Decision D.23-12-038 December 14, 2023

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations.	Rulemaking 21-10-002

ORDER DENYING REHEARING OF DECISION 23-06-029 AND MOTION FOR PARTIAL STAY

I. INTRODUCTION

On July 26, 2023, California Community Choice Association (CalCCA) filed a timely application for rehearing of Decision (D.) 21-10-002 (Decision). On August 4, 2023, two other separate and timely applications for rehearing of the Decision were filed. The first was filed by Shell Energy North America (US), L.P. (Shell Energy) together with The Alliance for Retail Energy Markets' (AreM) (collectively, ESP Parties). The second was filed by the California Efficiency + Demand Management Council, Leapfrog Power, Inc., OhmConnect, Inc., CPower, Enel X North America, Inc., and Center for Energy Efficiency and Renewable Technologies (collectively, Joint Parties). In the Decision, we adopted Local Capacity Requirements for 2024-2026, Flexible Capacity Requirements for 2024, and refinements to the Resource Adequacy program, including modifying the planning reserve margin for 2024 and 2025 and modifying the demand response (DR) counting requirements. As relevant to the Applications, we prohibited any community choice aggregator (CCA) or electric service provider (ESP) with a deficiency of greater than 1 percent of its system resource adequacy (RA) requirement on a month ahead RA filing during the previous two calendar

years from expanding its operations or taking on any new customers for the following year (RA Deficiency Rule or the Rule).

The RA Deficiency Rule arose from a repeated failure by load-serving entities (LSEs) to meet their RA requirements while seeking to expand their service territories. Seven LSEs received month-ahead RA deficiencies in 2021 and five LSEs received month-ahead RA deficiencies in 2022. Energy Division (ED) staff expressed concern with deficient LSE expansions that could (1) jeopardize reliability; (2) result in leaning on compliant LSEs; (3) undermining the purpose of the effective Planning Reserve Margin (PRM). ED also submitted its recommendations for adjustments to the DR program in a proposal that was the subject of comments and reply comments by parties.

In the first application for rehearing of the Decision, CalCCA asserts that RA Deficiency Rule is in error because the Commission lacks jurisdiction to limit expansion based on past RA deficiencies or prevent customers from aggregating their energy load pursuant to Public Utilities Code sections 366.2, 365.1, and 380.[1] CalCCA also asserts that through the RA Deficiency Rule, we have exceeded our statutory authority to prevent cost shifting or to set the earliest possible effective date for CCA program implementation. Moreover, according to CalCCA, the RA Deficiency Rule violates section 380 by discriminating against CCAs and is unsupported by sufficient evidence in the record.

In the second application for rehearing, the ESP Parties raise similar arguments as CalCCA but with respect to ESPs. Specifically, they argue that we lack statutory authority to restrict Direct Access load migration and are not aided by our authority to suspend and revoke ESP registration. Like CalCCA, ESP Parties also argue that the RA Deficiency Rule is discriminatory to LSEs pursuant to section 380 and is unsupported by sufficient record evidence.

[1] All further references are to the Public Utilities Code unless noted otherwise.

In the third application for rehearing, Joint Parties allege that the Decision committed legal error in determining: (1) whether D.23-06-029 contravenes D.16-09-056 by giving clear preference to Investor Owned Utility (IOU) DR programs, to the detriment of third-party DR, (2) a rule change to take "immediate effect," eliminating Reliability Demand Response Resource (RDRR[2]) as an emergency resource, that is wrongly characterized as a "clarification" of existing policy, which is not supported by any finding of fact or included in any ordering paragraph; (3) the elimination of the Transmission Load Factor (TLF) and the Planning Reserve Margin (PRM) Adders; (4) the expansion of the Proxy DR (PDR) availability requirement; and (5) derating third-party DR qualifying capacity (QC) values based on test results outside of the current QC valuation process. Joint Parties also filed a motion for partial stay, reiterating the claims of legal error in the application for rehearing, and requesting an immediate stay of the Decision. Joint Parties also requested that the Commission hold oral argument on their application for rehearing. The California Large Energy Consumers' Association (CLECA) filed a response in support of the Joint Parties' Application and Motion.

We have carefully considered all the arguments presented by rehearing applicants and are of the opinion that rehearing of the Decision is not warranted, as explained below. Each of the applications for rehearing of the Decision, therefore, is denied. Joint Parties' request for oral argument and motion for partial stay are also denied.

II. DISCUSSION

A. CalCCA Application for Rehearing.

1. Commission's Jurisdiction.

a) Public Utilities Code section 380.

CalCCA asserts that we acted without jurisdiction in adopting the RA Deficiency Rule because the relevant statutes do not expressly authorize the RA

[2] RDRR was referred to in D.10-06-034 as Reliability Demand Response Product or RDRP.

Deficiency Rule. (CalCCA Rehg. App., pp. 6-23.) Specifically, CalCCA argues that: (1) our authority over CCAs must be expressly granted and delineated by the Legislature and does not extend to enacting the RA Deficiency Rule and (2) sections 366.2, 365.1, and 380 do not require harmonization or support the RA Deficiency Rule. CalCCA's arguments fail to establish legal error for the following reasons.

We derive our power from the California Constitution and the Legislature. "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission ...." (Cal. Const., art. XII, § 5.) Exercising this plenary power, the Legislature enacted the Public Utilities Act (§ 201 *et seq*.). Yet, "the commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to '*do all things,* whether specifically designated in [the Public Utilities Act] *or in addition thereto,* which are necessary and convenient' in the exercise of its jurisdiction over public utilities. [Citations.] Accordingly, 'The commission's authority has been liberally construed' [citations], ….'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 915.) (A further discussion of the fact that CCAs are not public utilities follows in the section below.) There are two limits on this principle of liberal construction. The first provides that "[a]dditional powers and jurisdiction that the commission exercises … 'must be cognate and germane to the regulation of public utilities.'" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905–906.) The second is that section 701 does not authorize us to disregard express legislative directions or restrictions upon its powers found in other statutes. (*Assembly v. Public Utilities Com.* (1995) 12 Cal.4th 87, 103.)

While the deference rule does not apply where the scope of our powers and jurisdiction is at issue (*BullsEye Telecom, Inc. v. California Public Utilities Com.* (2021) 66 Cal.App.5th 301, 309), the courts may "tak[e] into account" agency interpretations. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8.) The weight given to agency interpretations is "contextual," and depends on factors such as "'the thoroughness evident in [the agency's] consideration, the validity of its reasoning,

its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. [Citation.]' " (*Id.* at pp. 14–15.)

CalCCA asserts that we do not have jurisdiction to enact the RA Deficiency Rule absent "express legislative authority for the Commission action at issue." (CalCCA Rehg. App., p. 8.) In fact, section 380 sets out our authority and legislative directives regarding RA programs. It states that we "shall establish resource adequacy requirements for all load-serving entities," including investor-owned utilities (IOUs), electric service providers (ESPs), and community-choice aggregators (CCAs). LSEs are required to submit annual and monthly filings to demonstrate compliance with the applicable RA requirements. (Pub. Util. Code, § 380, subd. (f).) Section 380 authorizes us to "implement and enforce" the RA requirements "in a nondiscriminatory manner" and to "exercise its enforcement powers to ensure compliance by all load-serving entities." (Pub. Util. Code, § 701, subd. (e).) We have established a citation program for LSEs who fail to comply with these requirements. (See D.21-06-029.)

Section 380's purpose was to "ensure that adequate physical generating capacity dedicated to serving all load requirements is available to meet peak demand and planning and operating reserves at just and reasonable rates." (Assem. Com. Utilities and Commerce, hearing analysis of Assem. Bill No. 380 (2005-2006 Reg. Sess.) as amended April 12, 2005, p. 1.) It was also "to develop a mechanism to ensure no shifting of costs" between an IOU's customers and "the customers on whose behalf they were incurred…." (*Ibid*.) The legislative comments explained that "[i]f the ESPs do not adequately provide for the demands of its customers, the customers of the IOU end up paying more for electricity." (*Id*. at p. 2.) The purpose of RA requirements "is to ensure that each retail electric service provider has sufficient resources available to ensure reliable service under adverse conditions." (*Id*. at p. 3.) "If the ESP has failed to procure enough resources, the customer continues to draw electricity from the IOU's reserves, which compromises reliability for the IOU's customers, or increases costs across all of its customers if the IOU has to purchase additional resources on the spot market for these unanticipated customers." (*Id*. at p. 3.) Both the plain language of section 380 and the legislative

history demonstrate the Legislature's concerns with system reliability and cost shifting caused by non-IOU LSEs. There is no indication that the Legislature somehow intended to limit our authority to effectuate these and other stated goals. Section 380, therefore, plainly authorizes us to set RA requirements and discipline CCAs who fail to comply.

As the Decision notes, "LSEs are continuing to fail to meet RA obligations." (Decision, pp. 35-36.) Some of these deficient LSEs seek to expand their program "even as they have been unable to secure sufficient capacity to meet their RA obligations and serve their existing customers." (Decision, p. 36.) The broad language of section 380 enables us to determine, in our discretion, the best enforcement mechanism for the RA program. Section 701 empowers us to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient' in the exercise of its jurisdiction" over public utilities (*San Diego Gas & Electric Co. v. Superior Court, supra*, 13 Cal.4th at p. 915) ***and entities adjacent to public utilities***. (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174.) That is, because section 380 authorizes us to establish RA requirements and enforce them, we may do all that is necessary and convenient to compel compliance, including preventing further expansion.

Otherwise, it would make "little sense to grant the Commission authority over protecting the public interest through conditions and mitigation measures, but not allow it to exercise its traditional functions to oversee and enforce those measures." (*PG&E, supra*, 118 Cal.App.4th at p. 1196.) "The primary limiting factor on PUC jurisdiction is that the PUC's action must be cognate and germane to utility regulation." (*Id.* at p. 1201.) We are obligated to intervene where "[CCA] program elements may affect utility operations and the rates and services to other customers." (D.05-12-041, at *8-9.) This is because we "retain[s] a responsibility to assure that a CCA's policies, practices and operations do not compromise the operations of the utility or service to utility customers." (D.05-12-041, at *11.) As explained in the Decision, the purpose of the RA Deficiency Rule is "to ensure that LSEs procure sufficient capacity to meet their customer loads, maintain electrical grid reliability, and prevent deficient LSEs from

increasing risk of grid emergencies arising from lack of resources bidding into CAISE's wholesale markets." (Decision, p. 38.) The RA Deficiency Rule, therefore, does not seek to regulate CCAs but is, instead, "cognate and germane" to ensuring "that a CCA's policies, practices and operations do not compromise the operations of the utility or service to utility customers." (D.05-12-041, at *11.)

Notwithstanding section 701, the Legislature deferred to our expertise in resource adequacy and granted us considerable discretion to determine what actions are necessary to accomplish the stated goals. At that point, we were enabled with "the authority to employ all necessary means to accomplish the end is always one of the implications of the law." (*Wendz v. California Department of Education* (2023) 93 Cal.App.5th 607, 622.)

Assembly v. Public Utilities Com., *supra*, 12 Cal.4th 87 and *Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634, are inapplicable here for the reason enunciated in *PG&E*: "In both *Assembly* and *Pacific Tel. & Tel. Co.,* section 701 was inapplicable because the actions of the PUC disregarded 'express legislative directives.' [Citations.] Here, by contrast, the holding companies fail to point to any statutory mandate or directive forbidding the PUC from enforcing the holding company conditions, and we are aware of none." (*PG&E, supra,* 118 Cal.App.4th at p. 1199.) In *Assembly v. Public Utilities Com.*, for example, the Commission "attempted to rely on section 701 as authority to direct ratepayers refunds from Pacific Bell to a school telecommunications infrastructure fund, despite an express statutory mandate (§ 453.5) that such refunds be returned to ratepayers." (*Assembly v. Public Utilities Com.*, *supra*, 12 Cal.4th at pp. 102–104.) In *Pacific Tel. & Tel. Co.,* the Commission "directed a utility to refund to ratepayers amounts collected under a previously approved rate schedule based on the PUC's conclusion that past rates should have been lower, notwithstanding express direction from the Legislature that the PUC's orders fixing rates must be prospective only." (*Pacific Tel. & Tel. Co., supra,* 62 Cal.2d at pp. 649–650, 653.) These cases demonstrate that,, absent an express legislative directive to the contrary,

section 701 supports our authority to "do all things, … which are necessary and convenient in the exercise" of its authority under section 380.

b) Public Utilities Code sections 366.2, 365.1, and 380.

CalCCA asserts that we erred in relying on a harmonization of sections 366.2, 365.1, and 380 because they each "serve unique, separate, and nonconflicting purposes" and do not provide us with jurisdiction to enact the RA Deficiency Rule. (CalCCA Rehg. App., pp. 8-13.) CalCCA misunderstands the RA Deficiency Rule.

Rules of statutory interpretation requires that "the plain and commonsense meaning" of the statutory language is considered "in the context of the statutory framework as whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." *(Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "[A] statute can be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase, and clause so that no part or provision will be useless or meaningless. [Citations.]" (*Smith v. Regents of University of California* (1976) 58 Cal.App.3d 397, 403.) "Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 [internal citations and quotation marks omitted].)

First, as we explained in the Decision, subdivisions (b)(4) and (5) clarify "that CCAs must prepare to fully supply electricity to their customers and may not shift costs for energy to the customers of other LSEs by failing to contract in advance for such capacity." (Decision, p. 37.) Moreover, subdivision (*l*)(1) empowers us to authorize an IOU to terminate CCA services. That section 366.2 contains limitations on CCAs' operations also dispels CalCCA's unsupported argument that section 366.2(a)(1) confers an absolute statutory right to aggregate on potential customers. (CalCCA Rehg. App., p. 3.) In applying AB 117's mandates, we explained that our authority over CCAs is the same as the "authority we have over any individual or entity whose acts or knowledge are

germane to our regulatory obligations." (D.05-12-041, at *11.) We also retain "a responsibility to assure that a CCA's policies, practices and operations do not compromise the operations of the utility or services to utility customers." (*Ibid*.) So, contrary to CalCCA's characterization, section 366.2 empowers us to regulate CCAs to the extent that their procurement deficiencies affect other customers and IOUs. The RA Deficiency Rule is not an expansion of our jurisdiction over CCAs but an enforcement of existing scope of authority.

Second, section 380 sets out our authority and legislative directives regarding RA programs. It is the operative statute under which we establish the RA Deficiency Rule. Pursuant to section 380, we establish RA obligations applicated to all LSEs, including IOUs, ESPs, and CCAs. Section 380 unequivocally authorizes us to "implement and enforce" the RA requirements. (Pub. Util. Code, § 380, subd. (e).) Thus, the RA Deficiency Rule is an application of our already existing authority over CCAs.

We have statutory authority to "do all things, … which are necessary and convenient in the exercise" of its power under sections 366.2 and 380 so long as those actions are not contrary to express legislative directives. Put another way, once the Legislature delineated to us certain powers and responsibilities, we are empowered take all actions necessary to exercise those powers and enforce such responsibilities. This includes ensuring that CCAs is responsible for all of its customers' procurement needs and complies with the RA requirements.

Third, section 365.1 further informs the Decision. CalCCA asserts that section 365.1 does not support the imposition of the RA Deficiency Rule because "the section seems irrelevant to the question at hand given that it predominantly governs direct access." (CalCCA Rehg. App., p. 13.) But while section 365.1 may not be directly relevant to CCAs, it is relevant to Energy Service Providers (ESP)—the other entities subject to the RA Deficiency Rule. Section 365.1 is discussed at length in the second half of this memorandum addressing ESP Parties' rehearing application.

2. Cost shifting.

CalCCA argues that the sole remediation against improper cost shifting is through the Power Charge Indifferent Adjustment (PCIA) proceedings and the Cost Allocation Mechanism (CAM). (CalCCA Rehg. App., pp. 15-17.) However, these cost recovery mechanisms—or any other that we may choose to promulgate—are tangential to the RA Deficiency Rule. The RA Deficiency Rule is predicated on section 380 and a history of RA violations, not purported cost shifts as CalCCA mistakenly believes. The Decision discusses cost shifting as one of the possible effects of RA violations.

3. Earliest possible effective date.

CalCCA argues that section 366.2(c)(8)'s requirement that we "designate the earliest possible date for implementation of a community choice aggregation program" does not authorize the Commission to base the earliest possible effective date on RA compliance. (CalCCA Rehg. App., p. 21.) But this argument again misconstrues the premise for the RA Deficiency Rule: it is based on the Commission's RA implementation and enforcement authority under section 380. As explained in the Decision, the "earliest possible effective date" is relevant only to the extent that Energy Division is unable to confirm the expansion date until after past RA compliance has been confirmed. (Decision, pp. 42, 115, 138-139.) The RA Deficiency Rule acts upon the Commission's RA authority and harmonizes it with the Commission's jurisdiction in other matters over CCAs, espoused in sections 366.2 and 366.3, to effectuate the Legislature's intent.

The RA Deficiency Rule does not seek to set an effective date based on a CCA's compliance thus whether an implementation plan is filed or not is irrelevant. (See CalCCA Rehg. App., pp. 22-23.) Instead, it is "a reasonable, measures approach to enforcing the Public Utilities Code, including Section 380, to ensure grid reliability through Resource Adequacy compliance." (Decision, p. 37.)

Moreover, contrary to CalCCA's argument, the fact that the Legislature specifically listed consideration of a procurement plan as a basis for specifying the

"earliest possible date" does not mean that we may only consider that factor.[3] We have rejected this exact argument previously. (See D.20-01-030, at *52-53, fn. 109.) CalCCA does not address D.20-01-030 or cite any authority that would support such its interpretation. To the contrary, any such reading would be "inapplicable where its operation would contradict a discernible and contrary legislative intent." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 351.)

4. Discrimination pursuant to Public Utilities Code section 380.

As it did in its comments, CalCCA argues that the RA Deficiency Rule discriminates against CCAs and ESPs in purported violation of section 380. (CalCCA Rehg. App., pp. 23-25.) We explained that "[t]he Public Utilities Code creates a variety of distinctions between different classes of LSEs," and lists IOUs are one example, given their role as the Providers of Last resort (POLR) whereas CCAs and ESPs are "permitted to return their customers" to the IOUs. (Decision, p. 39.)

A POLR is "a load-serving entity that the commission … designates to provide electrical service to any retail customer whose service is transferred to the designated load-serving entity because the customer's load-serving entity failed to provide, or denied, service to the customer or otherwise failed to meet its obligations." (Pub. Util. Code, § 387, subd. (a)(3).) "A POLR is the utility or other entity that has the obligation to serve all customers." (R.21-03-011, *Order Instituting Rulemaking to Implement Senate Bill 520 & Address Other Matters Related to Provider of Last Resort* (Mar. 18, 2021), at *1.) "Like IOUs, the ESPs and CCAs must procure sufficient power for their customers and recover the costs of that procurement. Unlike IOUs, ESPs and CCAs have the discretion to determine the terms and price for procured power without

[3] The Applicants are averring to a principle of statutory construction referred to as *inclusio unius est exclusion alterius* ("the expression of one thing is the exclusion of another"). (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 991 ["This rule of statutory construction, although useful at times, is no more than a rule of reasonable inference and cannot control over the plain meaning of the statutory language."].)

Commission review." (*Id*. at *4-5.) And, unlike ESPs and CCAs, "IOU procurement is subject to various levels of reasonableness review by the Commission." (*Ibid*.) "This close review [of IOUs] provides the opportunity to correct course if resources fail to materialize or effectively meet system needs. The retail rates charged by the IOUs are also closely reviewed to ensure they are just and reasonable. This oversight is necessary to ensure safe and reliable public utility electricity service at just and reasonable rates, consistent with Public Utilities Code Section 451." (*Ibid*.)

The three major IOUs are the POLR in their service territories. That means their procurement is subject to stringent review to ensure that IOUs meet their procurement requirements. CCAs and LSEs are not subject to the same standards. As the Decision points out, this is a legal distinction, and it is not discriminatory for our rules to reflect such distinctions. CalCCA does not argue that the distinct requirements for IOUs and CCAs are discriminatory. Instead, it suggests that we apply the RA Deficiency Rule to the IOUs in their non-POLR role. (CalCCA Rehg. App., p. 23.) It is unclear how we might achieve this and it is more reasonable to impose requirements based on legal distinctions as is occurring already.

CalCCA further asserts that to combat the purported discrimination in the RA Deficiency Rule, we should simply come up with "a more broadly applicable tool to enforce RA requirements [that] … fit comfortably within the scope of Section 380" such as "penalties and cost allocation." (CalCCA Rehg. App., p. 24.) But we have already employed these approaches—as CalCCA necessarily recognizes—to no avail. (Decision, p. 35.) CalCCA suggests that these approaches need to be "further adapted to serve the Commission's objectives of driving RA compliance." (CalCCA Rehg. App., pp. 24-25.) There is nothing constricting us from pursuing different strategies if the present ones are not sufficiently tailored to achieve our mandates. Moreover, neither penalties nor cost allocation would directly address the Legislative's concerns in enacting section 380—ensuring grid reliability.

5. Sufficiency of the record.

CalCCA also argues that the Decision's findings regarding grid reliability and the effects of LSEs' under-procurement are conclusory and unsupported by the record. (CalCCA Rehg. App., pp. 26-29.) Specifically, CalCCA objects to Finding of Fact (FOF) 6 which states:

> Allowing LSEs that cannot meet their existing RA obligations to expand their territory or to otherwise take on new customer load is detrimental to grid reliability. LSEs that are deficient in their RA obligations result in reliance on other LSEs' procurement activities and cost shifting. (Decision, p. 130.)

CalCCA argues that FOF 6 is in error because (1) there is no evidence of a subsidy by non-deficient LSEs of a deficient LSE so there is no basis to conclude that grid reliability may be impacted (CalCCA Rehg. App., pp. 25-26) and (2) the Decision does not explain how deficient LSEs are "leaning on other LSEs' procurement activities and impairing grid reliability" (CalCCA Rehg. App., pp. 26, 28).

A party challenging a Commission's finding for lack of substantial evidence must demonstrate that, based on the evidence before the Commission, a reasonable person could not reach the same conclusion. (*The Ponderosa Telephone Co. v. Public Utilities Com.* (2019) 36 Cal.App.5th 999, 1013.) "It is for this reason that the Commission's factual findings are almost always treated as 'conclusive' [citations], 'final and not subject to review.' [Citations.]." (*Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 839.)

"A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n* q 25 Cal.3d 200, 212.) There is a "strong presumption of the correctness of the findings and conclusions of the commission, which may choose its own criteria or method of arriving at its decision, even if irregular, provided unreasonableness is not 'clearly established.'" (*The Ponderosa Telephone Co. v. Public Utilities Com.*, *supra*, 36 Cal.App.5th at p. 1029.) Substantial evidence includes not only direct

evidence, but also circumstantial or indirect evidence and all reasonable inferences flowing therefrom. (*County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 72–73.)

The evidence in the record demonstrates that seven LSEs received month-ahead RA deficiency citations in 2021 and five LSEs received month-ahead RA deficiency citations in 2022. (Decision, pp. 30-31, citing Energy Division Phase 3 Proposal.) Leading up to these deficiencies, the California Independent System Operator (CAISO) had to institute unplanned rotating electricity outages in California in August 2020 which demonstrated "that the state's reliability issues are acute and immediate…." (PG&E Opening Comments at 9, citing D.21-06-033, at *3.) As a result of these concerns, we had decided against expansion of Direct Access because it "would further fragment the market, which in turn could exacerbate the planning and related activities necessary to ensure grid reliability." (D.21-06-033, at *3.) We explained that "in the coming years load serving entities will need to invest in … new generation resources through long-term contracts to ensure grid reliability." (*Id*. at p. *4.) The severe heat events also occurred in 2021 and 2022, leading to "significant stress on the grid that required California to rely on every available resource to prevent electric outages." (Decision, p. 35, citing Energy Division Phase 3 Proposals, at p. 34.) The evidence of the heat events and our prior actions regarding Direct Access reasonably inform the Decision's consideration of LSE expansions.

CAISO—the entity responsible with maintaining reliability and operating California's wholesale energy market—also opined that "it is critical that the Commission prioritize planning and procurement reforms to ensure reliability going forward." (March 3, 2023, CAISO Reply Comments, at p. 3.) CAISO stated that "[i]deally, LSEs will contract with a significant portion of the needed resources well in advance, such that incremental procurement required in the annual timeframe is minimized and limited to address, for example, small changes to load forecasts." (*Ibid*.)

CalCCA argued that the RA deficiencies were a product of a "severely constrained RA market conditions" (February 24, 2023, CalCCA Comments, at p. 5), whereas PG&E asserted that it "conducted a similar stack analysis and found different

results, specifically that there are sufficient resources available in each month in question to meet the RA program requirements, albeit with some months being tight." (March 3, 2023, PG&E Comments, at pp. 1-2.) As PG&E also correctly noted, "[w]hile some of system RA capacity may be expensive, LSEs already have the ability not to procure and pay the penalty price instead." (*Id*. at p. 4.)

PG&E explained that if CCAs are not required to comply with RA requirements, it would result in a process "fraught with free-rider (i.e., leaning) and market pricing issues." (March 3, 2023, PG&E Comments, at p. 4). And, if CCAs can elect not to comply with the RA requirements (and only pay the fine *post hoc*), "it turns the effective planning reserve margin ('PRM') into a backstop mechanism, as it would not make sense for the effective PRM to also be subject to that same price cap, resulting in the IOU procuring RA-eligible capacity for all LSEs that other LSEs chose not to procure…." (*Id*. at p. 5.) Southern California Edison asserted that "adequacy of resources directly affects an ESP's capability to operate." (SCE Reply Comments, at p. 4.)

CalCCA argues that there is no evidence of a "subsidy" in the record since "[t]he deficient LSE by definition did not purchase the RA…." (CalCCA Rehg. App., pp. 26-27.) CalCCA also asserts that the Decision "does not define 'leaning' nor explain how this occurs" since "LSEs procure only for their own customers, and all LSEs, including deficient LSEs, contribute to procurement of additional resources…." (CalCCA Rehg. App., p. 27.) CalCCA's reading of the Decision and the record here is extremely narrow. When a CCA (or any LSE) underprocures, excess procurement must be used to backfill the capacity not provided by the deficiencies. The deficient CCAs avoid paying for the RA resources and, instead, rely on other LSEs to provide reliability capacity that the CCAs should have acquired directly. In D.04-01-050, we established the Planning Reserve Margin (PRM) as an obligation for LSEs to procure generation capacity over and above the capacity required to meet peak demand. The purpose of the reserve margin was to ensure there would be sufficient energy capacity to meet peak demand plus needed operating reserves "since at any given time some percentage of

plants may not be available due to such factors as maintenance, forces outages, fuel limitations, or in the case of hydroelectric power, insufficient water." (D.04-01-050, at *21.) The appropriate PRM is set on the assumption that all LSEs would meet their RA requirements and was not set to provide backfill for deficient LSEs. Thus, when a CCA fails to procure for its own customers, this results in "leaning" on the excess procurement that is paid for by all customers and, instead of supplying the full intended benefit of an additional buffer of reliability accruable to all customers, results in partial subsidy to the deficient CCA.

Based on the record before it, we reasonably concluded that if a CCA is unable to provide for its existing customers' capacity, a further expansion of the customer base would further exacerbate the cycle of "leaning" on to other LSEs' procurement and be detrimental to section 380's goal of grid reliability.

B. ESP Parties' Application for rehearing.

1. Commission Jurisdiction.

ESP Parties argue that the RA Deficiency Rule violates the Direct Access (DA) statutory scheme because we may not bar retail customers from seeking service from registered ESPs. (ESP Parties Rehg. App., pp. 3-4.) In particular, ESP Parties assert that the legislative history and our prior interpretation of the Direct Access scheme does not allow us "to bar nonresidential retail customers from contracting with certain ESPs." (ESP Parties Rehg. App., p. 7.)

Direct Access is an electric service option that allows retail customers to buy electricity from an Energy Service Provider (ESP). Direct Access became available to customers as part of energy deregulation enacted by AB 1890 (Brulte, 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. (D.21-06-033, at *5.) AB 1X (Keely, 2001) suspended new customers from participating in Direct Access service. SB 695 (Kehoe, 2009) opened Direct Access to a limited amount of new load to non-residential, which was phased in over 2010 to 2013. SB 695

also created a capacity "cap" of the amount of load eligible for Direct Access and formed the Direct Access Lottery system that allowed for new non-residential customers to participate in the program.

The most current statue that modified the Direct Access program was SB 237 (Hertzberg, 2018). As amended, section 365.1 provided that "[t]he commission shall authorize individual retail nonresidential end-use customers to acquire electric service from other providers in each electrical corporation's distribution service territory, up to a maximum allowable total kilowatthours annual limit." (Pub. Util. Code, § 365.1, subd. (b).) Subdivision (d)(3) provides that section 365.1 "does not supplant the resource adequacy requirements of Section 380 or the resource procurement procedures established in Section 454.5." Subdivision (e) instructs us to establish the maximum allowable annual limit, implement a reopening schedule, and "review and, if appropriate, modify its currently effective rules governing direct transactions…." Subdivision (f) instructed us to "provide recommendations to the Legislature on implementing a further direct transactions reopening schedule," based on our analysis of four distinct factors including ensuring system reliability and prohibiting cost shifting. SB 237 was implemented in two phases. Phase I resulted in D.19-05-043, wherein we ordered an additional 4,000 GWh of Direct Access load and which went into effect January 1, 2021. Phase II resulted in D.21-06-033, wherein we recommended against further Direct Access expansion because it was unable to make the required statutory findings. Specifically, we concluded "that at this time, expansion of Direct Access to all non-residential customers would present an unacceptable risk to the state's long-term reliability goals." (D.21-06-033, at *2.)

The RA Deficiency Rule is propagated pursuant to our section 380 resource adequacy authority. While section 365.1 does not expressly provide for our authority to approve or disapprove current ESPs' expansion, the Legislature has expressly deferred to us the determination of the maximum allowable total kilowatthours annual limit, resource adequacy mechanisms, and appropriateness of implementing a further direct transactions reopening schedule (among other tasks). We had determined that further expansion of

Direct Access is currently inappropriate due to significant grid reliability concerns. (See D.21-06-033.) Moreover, SB 237's legislative history reflects significant and persistent concerns with expanding Direct Access "given the shaky status of RA" since "California's electric system is undergoing significant structural changes that include integrating greater numbers of intermittent renewable resources, repowering or retiring over 16 gigawatts of gas-fired power plants that rely on once-thorough cooling (OTC) technology, and an increasing number of resources that will surpass their design life in the coming years." (Assem. Utilities and Energy Com., com. on Sen. Bill No. 237 (2017-2018 Reg. Sess.) June 13, 2018, p. 3.) The Legislature also noted that,

> If California RA policies fail to provide sufficient resources, the CAISO may be forced to utilize centralized backstop procurement mechanisms whereby the CAISO enters into contract to address the shortfall in order to maintain electric system reliability. CAISO backstop procurement had been on the decline but in the fall of 2017, CAISO contracted for more than 1,500 megawatts of natural gas fired generation from five different plants. This is notice that RA is not working. (*Id.* at p. 4.)

The legislative history concluded that "[t]he expansion of the DA program called for in [SB 237] may be premature given the CPUC's warning that they observe similar circumstances in the electricity market as they observed before the energy crisis of 2001." (Assem. Floor Analysis., com. on Sen. Bill No. 237 (2017-2018 Reg. Sess.) August 24, 2018, pp. 3-4.)

Both the legislative history and the plain reading of section 380 and section 365.1 are relevant here. As discussed above with respect to CalCCA's application for rehearing, in interpreting a statute, the "fundamental task … is to determine the Legislature's intent so as to effectuate the law's purpose." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles*, *supra*, 34 Cal.4th at p. 737.) "Fundamental rules of statutory interpretation require that a statute be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect

should be given to every word, phrase, and clause so that no part or provision will be useless or meaningless. [Citations.]" (*Smith v. Regents of University of California*, *supra*, 58 Cal.App.3d at p. 403.) "Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute." (*State Dept. of Public Health v. Superior Court*, *supra*, 60 Cal.4th at p. 955 [internal citations and quotation marks omitted].)

Also as previously discussed, "[a]n administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate… [and] the absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority. ... [Citations.] [The administrative agency] is authorized to 'fill up the details' of the statutory scheme. [Citations.]" (*Wendz v. California Department of Education* (2023) 93 Cal.App.5th 607, 623.) That is, "where power is given to perform an act, the authority to employ all necessary means to accomplish the end is always one of the implications of the law. [Citations.]" (*Ibid*.) And, section 701 empowers us to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient' in the exercise of its jurisdiction" over public utilities. (*San Diego Gas & Electric Co. v. Superior Court*, *supra*, 13 Cal.4th at p. 915.)

The purpose of section 365.1 is a responsible approach to Direct Access, mindful of resource adequacy and reliability. Section 380 is unequivocal in our authority over resource adequacy while the legislative history of section 365.1 demonstrates keen awareness of California's reliability issues. The RA Deficiency Rule is, as discussed with respect to CalCCA's rehearing application, promulgated under our RA authority, not our jurisdiction over ESPs. Thus, we are enabled with "the authority to employ all necessary means to accomplish the end is always one of the implications of the law." (*Wendz*, *supra*, 93 Cal.App.5th at 622.)

2. Discrimination pursuant to Public Utilities Code section 380.

ESP Parties argue that the RA Deficiency Rule discriminates against ESPs in violation of sections 380(e) and 365.1(c)(1). (ESP Parties Rehg. App., pp. 7-10.) We explained that "[t]he Public Utilities Code creates a variety of distinctions between different classes of LSEs," and lists IOUs are one example, given their role as the Providers of Last resort (POLR) whereas CCAs and ESPs are "permitted to return their customers." (Decision, p. 39.)

ESP Parties argue that the RA Deficiency Rule "treats various types of LSEs in radically different ways for deficiencies in RA compliance." (ESP Parties Rehg. App., p. 8.) But that is not accurate. We are treating all LSEs the same pursuant to section 380 by requiring that all LSEs comply with their RA requirements. If LSEs fail to comply, they are subject to the RA citation program and, if they are seeking to expand operations or take on new load, they are prevented from doing so. The perceived differences cited by ESP Parties are, as the Decision explains, due to the entities' legal distinctions. By their nature, ESPs, CCAs, and IOUs are subject to different requirements, procedures, and operations. For example, we ordered "incremental excess resources" procurement for IOUs in 2021, 2022, and 2023 in D.21-03-056 and D.21-12-015 to be incremental to, and in excess of, RA procurement that LSEs were required to undertake. Moreover, as a POLR, the IOUs have the obligation to serve all customers, even if ESPs or CCAs fail to do so. (Pub. Util. Code, § 387, subd. (a)(3).) However, ESP Parties do not argue that these additional requirements for the IOUs are somehow discriminatory.

Like with section 365.1, ESP Parties advocate for a very narrow interpretation of section 380. But, as discussed above, section 380 must be considered in light of the legislative intent and related statutes. The legislative intent behind section 380 is to give us broad authority to enact and implement the statutory goals behind resource adequacy. Related statutes and relevant authorities demonstrate that LSEs are

routinely subject to different requirements as a result of their legal distinctions and obligations.

3. Section 394.25.

ESP Parties argue that the RA Deficiency Rule is grounded in section 394.25 (which sets out the Commission's authority to suspend or revoke ESP's registration under certain circumstances and pursuant to certain processes) which is in error. (ESP Parties Rehg. App., pp. 10-12.) But we do not rely on section 394.25 in enacting the RA Deficiency Rule. As discussed at length above, the Rule is based on our authority pursuant to section 380.

ESP Parties argue that the Decision makes "an oblique reference to the Commission's authority under section 394.25" when it acknowledges that "[b]oth CCA and ESP related statutes provide ways for the Commission to revoke the ability of such LSEs to operate if it shows the LSEs are unable to effectuate their primary functions of serving customer load consistent with their Commission-allocated RA obligations." (Decision, p. 115.) But ESP Parties quote the language out of context; this "oblique reference" is merely an example of our authority provided in response to the parties' comments on the Proposed Decision. (See *ibid*.) In fact, we do not cite or otherwise rely on section 394.25. As the Decision explains in the same paragraph, "[t]he Commission has statutory obligations to ensure energy reliability at just and reasonable rates and specific authority to ensure RA compliance," pursuant to section 380. (*Ibid*.)

4. Sufficiency of the record.

ESP Parties assert that Finding of Fact No. 6 is insufficient to support the adoption of the RA Deficiency Rule. (ESP Parties Rehg. App., pp. 12-14.) ESP Parties argue that we discuss "the significant pressures that LSEs are under with regard to their RA compliance obligations" and the RA Deficiency Rule "will not improve reliability." (ESP Parties Rehg. App., p. 13.) ESP Parties also cite CalCCA's argument that deficient ESPs do not cause cost shifting. (ESP Parties Rehg. App., p. 14.)

First, as discussed above with regard to CalCCA's rehearing application, the evidence in the record established our and CAISO's concerns with grid reliability in light of the recent and repeated heat events. The record also established that multiple LSEs were repeatedly RA deficient. The record also demonstrated that we have recommended against expansion of Direct Access due to its reliability concerns. Nor do ESP Parties dispute our reliability concerns and findings.

Second, to the extent that ESP Parties argue that the record does not demonstrate that the RA Deficiency Rule would "enhance grid reliability" (ESP Parties Rehg. App., p. 13), they misunderstand the purpose of the Rule. As we stated, the purpose is to prevent LSEs who are already unable to procure sufficient capacity to meet their RA requirements from expanding further, again failing to procure for more customers, and, through these failures, further jeopardizing grid reliability and undermining the purpose of effective PRM. (See Decision, pp. 31, 36-38.)

Third, ESP Parties assert that "[i]f RA deficiencies are being driven at least in part by a shortage of RA capacity, then those RA capacity shortages (and the resulting deficiencies) will continue to occur regardless of whether load migrates to a new LSE or remains with the current LSE." (ESP Parties Rehg. App., p. 14.) This argument is purely speculatory and ignores the additional requirements that IOUs are subject to as POLR, for example, or that only some ESPs are continually deficient.

Finally, as discussed with respect to CalCCA's objection to Finding of Fact No. 6, when a CCA (or any LSE) underprocures, excess procurement must be used to backfill the capacity not provided by the deficiencies. The deficient CCAs avoid paying for the RA resources and, instead, rely on other LSEs to provide reliability capacity that the CCAs should have acquired directly. Thus, when a CCA fails to procure for its own customers, this results in "leaning" on the excess procurement that is paid for by all customers and, instead of supplying the full intended benefit of an additional buffer of reliability accruable to all customers, results in partial subsidy to the deficient CCA.

C. Joint Parties' application for rehearing.

1. Conflict between D.23-06-029 and D.16-09-056.

Joint Parties claim throughout their application for rehearing that the Decision erred by preferring IOU DR programs, in violation of D.16-09-056, which set forth a principle of competitive parity between IOU and third-party DR. Joint Parties also generally argue that Federal Power Act sections 205 and 206 prohibit undue discrimination or preferences in organized electricity markets, citing Federal Energy Regulatory Commission (FERC) Order 719. (Joint Parties' Rehg. App., p. 3.)

These claims lack the specificity required by Rule 16.1(c). To the extent that specific claims of unfair playing field and discriminatory competition are raised regarding the issues discussed below, they are addressed herein. Generally, however, the claims that the Decision is unlawfully continuing to favor IOU DR lack specific allegations as to how we violated any rule or law, making it impossible for the Commission to correct any legal error, which is the purpose of an application for rehearing.

To the extent particular adjustments to DR programs are alleged to violate the principle of competitive parity, several of those involve our policy decisions which are made pursuant both to our statutory responsibilities under Public Utilities Code section 380.5 to ensure demand response supplies ratepayer benefits and to prior decisions, including D.16-09-056. That decision adopted not only the principle of competitive parity cited by Joint Parties but also the principle that "demand response shall evolve to complement the continuous changing needs of the grid." (D.16-09-056, pp. 97-98, OP 8.) By ensuring that ratepayers do not pay twice for third-party DR and by adjusting DR programs as necessary based on the record to ensure grid needs are met by demand response products, the Commission is complying with statutory and decisional law. Because Joint Parties have not specified how we contravened D.16-09-056 or FERC Order 719 or otherwise abused our discretion in making these policy adjustments, rehearing should be denied as to these claims.

2. Clarification of policy.

Joint Parties assert that RDRR cannot be used prior to the calling of a grid emergency. (Joint Parties' Rehg. App., p. 11.) This position is not supported by prior decisions, which state that RDRR should be used prior to the CAISO contacting neighboring balancing authorities for energy or capacity, to help avoid a system emergency. (See D.10-06-034, p. 2.) Moreover, due to CAISO changing its operating protocols from Alert, Warning, Emergency (AWE protocols) to NERC protocols, which include Energy Emergency Alert (EEA) Watch, EEA I, EEA II, and EEA III, we clarified in D.23-06-029 how RDRR, as an RA resource, should be dispatched before an actual system emergency. Due to minor differences between AWE and NERC protocols, leading to a situation where, under the NERC protocols, CAISO has not been dispatching RDRR RA resources before a system emergency. This is contrary to the intent of earlier decisions, which require that RDRR should be dispatched to help avoid emergency situations by being called during times of grid stress that do not rise to actual system emergencies. Moreover, all three decisions, D.23-06-029, D.18-11-029 and D.10-06-034, consistently make the important policy determination that ratepayers should not have to pay twice for the same resource, which Joint Parties fail to address in the application for rehearing.

Joint Parties argue that the Commission "reverses the present limitation on using RDRR as an RA resource during system emergencies only, defined by a CAISO Energy Alert (EEA) 2, and instead now directs that the CAISO "should be allowed to use RDRR, as an RA resource, for economic or exceptional dispatch upon the declaration of a day-of [Energy Emergency Alert ("EEA") Watch (or when a day-ahead EEA Watch persists in the day-of)." (Joint Parties Rehg. App., pp. 2-3.) Joint Parties claim that D.23-06-029 is thus inconsistent with both D.10-06-034 and D.18-11-029. (Joint Parties' Rehg. App., p. 11.) Therefore, Joint Parties allege that what the Commission has characterized as a "clarification" of existing policy is in fact a modification of the 2010 and 2018 decisions and thus requires findings of fact and ordering paragraphs and should not be made effective immediately. (Joint Parties' Rehg. App., p. 2.) Joint Parties allege that "[n]ot

only does this "clarification" fail to meet required legal standards for Commission decisions, but, if enforced by the Commission, wrongly results in eliminating RDRR as an emergency resource, which will lead to them being triggered sooner than they were intended to be, rendering them unavailable during actual emergencies." (Joint Parties' Rehg. App., p. 3.).

We are not persuaded by Joint Parties' arguments. As we clarified in D.23-06-029, the overriding objective for RDRR is that it should be available to mitigate or avoid an emergency grid reliability situation. We noted that prior decisions had the same goal. D.10-06-034 adopted a settlement in which CAISO enabled RDRR bids to be available for dispatch before CAISO emergency measures are taken. D.18-11-029 affirmed the 2010 decision and clarified the CAISO's dispatch order under previous protocols. (D.23-06-029, p. 95.) In the instant Decision, we again clarified the CAISO's dispatch order, which was necessitated by CAISO's change from AWE protocols to the NERC operating procedures. We clarified that CAISO should be able to use RDRR, as an RA resource, for economic or exceptional dispatch when CAISO declares a day-of EEA Watch (or when a day-ahead EEA Watch persists in the day-of.) As we noted, aligning the trigger to a day-of EEA Watch as a condition of RA-eligibility to reflect the NERC protocols is supported by CAISO. (D.23-06-029, p. 96.) While CAISO recognizes this approach may result in more frequent dispatch of RDRR than in the past, it asserts that DR use limitations will continue to be respected.[4] As we emphasized, if the RDRR trigger were later in the EEA sequence, "RDRR would only be enabled to mitigate emergency conditions, not to help prevent them, which is why these resources receive RA payments." (D.23-06-029, p. 97.)

Adjusting the trigger in view of CAISO's new operating procedures under NERC protocols is thus a clarification and not a modification as shown by review of the two prior decisions. As D.10-06-034 states, the reliability-triggered demand response program can be triggered prior before the CAISO canvasses neighboring balancing

[4] CAISO Opening Comments, p. 10.

authorities for energy or capacity. (D.10-06-034, p. 2.) While Joint Parties acknowledge this, they assert without citation that the conditions triggering an EEA Watch do not approach this degree of urgency. (Joint Parties' Rehg. App., p. 11.) In D.23-06-029, we reasonably determined based on the record before us when the trigger should occur, consistent with past decisions. Further, as we observed in D.18-11-029, the intent of D.10-06-034 was to "eliminate the anomalous treatment whereby emergency-triggered demand response counts for resource adequacy yet, unlike all other power that counts for resource adequacy, the CAISO currently procures costly exceptional dispatch energy or capacity before using this energy resource, a practice that has led to charges that ratepayers pay twice for this power." (D.18-06-037, pp. 36-37.)

Joint Parties make several additional vague assertions of legal error regarding the clarification. For example, Joint Parties allege DR cannot contribute to grid reliability "when pushed to dispatch outside their operational limitations, a condition FERC recognized in Order 2222" and which Joint Parties allege was ignored by the Commission. (Joint Parties Rehg. App., p. 20.) Joint Parties do not explain how the Commission's clarification will push DR to dispatch outside of their operational limitations. Also, no further explanation as to what condition FERC is recognizing nor page citation to the FERC order is given. Therefore, this argument fails to meet the requirements of Rule 16.1 that applicants for rehearing specify their claims of legal error so that the Commission may address them. In addition, since CAISO supports this clarification and has stated it will respect DR's operational limitations, it can be assumed that CAISO views the clarification as consistent with the FERC order and does not see an operational problem with dispatching DR during the period where CAISO declares an EEA Watch in the day-ahead or day-of timeframe when CAISO forecasts "one or more hours may be energy deficient."[5]

Because we are clarifying an existing policy, it is appropriate to make it effective immediately. Joint Parties' arguments to the contrary lack merit and are denied.

[5] CAISO Operating Procedure 4410, p. 7; see also CAISO's Opening Comments, p. 10.

3. Commission discretion and authority.

Energy Division's proposal pointed out that no other distribution-connected resources receive a transmission adder, so there is an inconsistency between the treatment of DR and other resources at this time. With regard specifically to the PRM adder, Energy Division asserts that while the current PRM adder accounts for forecast error and forced outages, DR does not lower either factor because if the CAISO does not procure to meet load, there would be no DR load to curtail. (D.23-06-029, pp. 98-99.) Energy Division additionally notes that the CAISO has stated that there is no evidence that DR lowers the system forecast error or the system average forced outage rate.[6]

Energy Division's view is that the administrative burden of "grossing up" RA filings to account for these adders is not currently outweighed by the relatively small ratio of MW that are being processed, and that these related MW do not add to or further support reliability. Energy Division therefore proposes removing the TLF and PRM adders for DR resources. (D.23-06-029, pp. 98-99.)

The Decision agrees with Energy Division and eliminates the TLF and PRM adders to DR resources. We found that there was a significant administrative burden on Energy Division Staff associated with applying the TLF and PRM adders to DR resources. As we noted, the record does not demonstrate that this administrative burden for both the TLF and PRM adders is outweighed by the potential value of the relatively small amount of MW associated with the adders. (D.23-06-029, pp. 99, 102.) Further, according to CAISO's Department of Market Monitoring (DMM), its reports show that PRM and TLF adders "have resulted in RA values that overestimate the availability of DR capacity." Thus, DMM states, removing the adders "is necessary to reduce the extent to which DR capacity is used to meet RA requirements but is then not available under critical system conditions."[7]

---

[6] R.19-11-009, *Track 4 Proposals of the CAISO* (January 28, 2021), p. 9.

[7] DMM Reply Comments, p. 2.

Joint Parties allege that D.23-06-029 erred by eliminating the TLF Adder because the administrative burden to Energy Division is not outweighed "by the relatively small ratio of MW that are being processed." (Joint Parties' Rehg. App., p. 3.) Joint Parties argues that the Decision does not describe how much of an administrative burden the TLF adder represents and that the Commission cannot credibly make this determination. (*Id.* at p. 13.) Joint Parties argue that demand-based resources, by cutting demand, also reduce transmission line losses. (*Id.* at p. 3.) Further, Joint Parties argue that removing the TLF adder will put DR resources at a competitive disadvantage to generation resources, "which are not required to account for TLF when selling capacity in the CAISO market." (*Ibid*.) Joint Parties also allege that the Decision erred in removing the PRM adder. (*Ibid.*)

We did not err in making these policy adjustments to the DR program. The Decision states, the record does not show that this administrative burden for the TLF and PRM adders "is outweighed by the potential value of the relatively small amount of MWs associated with the adders." (D.23-06-029, p. 102.) Finding of Fact 20 states that "[t]here is significant administrative burden on Energy Division Staff associated with apply the TLF and PRM adders to DR resources and a relatively small amount of MW associated with the adders." This finding is fully supported by the record. While Joint Parties contend there is almost no administrative burden to Energy Division in processing the TLF Adder because it can be a single combined adder with the Distribution Loss Factor adder (Joint Parties' Rehg. App., p. 13), they do not point to record evidence to support their argument. A party challenging a Commission's finding for lack of substantial evidence must demonstrate that, based on the evidence before the Commission, a reasonable person could not reach the same conclusion. (*The Ponderosa Telephone Co. v. Public Utilities Com.* (2019) 36 Cal.App.5th 999, 1013.)

Moreover, removal of the adders starts in 2024, giving DR providers time to decide to provide RA capacity or not based on the new terms. The Decision also noted that we may revisit the TLF adder issue, should a more streamlined process for incorporating TLF values into the CPUC and CAISO processes be identified in the

future. (D.23-06-029, p. 102.) With respect to the PRM adder, we reasonably determined based on the record "that removal of the adder is likely to enhance reliability, particularly during stressed conditions, by removing the risk that the PRM adder over-estimates the amount of capacity available to the CAISO on high system stress days." (D.23-06-029, p. 102.)

Finally, in their application for rehearing, Joint Parties present a chart purporting to show the value of the lost DR capacity from eliminating the adders. (Joint Parties' Rehg. App., p. 15.) This chart is new evidence, not in the record of this proceeding and thus not appropriate to raise at the rehearing stage. Discontinuing the use of TLF and PRM adders for DR resources at this time, based on the record before us, is an appropriate exercise of our discretion, to help ensure ratepayer costs are reasonable. Joint Parties' claim that the Commission erred in eliminating the TLF and PRM adders is denied.

4. Proxy DR (PDR) availability requirement.

D.23-06-029 agrees with Energy Division and DMM that the Commission's DR availability requirements should help ensure that DR resources are available when needed most. We found adjustments to the existing DR availability requirements are necessary for DR to be available during the kinds of prolonged weather events experienced recently. The Decision added the requirement that DR resources must also be available during a CAISO Flex Alert, through the last day for which the CAISO has issued a Grid Warning, or the Governor's Office has issued an emergency notice. The Decision acknowledged parties' concerns that while the new additional requirements may present some operational challenges to certain DR providers, the need for limited additional availability of those resources outweighs the potential for those providers to be unable to perform. Finally, due to operational constraints of RDRR, RDRR resources were exempted from the additional requirements. (D.23-06-029, p. 106.)

Joint Parties allege that expanding DR availability will discourage participation by DR providers. (Joint Parties' Rehg. App., p. 16.) According to Joint Parties, this contradicts D.16-09-056 by "adopting a requirement which would stifle DR instead of

"growing" it. (*Ibid.*) Moreover, increasing the frequency as to when DR providers need to be available would create confusion, uncertainty and customer fatigue. (*Id*. at p. 17.) Finally, Joint Parties allege that the expanded availability requirements "are out of step with FERC Order 2222, requiring ISOs to adopt bidding parameters to account for the physical operational characteristics of distributed energy resource (DER) aggregations." (*Id.* at p. 19.)

Aside from Joint Parties' claim that expanding availability conflicts with D.16-09-056's policy to grow DR, which is countered by the fact that the Commission must balance growing DR with its other statutory and decisional responsibilities, the claims above are not legal claims, but rather serve as a caution that the Commission may not receive as much PDR as expected. If a shortfall in PDR does occur, the Commission can further adjust these requirements as necessary. At the same time, Joint Parties fail to acknowledge that the Commission exempted RDRR from the additional requirements for operational reasons. Also, because CAISO supports expanded DR availability, it can be assumed that CAISO does not see a conflict with FERC Order 2222.

Finally, Joint Parties allege Finding of Fact 22 (adjustments are needed to existing DR availability to ensure DR is available during types of prolonged weather events experienced in recent years) and Conclusion of Law 21 (DR availability requirements should be expanded so that resources are available when most needed) do not provide a basis for supporting Ordering Paragraph (OP) 32, which contains the additional availability requirements. (Joint Parties' Rehg. App., p. 23.) Joint Parties claim that the Commission has not demonstrated how OP 32 will improve PDR availability. (*Ibid.*)

Joint Parties' claims lack merit. Joint Parties have the burden of establishing error in a Commission decision. We explained that expanding DR availability due to recent prolonged weather events will improve DR availability when it is most needed. (D.23-06-029, p. 106.) Joint Parties have not shown that the additional requirements will not provide additional PDR availability as expected. Further, the finding and conclusion as well as the rationale discussed in the Decision all support the additional requirements in

the Ordering Paragraph. Thus, we deny Joint Parties' claims that the Commission erred in adopting expanded availability requirements.

5. Third-party DR qualifying capacity values.

Joint Parties allege that the Decision errs in derating third-party DR qualifying capacity (QC) values when IOU DR is not subject to these requirements and based on test results outside the current QC valuation process. (Joint Parties' Rehg. App., pp. 4-5.) Joint Parties cite to D.23-06-029 which orders that "test performance failures will be considered when making capacity awards to non-investor-owned utility demand response (DR) resources procured by third-party DR providers. (D.23-06-029, p. 145, OP 32.) The Decision discusses Energy Division's concern that current test levels do not show that DR resources are performing reliably. (*Id.* at p. 109.) This concern is based on 2022 test performance results, with actual performance considerably below the monthly supply plans. As we noted in the Decision at 111, "[p]erformance in the range from 25 to 50 percent of what is on the supply plans is not an acceptable level of performance." In addition, DR providers do not always submit updated filings as required when resources fall below applicable thresholds. (D.23-06-029, p. 109.)

To address these problems, Energy Division proposed derating the non-IOU DR resources' capacity corresponding to their performance during test events for a particular quarter. Thus, DR resources that consistently fail to deliver their scheduled load curtailments should have their capacity awards lowered to better reflect the actual amount of RA provided. (D.23-06-029, p. 110.) Based on the record of comments and reply comments on Energy Division's proposal before us, we agreed that incorporating test results in capacity estimates "could incentivize resources to provide accurate estimates and to perform better when dispatched" to become more reliable RA resources. (*Id.* at p. 111.)

Joint Parties allege inconsistency with D.16-09-056 and discrimination since unlike third-party DR, which must file supply plans, (and thus have their QC derated if they fail to meet those plans), IOU DR is not required to be on a supply plan, and "thus, IOUs have the freedom to tailor their bids to reflect the capability of their DR sources on

a particular day, which does not need to reflect the QC value awarded it by Energy Division." (Joint Parties' Rehg. App., p. 17.)

Joint Parties fail to recognize the Commission's responsibility pursuant to section 380.5 to ensure DR resources deliver the expected results and provide ratepayer benefits. Since there are differences in calculating IOUs' DR QC and non-IOU third-party QC for RA purposes, Joint Parties have not shown a basis for claiming that the Commission must apply the same standards to both in considering whether to derate third-party DR. Further, while the Commission acknowledged parties' concerns regarding different treatment of DR resources managed by IOUs versus resources managed by third parties, there was evidence to show that "IOU DR resources appear to have met a majority of the scheduled load reductions." (D.23-06-029, p. 111.)

Joint Parties allege that Finding of Fact 24 (third-party DR "is not performing reliably in comparison to monthly supply plans") and Conclusion of Law 23 (third-party DR "QC should be derated based on performance during test events relative to their QC values" are overly broad to support OP 32, which derates third-party DR QC based on test performance failures (D.23-06-029, p. 146). Also, Joint Parties again claim that this provision fails to treat IOU and third-party DR providers equally. These claims lack merit. First, FOF 24 and COL 12 are based on the record and fully support OP 32. Second, as explained above, the factual differences in IOU and third-party DR require us to treat them differently. There is no inconsistency with D.16-09-056.

Joint Parties also claim derating QC based on test results earlier in 2023, before the issuance of this decision, result in retroactive sanctions. (Joint Parties' Rehg. App., p. 5.) Joint Parties' position appears to be that their prior poor performance on test events should be ignored because they did not have notice that their test event performance could impact their future ACT award. Joint Parties are mistaken. Joint Parties had a performance obligation when they were tested, but it had no consequences if they failed to meet their existing obligation prior to D.23-06-029. However, implicit in the Commission's ability to require quarterly performance testing is the authority to set and enforce performance standards and results to ensure ratepayers receive the value they are

paying for. Otherwise, the performance testing would be pointless. Moreover, the Commission has not only the authority but the responsibility to derate capacity for DR providers under section 380.5(a)(2). We would not be complying with section 380.5 if we did not make necessary adjustments to various aspects of the DR program to ensure ratepayer benefits.

Finally, Joint Parties' claim that derating DR QC is inconsistent with D.16-09-056 (Joint Parties' Rehg. App., p.17) does not comply with the requirements of Rule 16.1, since they do not specify the inconsistency or cite to a specific page. The Commission is not required to hunt through a lengthy decision to try to ascertain the legal error.

Derating of DR QC has not been shown to be discriminatory nor does it constitute a retroactive sanction for third-party DR. We made a policy adjustment based on the record, in furtherance of our statutory duty and acted within our discretion. Therefore, Joint Parties' claim of legal error regarding derating of QC lacks merit and is denied.

6. Motion for partial stay.

Joint Parties filed a Motion for Partial Stay of D.23-06-029 pending disposition of the application for rehearing. Joint Parties claim that the partial stay should be granted or else they will be irreparably harmed by the Decision. Since we deny Joint Parties' application for rehearing, the motion for partial stay of the Decision is moot and is denied.

7. Request for oral argument.

The Joint Parties requested oral argument. (Joint Parties' Rehg. App., pp. 26-27.) Under Rule 16.3, oral argument is not necessary as it would not materially assist the Commission in resolving this case and the request is therefore denied.

III. CONCLUSION

For above reasons, we deny rehearing of the Decision.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.23-06-029 is denied.
2. Joint Parties' Motion for Partial Stay of D.23-06-029 is denied.
3. This proceeding remains open.

The order is effective today.

Dated December 14, 2023, at San Francisco, California.

ALICE REYNOLDS
President
DARCIE L. HOUCK
JOHN REYNOLDS
KAREN DOUGLAS
Commissioners

Commissioner Genevieve Shiroma, being necessarily absent, did not participate.