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Date of Issuance
December 19, 2022

Decision 22-12-058 December 15, 2022

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

ORDER DENYING REHEARING OF DECISION 21-06-033

In this Order, we dispose of the application for rehearing of Decision (D.) 21-06-033 (Decision) filed jointly by the Alliance for Retail Energy Markets, California Large Energy Consumers Association, Direct Access Customer Coalition, Energy Producers and Users Coalition, Shell Energy North America (US), L.P., and Western Power Trading Forum (collectively, rehearing applicants). We have determined that good cause has not been demonstrated to grant rehearing of D.21-06-033.

I. BACKGROUND

This proceeding was initiated in 2019 to implement Senate Bill (SB) 237,[1] which concerns direct transactions between electricity suppliers. Direct transactions are also known as Direct Access (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 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.

[1] Stats. 2018, Ch. 600, amending Public Utilities Code section 365.1. All further statutory references are to the Public Utilities Code, unless otherwise specified.

In Phase 1 of the proceeding, we addressed the SB 237 mandate for the Commission to increase the maximum allowable kilowatt-hour (kWh) annual limit for DA 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, we issued D.19-05-043 resolving the Phase 1 issues.

SB 237 also added section 365.1 of the Public Utilities Code, which requires the Commission to provide recommendations and findings to the Legislature. Section 365.1(f) states: "The commission shall provide recommendations to the Legislature on implementing a further direct transactions reopening schedule, including, but not limited to, the phase-in period over which the further direct transactions shall occur for all remaining nonresidential customer accounts in each electrical corporation's service territory." (Pub. Util. Code, § 365.1(f)(1).)

In developing the recommendations, the Commission is required to consider the following Required Findings:

(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.

(Pub. Util. Code, § 365.1(f)(2).)

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

In 2019, Commission Energy Division staff began preparing the recommendations and the assessment of the statutory provisions for our consideration. This process began 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 data, and responding to comments filed by the parties.

In August 2020 and early September 2020, the Western United States experienced an unprecedented heatwave and the California grid experienced several electricity shortages and rotating outages. The first heat wave continued from 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 the California Independent System Operator (CAISO) did not need to call for additional rotating outages.[2] The CAISO footprint experienced another period of high temperatures and demand over the 2020 Labor Day weekend. The CAISO was again able to avoid rolling outages. The Final RCA credits "considerable conservation from the public" for decrease in expected demand.[3]

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[2] 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.

[3] Final RCA at 36.

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 Final RCA set forth actions to be completed in set time periods so that the State would be better prepared for extreme climate change-induced weather events and other operational challenges facing our evolving power system.

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 DA 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 the ESPs of compliance with Integrated Resource Planning (IRP), Renewables Portfolio Standard (RPS) and RA procurement obligations.

The Staff Report issued in September 2020 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.

Fifteen sets of opening comments were filed on October 16, 2020 and nine sets of reply comments were filed on October 26, 2020. The comments expressed the positions of Direct Access providers, as well as the electric utilities and consumer groups. In their comments, parties expressed concerns with specific elements of the assessment in the Staff Report, as well as its conclusions and recommendations.

Commission staff responded to these comments and updated the data and analysis in the Final Staff Report. The Introduction[4] to the Final Staff Report summarized its assessment as follows:

- 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.
- 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.[5]

[4] Staff Report at 4.

[5] Final Staff Report at 4.

On June 29, 2021, we issued D.21-06-033. In the Decision, we concluded that expansion of DA to all non-residential customers presented an unacceptable risk to the state's long-term reliability goals. Further, based on the current procurement practices of DA providers, the Commission determined that it was unable to ensure that expansion of DA would not result in increased greenhouse gas emissions, criteria air pollutants, and toxic contaminants when compared to maintaining the cap on DA. For these reasons, we found that we could not recommend further expanding DA.

On July 29, 2021, the Alliance for Retail Energy Markets, California Large Energy Consumers Association, Direct Access Customer Coalition, Energy Producers and Users Coalition, Shell Energy North America (US), L.P. and Western Power Trading Forum (collectively, rehearing applicants) filed a joint application for rehearing of D.21-06-033. Rehearing applicants challenge the Decision on the following grounds: (1) the Commission failed to proceed in the manner required by law and abused its discretion when it disregarded the express duties imposed on it by SB 237; (2) the Decision discriminates against out-of-state ESPs in violation of the dormant Commerce Clause of the United States Constitution; (3) the Decision ignores substantial evidence in the record, further demonstrating the discriminatory nature of the Decision; and (4) the Decision discriminates between different types of load-serving entities.

A response to the rehearing application was filed on August 13, 2021 by California Community Choice Association.

We have reviewed the allegations of error contained in the application for rehearing of D.21-06-033 and have determined that good cause has not been demonstrated to grant rehearing.

II. DISCUSSION

A. The Commission complied with its duties under SB 237.

Rehearing applicants first allege that the Decision does not comply with the duties imposed on the Commission by the Legislature in SB 237. (Rehearing Application (Reh. App.), pp. 4-6.) Rehearing applicants also claim that the use of "shall" in SB 237 requires the Commission to offer recommendations to the Legislature on reopening

Direct Access. (Reh. App., pp. 7-9.) Finally, rehearing applicants allege that legislative history confirms that the Legislature intended for the Commission to issue a report on how a direct transactions reopening schedule should be implemented. (Reh. App., pp. 12-13.) These allegations of error are without merit, as discussed below.

Section 365.1(e)-(f) directs the Commission to address reopening DA in 2 phases. First, the Commission is directed by section 365.1(e) to issue an order by June 1, 2019 implementing a limited reopening of DA. That order was issued in Phase 1 of the proceeding as D.19-05-043. Notably, section 365.1(e) says that the Commission "shall" issue an order by June 1, 2019 which implements a limited reopening of DA. We reasonably interpreted section 365.1(e) as mandatory and issued the order required by that section. (Pub. Util. Code, § 365.1(e).)

The second phase of DA reopening, at issue in the instant rehearing application, directs the Commission to make findings as to specific issues, and recommendations based on the findings, with respect to a potential further reopening of DA. The required findings, to be considered when developing the recommendations, as stated above, include the following: (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; and (D) The recommendations do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers. (Pub. Util. Code, § 365.1(f)(2).)

Section 365.1(f)(1)-(2) states that the Commission "shall" make findings and recommendations as to further reopening of DA. While section 365.1(f)(2) directs the Commission to make findings on the specific issues listed above, and recommendations based on the findings, it does not direct the substance of those recommendations and findings. That issue was left to the expertise and discretion of the Commission. The Legislature could have mandated in section 365.1(f), as it did in section 365.1(e), that we issue an order in Phase 2 that implemented a further reopening of DA, following the limited reopening of DA addressed in Phase 1. The Legislature did not do so. Instead, section 365.1(f) invites the Commission's input, stating that the Commission "shall" make findings and recommendations as to further reopening of DA, but does not direct the Commission to order such further reopening. We subsequently determined in the Decision that our findings did not support the further reopening of DA. (D.21-06-033, pp. 19-22.)

In the Decision, we specifically addressed each of the required findings outlined in section 365.1(f)(2). (See D.21-06-033, pp. 19-22.) As to electric system reliability, we determined that a further expansion of DA was not consistent with ensuring electric system reliability. (D.21-06-033, pp. 19-20.) Regarding the issue of GHG emissions, we determined that we could not find that further reopening of DA was consistent with California's GHG reduction goals. (D.21-06-033, pp. 20-21.) As to the issue of air pollutants and contaminants, we could not determine whether further of reopening DA would, or would not, result in an increase of pollutants and contaminants, but we found that we could not guarantee that reopening DA would not increase such pollutants and contaminants. (D.21-06-033, p. 21.) Finally, as to the issue of undue shifting of costs, we found that it could not make a final determination on this "complex" and "evolving" issue. (D.21-06-033, p. 22.) However, we did note that DA 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." (D.21-06-033, p. 22.)

In concluding that the findings do not support a recommendation to further reopen DA under the circumstances presented, we stated that "[t]he record demonstrates a wide range of complexities and potential risks that could result from reopening, especially in terms of electric reliability." (D.21-06-033, p. 22.) We further determined that, "[d]ue 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." (D.21-06-033, p. 22.) The Decision concluded:

> 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.

(D.21-06-033, p. 22.) The Decision's Findings of Fact summarize the factual foundation for the Commission's determination that it cannot recommend a further reopening of DA under the criteria established in section 365.1(f). (See D.21-06-033, pp. 27-29 [Findings of Fact 1-14; Conclusions of Law 1-4].)

Rehearing applicants' final allegation of error regarding the Commission's interpretation and implementation of section 365.1(f) is that the Commission misunderstands the legislative history underlying section 365.1(e)-(f). (Reh. App., pp. 12-13.) This allegation of error is without merit. The original bill which became SB 237 was initially drafted to require the Commission to entirely eliminate the cap on DA over 3 years, beginning July 1, 2019.[6] After comments on the bill analysis reflected concerns about a full reopening of DA, the bill was amended to require the limited reopening which was accomplished in Phase 1, and to require our input in the form of findings and recommendations as to any further reopening in Phase 2.[7] Importantly, during the Third Reading of SB 237 in August 2018, the Comment portion of the bill notes that "[t]he expansion of the DA program called for in this bill may be premature" given the Commission's warning that it observes "similar circumstances in the electricity

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[6] See Text of Senate Bill No. 237, Amended in Assembly June 13, 2018, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB237; see also Assembly Committee on Utilities and Energy, June 26, 2018, at 1, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237 (summarizing Senate Bill No. 237 as requiring the Commission to eliminate the DA cap over three years, commencing on July 1, 2019).

[7] Senate Third Reading, SB 237 (Hertzberg), as amended, at 1 (emphasis added), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237

market as they observed before the energy crisis of 2001."[8] The legislative evolution of SB 237 demonstrates that the Legislature deliberately pulled back on requiring a full reopening of DA, instead requiring the Commission to submit findings and recommendations as to the advisability of a further DA reopening. It should also be noted that, after receiving the Commission's findings and recommendations in June 2021 in D.21-06-033, almost a year and a half ago, the Legislature could have decided to move forward with a further reopening of DA and could have drafted legislation to that effect. It has not done so.

In conclusion, rehearing applicants have failed to establish that the Commission did not comply with its duties pursuant to SB 237. As such, rehearing should be denied as to this allegation of error.

B. The Decision does not discriminate against out-of-state ESPs in violation of the dormant Commerce Clause.

Rehearing applicants next allege that the Decision discriminates against out-of-state ESPs in violation of the dormant Commerce Clause of the United States Constitution. (Reh. App., pp. 13-16.) This allegation is without merit.

Rehearing applicants' allegations regarding the dormant Commerce Clause are vague and conclusory and primarily involve a recitation of the basic concepts of dormant Commerce Clause jurisprudence. The most specific allegations contained in the rehearing application are that "[t]he practical effect of the Decision is to favor California-based IOUs and CCAs, to the detriment of the state's ESPs, the overwhelming majority of which are out-of-state corporations," and that "a nondiscriminatory alternative does exist." (Reh. App., pp. 15-16.) The rehearing application contains no legal or factual analysis to justify these two conclusions. Moreover, the rehearing application does not address the fact that the Decision applies equally to both in-state and out-of-state ESPs, a significant fact which weighs against rehearing applicants' allegation of discriminatory treatment.

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[8] Id.

In their comments on the PD, rehearing applicants raised the issue of an alleged violation of the dormant Commerce Clause. (Direct Access Parties Opening Comments on PD, June 3, 2021, at pp. 7-9.) The Decision discusses this allegation of error in detail at pages 25-27. Specifically, the Decision notes that, in order to state a violation of the dormant Commerce Clause, at least one of the following three analytical frameworks must be implicated:

> 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.

(D.21-06-033, at p. 26, citing D.07-01-039 at pp. 205-06 (quoting *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142).)

The Decision finds that, in their comments on the PD, the Direct Access parties failed to identify one of these analytical frameworks that is implicated by the present circumstances involving Direct Access. (D.21-06-033, pp. 26-27.) As such, the Decision determined that the Direct Access parties did not substantiate their claim that the PD violated the dormant Commerce Clause. (D.21-06-033, pp. 26-27.)

Article I, Section 8, Clause 3 of the United States Constitution provides Congress with the power to regulate commerce among the States. (U.S. Constitution, Art. 1, §8, Clause 3.) Courts have inferred a restriction on state power known as the "dormant Commerce Clause," which limits the States' authority to enact or enforce laws that discriminate against or unduly burden interstate commerce. (See, e.g., *Granholm v. Heald* (2005) 544 U.S. 460, 492-93.) A state law may be struck down under the dormant Commerce Clause if it requires different treatment of in-state and out-of-state competing economic interests in a manner that burdens out-of-state interests. (*Id.*)

As a general matter, laws that treat in-state and out-of-state businesses equally do not violate the dormant Commerce Clause. For example, in *Minnesota v. Clover Leaf Creamery Co.,* the Supreme Court upheld a state law prohibiting the retail sale of milk products in plastic, nonreturnable containers, but allowing sales in other nonreturnable, nonrefillable containers, such as paper cartons. (*Minnesota v. Clover Leaf Creamery Co.*, *et al.* (1981) 449 U.S. 456, 470-74.) The Court found no discrimination against interstate commerce, because plastic containers were prohibited for both in-state and out-of-state businesses, thus treating both in-state and out-of-state businesses equally. (*Id.*) A similar outcome was reached in *North American Meat Institute v. Becerra,* in which the district court upheld a California law banning the sale of veal or pork in California where the animal was confined in a "cruel manner." (*North American Meat Institute v. Becerra* (C.D. Cal. 2019) 420 F.Supp.3d 1014, 1025-27.) The court rejected the argument that the law discriminated against interstate commerce in violation of the dormant Commerce Clause by excluding them from California's market. In so ruling, the court found that the law applied equally to California meat producers and out-of-state meat producers, thus burdening all meat producers equally. As such, there was no discriminatory burden placed exclusively on out-of-state meat producers. (*Id.*)

Rehearing applicants nevertheless argue that the underlying Decision violates the dormant Commerce Clause because some out-of-state businesses will be impacted. This assertion is similar to the arguments advanced by out-of-state interests in *Minnesota v. Clover Leaf Creamery Co.*, *et al.* and *North American Meat Institute v. Becerra, supra*, and which were rejected by both courts. The Decision's determination not to reopen DA applies equally to both in-state and out-of-state companies, and as such there is no dormant Commerce Clause violation.

For the reasons discussed above, rehearing applicants' allegation of error as to the dormant Commerce Clause is without merit. As such, rehearing should be denied as to this issue.

C. The Decision is supported by substantial record evidence and contains sufficient findings.

Rehearing applicants next allege that the decision ignores substantial evidence in the record, thus demonstrating the Decision's discriminatory nature. (Reh. App., pp. 16-17.) They further claim that the decision ignores the fact that all load-serving entities are subject to the same reliability and emission related obligations. (Reh. App., pp. 17-19.) Rehearing applicants also assert that the decision's concern about direct access load migration ignores the evidence that significant load migration is already occurring without destabilization. (Reh. App., pp. 19-20.) Finally, rehearing applicants allege that the decision ignores the experience level of ESPs. (Reh. App., p. 20.) These allegations of error lack merit, as the Decision is adequately supported by the Commission's findings based on the underlying administrative record.

Public Utilities Code section 1757.1 provides the standard of review in this quasi-legislative proceeding. Under section 1757.1(a)(4), review of a Commission decision in a quasi-legislative proceeding includes whether the challenged decision is supported by the Commission's findings. (Pub. Util. Code, § 1757.1(a)(4).) Such review is based on the entire record in the underlying proceeding, and there is a strong presumption in favor of the validity of Commission decisions. (Pub. Util. Code, § 1757.1(a); see also *City of Vernon v. Public Utilities Comm'n* (2001) 88 Cal.App.4th 672, 677; *Pacific Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838.)

Rehearing applicants claim that the Decision errs with respect to past procurement performance in light of the ESPs' past track record of meeting their procurement obligations. Rehearing applicants further allege that all LSEs are all required to meet the same obligations in terms of RA, RPS, IRP and GHG requirements. (Reh. App., pp. 16-19.) Rehearing applicants also assert that the Decision errs in determining that unpredictable load migration could destabilize the State's energy system. (Reh. App., pp. 19-20.)

In making our determination regarding the reopening of DA, we relied on a Draft Staff Report, 54 sets of party comments, and party participation at a Commission workshop. Based on the underlying record developed by the parties, we made specific findings, in compliance with sections 365.1(f)(2) and 1757.1(a)(4), in support of its decision to recommend against reopening Direct Access. We further determined that, based on the underlying record, we were unable to make the first two findings outlined in section 365.1(f)(2). As such, we concluded that we could not recommend that Direct Access be reopened.

The first requirement for reopening Direct Access identified in section 365.1(f)(2)(A) is that such reopening is consistent with the State's GHG emission reduction goals. (Pub. Util. Code, § 365.1(f)(2)(A).) We found that 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. (D.21-06-033, p. 28 [Finding of Fact 9].) The findings further determine that, as of 2019, the power mix for each type of LSE is: IOUs – 64.4 percent GHG-free; CCAs – 79.1 percent GHG-free; and ESPs – 30.6 percent GHG-free. (D.21-06-033, p. 28 [Finding of Fact 10].) Finally, the Decision found that, if ESPs continue to rely on unspecified power, load migration due to Direct Access expansion will result in increased GHG emissions. (D.21-06-033, p. 28 [Finding of Fact 12].)

The third requirement for reopening Direct Access identified in section 365.1(f)(2)(C) is that a recommendation to reopen must ensure electrical system reliability. (Pub. Util. Code, § 365.1(f)(2)(C).) As to this requirement, we could not find that reopening Direct Access would ensure system electric reliability, given the concerns raised in the Staff Report and the reliability challenges faced by the State. (D.21-06-033, p. 19.) We also found that, given the rotating outages that California experienced in 2020 due to capacity and reliability challenges, near-, mid-, and long- term actions are needed to ensure summer reliability. (D.21-06-033, p. 27 [Findings of Fact 1-2].) The Decision also determined that, while significant new generation has been ordered by the Commission, construction of new generation requires financing, and such financing is generally obtained by showing long-term customer commitments. (D.21-06-033, p. 27 [Findings of Fact 3-4].) Without such long-term load certainty, LSEs cannot demonstrate the long-term customer commitments needed to support or enter into the long-term power purchase agreements necessary to finance construction of new generation. (D.21-06-033, p. 27 [Finding of Fact 5].) The Decision further determined that Direct Access customers generally enter into short term agreements with ESPs, and that ESPs primarily fill their obligations through short-term contracts, or unspecified power purchased on the CAISO energy market. (D.21-06-033, p. 28 [Finding of Fact 6].) Finally, we found that expanding Direct Access will allow load migration between LSEs, causing fragmentation of the electricity market, which will result in CCAs and ESPs having difficulty financing new generation needed for system reliability and for GHG emissions reduction goals. (D.21-06-033, p. 28 [Findings of Fact 7-8].)

In reaching these conclusions, we relied upon the Final Staff report, which is attached as Exhibit A to the Decision. (D.21-06-033, pp. 8-11.) In particular, the Final Staff Report addresses each of the factors outlined in section 365.1(f)(2) in detail, including analysis of relevant evidence regarding these factors. For example, the Final Staff Report analyzes data related to 2021 Direct Access Load (GWh) and Eligible Direct Access Load (GWh) (D.21-06-033, Exhibit A, p. 6); Direct Access Load (GWh) and Direct Access Eligible Load (GWh) if Direct Access Becomes Eligible to All Non-Residential Load (D.21-06-033, Exhibit A, p. 7); Energy Resource Mix Used by Each LSE Class in 2019 (D.21-06-033, Exhibit A, p. 14); Average Actual and Forecasted LSE RPS Percentages (2011-2020) (D.21-06-033, Exhibit A, p. 16); Total Net Qualifying Capacity by Month and Resource Type 2021-2024 (D.21-06-033, Exhibit A, p. 19); and Total Contracted GWh each month by resource type and LSE Type, 2021-2024 (D.21-06-033, Exhibit A, p. 21). The Decision relies upon the evidence and analysis developed in Final Staff Report in support of its conclusions regarding further reopening of DA. (D.21-06-033, pp. 8-11, 13, 16, 18, 20, 28 [Finding of Fact 12].)

Given the extensive findings contained in the Decision and evidentiary support, rehearing applicants' claims regarding unsupported findings or lack of substantial evidentiary support are without merit. As such, rehearing is denied as to this issue.

D. The Decision does not discriminate between different types of load-serving entities.

Rehearing applicants' final allegation of error is that the Decision discriminates between different types of load-serving entities. (Reh. App., p. 21.) Rehearing applicants further assert that the Decision violates the Equal Protection rights of non-residential customers and the ESPs that wish to serve them. (Reh. App., pp. 21-22.) These allegations of error lack merit.

The rehearing application asserts that "[t]he Decision unlawfully discriminates against both non-residential customers and the ESPs that wish to serve them and violates their right to equal protection under the law for two reasons." (Reh. App., p. 21.) First, rehearing applicants allege that the Decision "restricts the ability of non-residential customers to freely exercise the right to choose an electric provider." (Reh. App., p. 21.) Second, rehearing applicants claim that the Decision "treats ESPs differently from the way it treats other nonutility LSEs [load-serving entities]." (Reh. App., p. 21.) Rehearing applicants further assert:

> Both the State and Federal constitutions preclude different treatment of similarly situated parties. United States Constitution, 14th Amendment; California Constitution, Art. I, Sec. 7, subd. (a). The Decision prevents non-residential customers from opting for Direct Access above the current capped limitations, despite allowing the same customers within CCA or IOU service areas to take service from either LSE. The Decision therefore allows CCAs and IOUs to serve all non-residential customers within their service areas while preventing ESPs from expanding service beyond the caps applicable to Direct Access service. This disparate treatment is precisely the sort of government behavior the equal protection clause was designed to prevent.

(Reh. App., p. 21.)

In support of their asserted Equal Protection claim, rehearing applicants cite two cases that are inapposite to the present circumstances involving Direct Access. First, rehearing applicants cite *Ex parte Virginia* (1880) 100 U.S. 339, 346, which stands for the general proposition that a state's legislative or administrative action can violate the Equal Protection Clause. (Reh. App., p. 21.) Rehearing applicants also cite *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville* (1993) 508 U.S. 656, which generally discusses the standing required in order to assert a violation of Equal Protection. (Reh. App., p. 22.) Neither case supports a viable Equal Protection claim by rehearing applicants.

Rehearing applicants further argue that the Decision "constitutes a state-imposed barrier to two groups," and cite the "disparate treatment" of ESPs as compared to CCAs and IOUs which are able to serve all non-residential customers within their service areas. (Reh. App., pp. 21-22.) In analyzing this claim, case law indicates that the rational basis test is applied, and as such rehearing applicants must demonstrate that the Decision's determinations regarding reopening DA are not rationally related to any legitimate government purpose. (See, e.g., *Federal Communications Comm'n v. Beach Communications, Inc., et al.* (1993) 508 U.S. 307, 313 (laws that do not involve suspect classifications or infringe on fundamental constitutional rights will be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for the classification); see also *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 461-62 (state classification between different types of milk containers is rationally related to the legitimate state purpose of promoting resource conservation, easing solid waste disposal problems, and conserving energy).)

Under rational basis review, a regulatory classification bears a strong presumption of validity. (*Id.*) In the present case, as discussed above, we reasonably concluded based on the record in the underlying proceeding that we could not recommend a further reopening of DA in light of the factors outlined in section 365.1(f)(2).

As discussed above regarding the findings supporting our recommendation against reopening Direct Access, important public policy justifications exist which implicate electric system reliability and the environment, and support the Decision's findings and conclusions. For the reasons discussed herein, rehearing applicants' Equal Protection claim lacks merit.

III. CONCLUSION

As discussed above, we have determined that rehearing of D.21-06-033 should be denied because no legal error has been demonstrated.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.21-06-033 is hereby denied.
2. This proceeding is closed.

This order is effective today.

Dated December 15, 2022 at San Francisco, California.

ALICE REYNOLDS
President
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
DARCIE L. HOUCK
JOHN REYNOLDS
Commissioners