to procure certain of its 2021 local Resource Adequacy obligations. This Resolution denies the appeal, and this proceeding is closed.

**BACKGROUND**

On November 2, 2020, Commercial Energy of California (Commercial Energy or Appellant) filed a waiver request for its 2021 year-ahead local Resource Adequacy (RA) requirements in more than one of the disaggregated Pacific Gas and Electric Company (PG&E) Other local areas, and two other local areas. On December 30, 2020, the California Public Utilities Commission's (Commission) Energy Division issued a disposition letter denying the request for a local waiver, explaining that the request failed to demonstrate that Commercial Energy pursued all commercially reasonable efforts in procuring to meet its local RA obligations.

On January 11, 2021, Commercial Energy filed an appeal of Energy Division's denial of the waiver request. On April 15, 2021, the Commission issued Resolution E-5138, which denied Commercial Energy's appeal.

On May 17, 2021, Commercial Energy filed an Application for Rehearing of Resolution E-5138. On September 27, 2021, the Commission issued Decision (D.) 21-09-046, modifying Resolution E-5138 and denying the rehearing application.

On July 1, 2021, the Commission's Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-100 to Commercial Energy. A penalty of \$1,121,787.50 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified. On August 2, 2021, Commercial Energy filed the instant notice of appeal of Citation E-4195-100.

On October 18, 2021, CPED and Commercial Energy filed the First Joint Response to the Administrative Law Judge's (ALJ) request for information. On November 5, 2021, the ALJ issued a ruling setting the schedule and scope of issues for the citation appeal. The scope of issues identified were as follows:

1. Does the citation correctly identify Commercial Energy's deficiencies in meeting local RA obligations?
2. Was the citation penalty for Commercial Energy's local RA deficiencies correctly calculated and lawfully assessed?
  - a. If not, should the five-factor test identified in D.98-12-075, or another standard, be applied in reexamining the assessment of the citation penalty?

Opening briefs were submitted on December 1, 2021, and reply briefs were submitted on December 10, 2021. On February 4, 2022, CPED and Commercial Energy filed a Second Joint Response to the ALJ's request for information. In the joint response, CPED and Commercial Energy stated that all disputed issues identified could be resolved through submission of written testimony and supporting documentation. Commercial Energy stated it did not seek an evidentiary hearing on any of the identified issues.

On February 14, 2022, the ALJ issued a ruling that set forth a procedural schedule for testimony and briefs, and deemed that evidentiary hearings were not necessary. The ruling identified an additional issue as within the scope of the citation appeal, as follows:

- b. Under the "Totality of the Circumstances in Furtherance of the Public Interest" component of the five-factor test, D.98-12-075 provides that "[t]he Commission will review facts which tend to mitigate the degree of wrongdoing as well as

any facts which exacerbate the wrongdoing.”<sup>1</sup> If the five-factor test is applied to this citation appeal, should the Commission consider any facts that exacerbate the wrongdoing? If so, what facts should be considered?

Opening testimony was served by parties on March 4, 2022, with rebuttal testimony served on April 1, 2022. On April 22, 2022, the ALJ granted a motion to admit prepared testimony and exhibits into evidence based on parties’ stipulation. Opening briefs were filed by parties on April 29, 2022, and reply briefs were filed on May 13, 2022.

## **STANDARD OF REVIEW**

### **1. Applicable Rules and Decisions on RA Enforcement and Citation Appeals**

Public Utilities (Pub. Util.) Code § 380 governs California’s Resource Adequacy program. Section 380(e) addresses enforcement of the RA requirements and provides that:

The commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner. Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities.

In D.05-10-042, the Commission adopted a penalty regime for load-serving entities (LSEs) that fail to procure sufficient “system” RA capacity.<sup>2</sup> In D.06-06-064, the Commission adopted a penalty regime for LSEs that fail to procure sufficient “local” RA capacity, and adopted a waiver program for local RA deficiencies.<sup>3</sup>

Resolution E-4017 established a citation program to enforce the Commission’s RA program requirements and included a schedule of penalties. Resolution E-4195, adopted on November 6, 2008, superseded and replaced Resolution E-4017 in its entirety, and updated the schedule of penalties for violations of the RA requirements.

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<sup>1</sup> D.98-12-075 at 76.

<sup>2</sup> D.05-10-042 at Conclusion of Law (COL) 21.

<sup>3</sup> D.06-06-064 at COL 24-28.

Resolution E-4195 has been modified by several decisions, including D.10-06-036, D.11-06-022, D.14-06-050, and D.19-06-026.

Resolution ALJ-377 established a standardized appeal process for citation appeals and applies here. Pursuant to Resolution ALJ-377, Commission staff has the burden to prove by a preponderance of evidence the case supporting issuance of a citation.<sup>4</sup> If that initial burden is met, the burden shifts to the appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is not appropriate.

## **2. Application of the Five-Factor Test to RA Penalties**

At issue in this appeal is whether the five-factor test, established in D.98-12-074, should apply to a review of the citation. In D.98-12-075, the Commission identified five factors to consider in determining the appropriate level of a fine: (1) the severity of the offense, (2) the entity's conduct, (3) the entity's financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest.

CPED argues that the five-factor test should not be applied because Pub. Util. Code § 380(e) requires the Commission to enforce its RA requirements in "a nondiscriminatory manner."<sup>5</sup> CPED contends that when Resolution E-4195 was first issued, commenters to the draft resolution recommended that smaller LSEs be subject to smaller fines and other commenters, argued that such an approach would result in inequitable treatment in violation of § 380(e).<sup>6</sup> The final Resolution adopted a uniform penalty schedule for all LSEs.

CPED also argues that the appropriate means to challenge the reasonableness of RA penalties, or the RA penalty regime in general, is through a rulemaking.<sup>7</sup> CPED states that the Commission has never altered the RA penalty regime in the context of individual citation appeals but has only done so through the RA rulemaking such that all affected parties can comment. Commercial Energy, by contrast, argues that the five-factor test should apply because it was applied in other RA citation appeals, such as Resolution ALJ-394.

In establishing the system RA penalty structure in D.05-10-042, the Commission cited the five factors from D.98-12-075 and stated that: "In determining whether to impose a

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<sup>4</sup> ALJ-377, Appendix A, Paragraph 11.

<sup>5</sup> CPED Opening Brief, December 1, 2021, at 11.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 9.

fine and, if so, at what level, the Commission will consider five factors, namely, the severity of the offense, the entity's conduct, the financial resources of the entity, the role of precedent, and the totality of circumstances in furtherance of the public interest."<sup>8</sup> The Commission, however, did not explicitly state that the five-factor test was used to establish the adopted RA penalty schedule.

Previous Commission resolutions reviewing RA citation appeals have not consistently applied the five-factor test. Two resolutions did not apply the five-factor test in affirming the appellant's RA citation,<sup>9</sup> while three resolutions did apply the five-factor test (although one of those resolutions, Resolution ALJ-382, is pending a rehearing).<sup>10</sup>

In Resolution ALJ-394, the Commission determined that the five-factor test should apply to an RA citation appeal with a specified penalty schedule and stated that "[w]hile it may be true that CPED does not have the discretion to deviate from its delegated citation authority to impose a penalty calculated based on the Commission's penalty schedule, the Commission fully retains its discretion to do so."<sup>11</sup>

First, we agree that, as stated in Resolution ALJ-394, CPED does not have discretion to deviate from its delegated authority to impose a penalty calculated based on the RA penalty schedule.

Next, as to whether the Commission must apply the five-factor test to RA citation appeals, Pub. Util. Code § 380(e) provides that: "[t]he commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner."<sup>12</sup> All LSEs participating in the RA program are subject to the same requirements and same penalty regime. We do not find that merely applying the five-factor test to a citation appeal conflicts with § 380(e).

Further, it is not explicit in D.05-10-042, or other RA decisions, that the five-factor test was considered when adopting the RA penalty structure. Thus, we apply the five-

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<sup>8</sup> D.05-10-042 at 94.

<sup>9</sup> Resolution ALJ-356, *Resolving Citation Appeal K.18-05-018 and affirming the penalty assessed against Pilot Power Group, Inc.*; Resolution ALJ-298, *Affirming the Penalty Assessed Against 3 Phase Renewables*.

<sup>10</sup> Resolution ALJ-394, *Resolves K.20-05-006, the Appeal of Clean Power Alliance of Southern California from Citation No. E-4195-82*; Resolution ALJ-406, *Resolves K.20-04-005, the Appeal of City of San Jose, an administrator of San Jose Clean Energy*; Resolution ALJ-382, *Resolves the Appeal K.19-03-024 of Citation E-4195-0052 by San Jose Clean Energy*.

<sup>11</sup> Resolution ALJ-394 at Footnote 3.

<sup>12</sup> Pub. Util. Code § 380(e).

factor test in reviewing the instant appeal. We note that the appropriate forum for addressing changes to the RA penalty regime, including whether the five-factor test should not be applied in reviewing individual RA citation appeals, is the Commission's RA rulemaking. Doing so through the RA rulemaking allows all affected parties an opportunity to comment.

## DISCUSSION

As a preliminary matter, we note that prior to the instant appeal, Appellant's 2021 local RA deficiencies have undergone a lengthy procedural and appellate process before the Commission. To summarize:

- In November 2020, Commercial Energy applied for a local waiver request from Energy Division for deficiencies in meeting its 2021 local RA requirements.
- In December 2020, Energy Division denied the waiver request because Commercial Energy failed to demonstrate that it pursued all commercially reasonable efforts to procure RA capacity.
- In January 2021, Commercial Energy appealed the denial of the waiver request.
- In April 2021, the Commission issued Resolution E-5138, denying the appeal and affirming the denial of the waiver request.
- In May 2021, Commercial Energy filed an Application for Rehearing of Resolution E-5138.
- In September 2021, the Commission issued D.21-09-046, modifying Resolution E-5138 and denying the rehearing of the Resolution.
- In July 2021, CPED issued Citation E-4195-100 to Commercial Energy for its 2021 local RA deficiencies.
- In August 2021, Commercial Energy filed the instant citation appeal.

The Commission has twice reviewed and twice affirmed Energy Division's denial of Appellant's waiver request for its 2021 local RA deficiencies. Arguments relitigating whether the waiver request was properly denied will not be considered here. Rather, at issue in this instant appeal is whether: (a) the citation correctly identified Appellant's deficiencies and (b) whether the penalty was correctly calculated and lawfully assessed.

**1. The Citation Correctly Identified and Calculated Appellant's 2021 Local RA Deficiencies.**

The parties agree that the citation correctly identified Appellant's 2021 local RA deficiencies and that the citation correctly applied the RA penalty schedule to those deficiencies when calculating the penalty amount.<sup>13</sup> As such, CPED has met its burden to demonstrate that Appellant's local RA procurement was deficient by the amount shown on the citation and that the penalty amount was correctly calculated based on the established penalty schedule.

**2. Application of the Five-Factor Test Warrants Affirming the Citation and the Penalty.**

Once Commission staff has met its burden, Appellant must meet its burden to demonstrate that a violation did not occur and the citation should not issue, or that the amount of the penalty is not appropriate. D.98-12-075 identifies five factors for the Commission to consider in the assessment of fines: (1) the severity of the offense, (2) the entity's conduct, (3) the entity's financial resources, (4) the role of precedent, and (5) the totality of circumstances in the public interest. We address each factor in turn.

**2.1. Severity of the offense.**

In D.98-12-075, the Commission stated that this factor includes several considerations:

Economic harm reflects the amount of expense which was imposed upon the victims, as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. In comparison, violations which caused actual physical harm to people or property are generally considered the most severe, with violations that threatened such harm closely following.<sup>14</sup>

The Commission further observed:

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm

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<sup>13</sup> Commercial Energy Opening Brief, April 29, 2022, at 2; CPED Opening Brief, April 29, 2022, at 4.

<sup>14</sup> D.98-12-075, 1998 Cal. PUC LEXIS 1018, at 54.



may not be to consumers but rather to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities: [citing Pub. Util. Code Section 702].<sup>15</sup>

The Commission noted that “[s]uch compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.”<sup>16</sup>

Based on the evidence, we find that Appellant deliberately failed to procure sufficient local RA capacity, in accordance with the Commission’s RA requirements. Appellant does not argue that it inadvertently failed to procure sufficient capacity.

The RA program was established in the wake of the 2000 Western energy crisis and was designed to ensure that LSEs secure sufficient electrical capacity to maintain grid reliability. Appellant’s deliberate failure to procure sufficient RA capacity threatened the reliability of the electrical grid. Regardless of whether Appellant’s violations resulted in backstop procurement by the California Independent System Operator or resulted in actual harm to grid reliability, the deliberate failure to meet RA requirements is accorded a high level of severity.

In addition, Appellant’s deliberate violations harmed the integrity of the Commission’s regulatory processes. In establishing the RA penalty program in D.05-10-042, the Commission underscored the importance of holding LSEs that participate in the RA program responsible for non-compliance: “A regulatory program that imposes significant procurement obligations upon LSEs cannot be expected to succeed unless those LSEs have reason to believe there are consequences for noncompliance that outweigh the costs of compliance.”<sup>17</sup> Disregarding a Commission directive, regardless of the effects on the public, is accorded a high level of severity.<sup>18</sup>

### **2.1.1. Appellant Failed to Pursue Commercially Reasonable Efforts**

For local RA requirements, unlike for system RA requirements, a waiver process was established to consider whether an LSE should receive a waiver of any local

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<sup>15</sup> *Id.* at 55.

<sup>16</sup> *Id.*

<sup>17</sup> D.05-10-042 at 93.

<sup>18</sup> *See* D.98-12-075 at 56.

deficiencies, if certain requirements were met. Those requirements generally include a demonstration that an LSE: (1) reasonably and in good faith solicited bids, and (2) actively pursued all commercially reasonable efforts to acquire capacity.<sup>19</sup> As discussed, the Commission has twice upheld Energy Division's denial of Appellant's local waiver.

Appellant nevertheless argues that it made a good faith effort to meet its 2021 local RA obligations by conducting a Request for Offers (RFO) solicitation and seeking bids from certain parties through brokers.<sup>20</sup> Based on review of the evidence, we affirm that Appellant did not pursue all commercially reasonable efforts to acquire local RA capacity.

For background, there are several ways in which an LSE can seek to procure capacity to meet its RA obligations, whether local, system, or flexible RA capacity. LSEs typically procure RA capacity using a combination of: (1) issuance of a RFO solicitation to other market participants, (2) bidding into other market participants' RFO solicitations, and (3) use of brokers or traders to seek capacity.

Significantly, Appellant did not participate in any RFO solicitations offered by other market participants to procure for its 2021 local requirements. However, PG&E held at

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<sup>19</sup> In D.06-06-064, the Commission permitted an LSE to request a waiver for local RA deficiencies by providing the following:

1. a demonstration that the LSE reasonably and in good faith solicited bids for its RAR capacity needs along with accompanying information about the terms and conditions of the Request for Offer or other form of solicitation, and
2. a demonstration that despite having actively pursued all commercially reasonable efforts to acquire the resources needed to meet the LSE's local procurement obligation, it either
  - a. received no bids, or
  - b. received no bids for an unbundled RA capacity contract of under \$40 per Kilowatt (kW) -year or for a bundled capacity and energy product of under \$73 per kW-year, or
  - c. received bids below these thresholds but such bids included what the LSE believes are unreasonable terms and/or conditions, in which case the waiver request must demonstrate why such terms and/or conditions are unreasonable.

The Commission further stated that "[a]n LSE's waiver request that meets these requirements is a necessary but not a sufficient condition for the grant of such waiver. The Commission will also consider other information brought to its attention regarding the reasonableness of the waiver request." D.06-06-064 at 73.

<sup>20</sup> Commercial Energy Opening Brief, April 29, 2022, at 3-4.

least five solicitations to sell 2021 local RA capacity.<sup>21</sup> Appellant offers conflicting accounts as to why it did not bid in any of PG&E's solicitations. Appellant first claims that "CE did not receive notice from PG&E of offers to sell Local RA to LSEs through the end of 2021."<sup>22</sup> This is confounding because Appellant submits PG&E's Advice Letter 6227-E into evidence, which provides PG&E's solicitations to sell 2021 local RA and PG&E's notices to LSEs to invite participation.<sup>23</sup> Appellant does not explain how it did not receive notice.

Appellant next argues that it did not bid in PG&E's solicitations because it believed PG&E was only seeking to buy local RA, not sell it: "...[W]hile the table labels each solicitation as one in which PG&E was looking to 'buy and sell' Local RA, PG&E provides no evidence that it actually sold any Local RA in any of these solicitations."<sup>24</sup> As support for its claim, Appellant offers a press release from California Community Choice Association (CalCCA) and PG&E's Advice Letter 6227-E, in which Appellant claims that "[t]he majority of the redacted email communications... appear to discuss PG&E offers to buy, not sell, Local RA."<sup>25</sup>

Appellant's argument is baseless. Appellant, not PG&E, bears the burden to demonstrate that a citation or penalty is not appropriate. Appellant provides no evidence that PG&E did not intend to sell 2021 local RA in its solicitations.<sup>26</sup> In fact, CalCCA's June 2019 press release states that "PG&E has stated that it does not intend to sell RA for 2020 and beyond *until this September...*"<sup>27</sup> (emphasis added). PG&E's solicitations to sell 2021 local RA occurred after September 2019. Further, it is noteworthy, and not well-taken, that Appellant intentionally omits the September 2019 end date from multiple references to CalCCA's press release.

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<sup>21</sup> See Exhibit CE-002, Commercial Energy's Response to CPED Data Request 1 (Public Version), Attachment 22, at 4.

<sup>22</sup> Exhibit CE-003, Commercial Energy's Response to CPED Data Request 2 (Public Version), at 9 (Response to Data Request 2.5).

<sup>23</sup> Exhibit CE-002, Attachment 22, at 4, Appendix A.

<sup>24</sup> Exhibit CE-003 at 9 (Response to Data Request 2.5).

<sup>25</sup> *Id.*

<sup>26</sup> We note that Appellant argues that it responded to PG&E's solicitation by offering to swap 1 MW of local RA in one area for another. (See Exhibit CE-001, Direct Testimony of Ron Perry (Public Version), at 26.) The swap request, however, was made on September 1, 2021, nearly one year after Appellant failed to meet its 2021 local RA obligations.

<sup>27</sup> Exhibit CE-002, Attachment 23.

Appellant asserts that it conducted an RFO for local RA on March 9, 2020 through its contractor, Fractal Energy Consultants (Fractal), but that prior to the March 2020 solicitation, “in January, March, and April of 2020, Commercial Energy conducted its own solicitations....”<sup>28</sup> Inexplicably, however, Appellant’s attached emails are to solicitations that occurred in January, March, and April of 2021, after Appellant failed to meet its year-ahead RA requirements and after it had been denied the local waiver.<sup>29</sup> Appellant provides no evidence that it conducted any solicitations in 2020, other than its March 2020 RFO conducted by Fractal.

In addition, Appellant states that the bids received from the RFO did not result in any contracts for local RA.<sup>30</sup> Appellant’s RFO, however, sought local RA products for a 3-year term or minimum 10-year term.<sup>31</sup> It is unclear why the RFO was restricted to these term lengths, as seeking RA products with a shorter-term length may have increased the number of bids received.

For all of these reasons, we affirm that Appellant failed to pursue all commercially reasonable efforts to acquire local RA capacity.

### **2.1.2. Procurement Efforts After the Compliance Deadline**

Appellant further argues that it made a good faith effort to meet its local RA obligations by continuing to procure local RA between November 2020 and October 2021, after the year-ahead compliance deadline.<sup>32</sup> Efforts to procure local RA after the year-ahead deadline do not inform our review of this citation appeal for reasons discussed below.

At issue in this appeal is Appellant’s year-ahead local RA deficiencies, not month-ahead deficiencies. For background, LSEs in the RA program have a separate year-ahead and month-ahead requirement. For year-ahead, LSEs must show they met the year-ahead obligations by October 31 of each year. If an LSE fails to meet this obligation for local RA, the LSE may request a local waiver. If the waiver is denied, Energy Division will refer the LSE to CPED for a citation. By contrast, for month-ahead requirements, LSEs must show they met their obligations for each month. Similar to year-ahead, if an LSE fails to meet its month-ahead local obligation, the LSE may seek a local waiver (even if

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<sup>28</sup> Exhibit CE-001 at 20; *see also* Exhibit CE-003 at 5 (Response to Data Request 2.2).

<sup>29</sup> *See* Exhibit CE-002C, Attachment 12, Attachment 13, and Attachment 14.

<sup>30</sup> Exhibit CE-001, at 23.

<sup>31</sup> Exhibit CE-002C, Commercial Energy’s Response to CPED Data Request 1 (Confidential Version), Attachment 1, at 2.

<sup>32</sup> Exhibit CE-001 at 29; Exhibit CE-003 at 5 (Response 2.2.7).

its year-ahead waiver was denied). Thus, if a year-ahead waiver is denied but a month-ahead waiver is granted, the LSE is still subject to a year-ahead penalty but not subject to month-ahead penalties.

Here, Appellant did not meet its year-ahead local requirements by October 31 and its waiver request was thereafter denied. Any subsequent procurement after Energy Division issued its deficiency notice does not mitigate the deficiency or the associated penalty amount. Further, an LSE is incentivized to demonstrate efforts to procure RA after the year-ahead deadline, if it intends to request a month-ahead local waiver, per the requirements of D.06-06-064. Indeed, after Appellant failed to meet its year-ahead requirements, it requested four month-ahead local waivers for its 2021 month-ahead deficiencies.<sup>33</sup> Thus, Appellant's efforts to procure after the year-ahead deadline do not inform our review of this citation appeal.

Lastly, Appellant argues that it spent a significant amount over the citation penalty amount to procure system RA in 2021 and 2022.<sup>34</sup> We first note that Appellant's expenditures conflate several irrelevant figures, including the amount spent on system RA capacity, the amount spent on local RA capacity after the year-ahead deadline, and the amount spent on local RA capacity for 2022 RA obligations. These figures are not at issue in this appeal. By removing these figures, it is apparent that Appellant spent a much smaller portion on 2021 local RA prior to the year-ahead deadline.<sup>35</sup> Even if Appellant could show it spent a significant amount to meet its 2021 local RA obligations, it is unclear what Appellant seeks to prove. Appellant did not pursue all commercially reasonable efforts to meet its 2021 local RA obligations and thus, the amount it spent on local RA obligations is not instructive.

Lastly, we find that several of the representations made by Appellant in its filings for this citation appeal are misleading and concerning, including omitting relevant portions of a quoted sentence and combining irrelevant expenditure amounts. We caution Appellant that its representations before the Commission may implicate Rule 1.1 of the Commission's Rules of Practice and Procedure.<sup>36</sup>

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<sup>33</sup> Exhibit CE-004, Rebuttal Testimony of Ron Perry, at 5.

<sup>34</sup> Exhibit CE-001 at 30. (*See also* Exhibit CE-003C at 6 (Response 2.2.10), Attachment 27, Attachment 31.)

<sup>35</sup> *See* Exhibit CE-003C, Attachment 28.

<sup>36</sup> *See* Rule 1.1 of the Commission's Rules of Practice and Procedure:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission,

## **2.2. The Entity's Conduct.**

As stated in D.98-12-075, this factor “recognizes the important role of the public utility’s conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation.”<sup>37</sup> In considering a utility’s actions to prevent a violation, the Commission states that “[p]rudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives” and that the Commission “will consider the utility’s past record of compliance with Commission directives.”<sup>38</sup> In considering a utility’s actions to detect a violation, the Commission states that “[d]eliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor.”<sup>39</sup>

As discussed, Appellant did not pursue all commercially reasonable efforts to ensure compliance with its RA obligations. Thus, Appellant did not take all reasonable steps to ensure compliance with Commission directives. As further discussed, Appellant’s efforts to procure local RA after the year-ahead deadline do not inform our review of the year-ahead RA violations, as those efforts are related to meeting Appellant’s month-ahead obligations and/or obtaining a month-ahead waiver. Here, Appellant’s failure to meet its regulatory requirements was deliberate, as opposed to inadvertent, and is thus an aggravating factor.

This factor necessitates that the Commission consider Appellant’s past record of compliance with Commission directives.<sup>40</sup> We address Appellant’s past record of compliance under Section 2.5 below.

## **2.3. Financial Resources.**

Under this factor, D.98-12-075 states that “[e]ffective deterrence also requires that the Commission recognize the financial resources of the public utility in setting a fine which balances the need for deterrence with the constitutional limitations on excessive

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members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

<sup>37</sup> D.98-12-075 at 56.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 57.

<sup>40</sup> *See id.* at 57-58.

finer.”<sup>41</sup> The Commission “intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.”<sup>42</sup>

Appellant testifies that it “has the financial resources to absorb prices for Local RA well in excess of the penalty rate, in addition to the penalty itself.”<sup>43</sup> Appellant argues, however, that the penalty will not deter future procurement deficiencies because the local RA market is over-subscribed in that multiple LSEs have sought waivers in recent years.<sup>44</sup>

Here, Appellant admits it has the financial resources to pay the penalty but states that the penalty amount is not an effective deterrent due to market conditions. However, Appellant did not pursue all commercially reasonable efforts to procure local RA capacity. Appellant appears to make the case that the RA penalties are not sufficiently high to effectively deter non-compliance. As the Commission stated in establishing the RA penalty framework, “[a] regulatory program that imposes significant procurement obligations upon LSEs cannot be expected to succeed unless those LSEs have reason to believe there are consequences for noncompliance that outweigh the costs of compliance.”<sup>45</sup> Appellant’s argument that the penalty is not an effective deterrence when it did not pursue all commercially reasonable efforts to obtain RA capacity, if anything, favors increasing the fine amounts.

#### **2.4. Role of precedent.**

D.98-12-075 provides that: “In future decisions which impose sanctions, the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.”<sup>46</sup>

Appellant and CPED have pointed out that there is limited precedent in Commission resolutions or decisions addressing RA citation appeals. We note, however, that in several Commission resolutions addressing RA citation appeals, the Commission:

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<sup>41</sup> *Id.* at 59.

<sup>42</sup> *Id.*

<sup>43</sup> Exhibit CE-001 at 35.

<sup>44</sup> Commercial Energy Opening Brief, April 29, 2022, at 5.

<sup>45</sup> D.05-10-042 at 93.

<sup>46</sup> D.98-12-075 at 60.

(1) determined that the appellant deliberately failed to procure sufficient RA capacity to meet its obligations, and (2) upheld the citation and penalty based on the penalty schedule tied to the size of the deficiency.<sup>47</sup> The parties have provided no Commission precedent that adjusted an RA citation penalty downward or upward, or otherwise deviated from the RA penalty schedule.

Based on the limited Commission precedent reviewing RA citation appeals, this factor favors affirming the citation penalty based on the penalty schedule tied to the size of the deficiency.

### **2.5. Totality of the Circumstances.**

D.98-12-075 provides that:

Setting a fine at a level which effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.<sup>48</sup>

Appellant argues that its procurement shortfall was “due to market power beyond its control – which the Commission has long recognized as a valid reason for local RA shortfalls.”<sup>49</sup> To support its claim, Appellant testifies that bidders stated that the RA amount sought by Appellant was too small, or bidders did not have RA capacity to sell.<sup>50</sup> Appellant also argues that the number of other LSEs that sought local waivers for 2021 obligations shows the limitations and shortage of resources in the local RA market.<sup>51</sup>

Appellant’s arguments are without merit. The Commission created the local waiver process for the purpose of addressing market power concerns in local areas. In D.06-06-064, the Commission determined that “a waiver process is necessary as a

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<sup>47</sup> (See Resolution ALJ-356, Resolution ALJ-298, Resolution ALJ-406, Resolution ALJ-382.)

<sup>48</sup> D.98-12-075 at 59.

<sup>49</sup> Commercial Energy Opening Brief, April 29, 2022, at 8.

<sup>50</sup> *Id.* at 9 (citing Exhibit CE-001C at 23).

<sup>51</sup> Commercial Energy Opening Brief, April 29, 2022, at 5.



market power mitigation measure and should therefore be adopted as a component of the Local RAR program.”<sup>52</sup> While an LSE may seek a waiver of local RA deficiencies, the LSE must meet the given requirements for approval.<sup>53</sup> The fact that other LSEs applied for a local waiver does not inform our review of Appellant’s citation, nor does it substantiate claims of market power. As exemplified in the instant appeal, Appellant applied for a local waiver but was denied the waiver for failing to meet the threshold requirements.

Outside of the local RA waiver process, the Commission has been clear that market conditions do not excuse non-compliance with the RA requirements. In Resolution ALJ-298, which affirmed 3 Phase Renewables’ citation for system RA deficiencies, the Commission held that “[f]ines under Resolution E-4195 need not take market conditions into account.”<sup>54</sup> Likewise, in Resolution ALJ-406, which affirmed San Jose Clean Energy’s citation for system RA deficiencies, the Commission stated:

[N]one of these [cited] decisions endorse the principle that commercial impracticability due to market conditions alone excuses compliance with RA requirements. Rather, the decision uniformly emphasize that, while the Commission will act to protect ratepayers from the failure of the market due to market power, tight market conditions alone are not reason to excuse compliance with RA compliance.<sup>55</sup>

Similarly, in Resolution ALJ-382, the Commission stated that “LSEs are not excused from providing service due to market conditions.”<sup>56</sup> In rejecting the appellant’s claim that unfavorable market conditions made it unreasonable to meet RA obligations, the Commission stated that “the cost of operating as an LSE as required by law is not a mitigating factor for failure to meet those [RA] requirements. Pub. Util. Code § 380(c) and the RA program require that, in order to operate as an LSE, the entity must meet its procurement obligations.”<sup>57</sup>

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<sup>52</sup> D.06-06-064 at COL 27.

<sup>53</sup> See *supra* Footnote 19.

<sup>54</sup> Resolution ALJ-298 at COL 3.

<sup>55</sup> Resolution ALJ-406 at 3.

<sup>56</sup> Resolution ALJ-382 at 5.

<sup>57</sup> *Id.*

Based on the totality of the circumstances, including the previous four factors discussed, we are not persuaded that the citation should be excused or that the penalty should be reduced.

### **2.5.1. Past Acts of Non-Compliance**

Finally, we consider Appellant's past acts of non-compliance. Under the "totality of circumstances," the Commission is to review facts that tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. Under the second factor of "the entity's conduct," the Commission is similarly to consider a utility's past record of compliance with Commission directives.<sup>58</sup>

CPED contends that Appellant is a repeat offender with a demonstrated pattern of non-compliance with the Commission's RA rules and that these repeated violations are serious aggravating factors. CPED states that it issued a warning letter to Appellant in November 2020 that listed 19 RA citations for year-ahead and month-ahead RA deficiencies from January 2017 – October 2020 totaling \$885,350.<sup>59</sup> The warning letter further describes non-compliance with the Commission's Integrated Resource Plan (IRP) and Renewable Portfolio Standard (RPS) rules.<sup>60</sup>

We are concerned with Appellant's repeated failures to comply with the RA requirements over the course of four years, as well as failures to comply with the IRP and RPS requirements. D.98-12-075 permits the Commission to consider facts that exacerbate the wrongdoing, as well as the utility's past record of compliance with Commission directives.<sup>61</sup> However, based on Appellant's numerous violations and that the violations span multiple Commission proceedings, we conclude that the instant appeal is not the proper forum to consider Appellant's past acts of non-compliance. As stated in Resolution E-4195, a more appropriate forum for review of these violations could occur in an investigation or other enforcement proceeding.<sup>62</sup> As such, Appellant's past acts of non-compliance are not considered aggravating factors at this time.

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<sup>58</sup> (See D.98-12-075 at 57-58.)

<sup>59</sup> Exhibit CPED-001, Prepared Direct Testimony of Nate Christo, at 3 (citing Attachment 1 Warning Letter).

<sup>60</sup> *Id.*

<sup>61</sup> D.98-12-075 at 57-59.

<sup>62</sup> See Resolution E-4195: "Nothing in this Resolution diminishes, alters, or reduces the Commission's existing authority to open an investigation and take formal enforcement action for a LSEs failure to procure all or part of its Resource Adequacy requirement or otherwise fail to comply with the Resource Adequacy program."

## CONCLUSION

As the Commission stated in D.06-06-064, “we do not intend to pursue any action, or tolerate inaction, that condones or promotes continued reliance on backstop procurement when capacity can be purchased by LSEs.”<sup>63</sup> Based on the five-factor test in D.98-12-075, we find that Appellant failed to meet its burden to rebut CPED’s demonstration that the violations occurred and failed to meet its burden of persuasion that the citation penalty should be reduced or excused. The citation appeal is hereby denied.

## COMMENTS

Pub. Util. Code § 311(g)(1) requires that a draft resolution be served on all parties and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of today’s resolution was distributed for comment to the service list.

## FINDINGS OF FACT

1. On July 1, 2021, CPED issued Citation E-4195-100 to Commercial Energy. A penalty of \$1,121,787.50 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified.
2. On August 2, 2021, Commercial Energy filed a Notice of Appeal of Citation E-4195-100.
3. Citation E-4195-100 correctly identifies Commercial Energy’s deficiencies in procurement of its 2021 year-ahead local RA obligations.
4. Citation E-4195-100 correctly calculates the penalties pursuant to the penalty schedule adopted in Resolution E-4195, as modified.

## CONCLUSIONS OF LAW

1. Commercial Energy has not met its burden of rebutting CPED’s demonstration that the violation occurred and has not met its burden of persuasion that the citation penalty should be reduced or excused.
2. Based on review of the evidence and testimony, the citation and penalty amount were appropriately issued.
3. The citation should be affirmed.

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<sup>63</sup> D.06-06-064 at 66.

Therefore, **IT IS ORDERED** that:

1. Citation E-4195-100 is affirmed.
2. Commercial Energy shall pay a fine of \$1,121,787.50 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102 within 30 days of the effective date of this resolution.
3. K.21-08-001 is closed.

This resolution is effective today.

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

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Rachel Peterson  
Executive Director

ALJ/DBB/sgu

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

RESOLUTION ALJ-424. Resolves the Appeal K.21-08-001 of Citation E-4195-100 by Commercial Energy.

**INFORMATION REGARDING SERVICE**

I have electronically served all persons on the attached official service list who have provided an e-mail address for K.21-08-001.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the filed document to be served by U.S. mail on all parties listed in the "Party" category of the official service list for whom no e-mail address is provided.

Dated September 14, 2022, at San Francisco, California.

\_\_\_\_\_  
/s/ SHANE GUTTO

Shane Gutto

**N O T I C E**

Persons should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

Resolution ALJ-424 ALJ/DBB/sgu

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\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 14-SEP-2022 by: KB3  
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