

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 9, 2024

Agenda ID #22502

TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-459:

This is the draft Resolution of Administrative Law Judge Debbie Chiv Resolving K.23-05-017. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

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

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

/s/ MICHELLE COOKE
Michelle Cooke
Chief Administrative Law Judge

MLC:sgu

Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-459
Administrative Law Judge Division
[Date]

RESOLUTION

RESOLUTION ALJ-459. Resolves the Appeal K.23-05-017 of Citation E-4195-0133 by Desert Community Energy.

SUMMARY

This resolution resolves Desert Community Energy's (DCE) appeal of Citation No. E-4195-0133 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation E-4195-0133 cites and fines DCE for failing to procure its year-ahead system Resource Adequacy obligation. This Resolution denies the appeal and closes this proceeding.

BACKGROUND

On October 31, 2022, Desert Community Energy (DCE) filed its year-ahead system Resource Adequacy (RA) compliance showing. On February 13, 2023, the California Public Utilities Commission's (Commission) Energy Division sent DCE a deficiency notice, indicating a need to procure additional megawatts of system RA for the months of July, August, and September 2023.¹ Energy Division provided a deadline of February 21, 2023 to come into compliance. On April 10, 2023, Utilities Enforcement Branch (UEB) staff requested an update from DCE on its 2023 RA deficiencies and on April 11, 2023, DCE informed UEB that it was unable to cure its year-ahead RA deficiencies.

On April 17, 2023, the Commission's Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-0133 to DCE. A penalty of \$374,647.20 was assessed in

¹ While CPED submitted filings that redacted the deficiency months and RA type for this citation appeal, subsequent filings by both parties disclosed this information.

accordance with the schedule of penalties in Resolution E-4195, as modified. On May 18, 2023, DCE filed a notice of appeal of Citation E-4195-0133.

On May 31, 2023, CPED filed its Compliance Filing pursuant to Resolution ALJ-377. On July 21, 2023, CPED and DCE filed a Joint Statement Pursuant to the Administrative Law Judge's (ALJ) ruling requesting responses. On July 25, 2023, the ALJ issued a ruling setting the procedural schedule and scope of issues.

Prepared testimony was served by CPED to the service list on October 13, 2023. On November 28, 2023, an ALJ's Ruling on Procedural Schedule and Other Matters was issued, noting that DCE had not served testimony to the service list and directing DCE to serve its testimony. On November 30, 2023, DCE served its prepared testimony to the ALJ.

On November 17, 2023, DCE and CPED submitted a Joint Response Pursuant to the ALJ's Scoping Memo. In the Joint Response, both CPED and DCE stated that they do not believe an evidentiary hearing is necessary in this proceeding. CPED stated that while it continues to dispute certain facts, CPED can address those disputed facts in briefing without a need for a hearing.

Opening briefs were submitted on January 12, 2024, and reply briefs were submitted on February 2, 2024. On March 4, 2024, the ALJ granted parties' joint motion to admit evidence and granted motions to file confidential documents under seal.

STANDARD OF REVIEW

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

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

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

In Decision (D.) 05-10-042, the Commission adopted a penalty regime for load-serving entities (LSEs) that fail to procure sufficient system RA capacity.² Resolution E-4017 established a citation program to enforce the Commission's RA program requirements and included a schedule of penalties. Resolution E-4195, adopted on November 6, 2008, superseded and replaced Resolution E-4017 in its entirety, and updated the schedule of penalties for violations of the RA requirements. Resolution E-4195 has been modified by several decisions, including D.10-06-036, D.11-06-022, D.14-06-050, and D.19-06-026.

Resolution ALJ-377 established a standardized appeal process for citation appeals and that process applies here. Pursuant to Resolution ALJ-377, Commission staff has the burden to prove by a preponderance of evidence the case supporting issuance of a citation. If that initial burden is met, the burden shifts to the appellant "to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate."³

Lastly, in D.98-12-075, the Commission identified five factors to consider in determining the appropriate level of a fine: (1) the severity of the offense, (2) the entity's conduct, (3) the entity's financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest.⁴ The five-factor test is applicable in reviewing this citation appeal.

DISCUSSION

1. The Citation Correctly Identified and Calculated Appellant's Year-Ahead System RA Deficiencies

The parties agree that the citation correctly identified Appellant's 2023 year-ahead system RA deficiencies and that the citation correctly applied the RA penalty schedule to those deficiencies when calculating the penalty amount.⁵ As such, CPED has met its burden to demonstrate that Appellant's 2023 year-ahead system RA procurement was deficient by the amount shown on the citation and that the penalty amount was correctly calculated based on the established penalty schedule.

Under Resolution ALJ-377, once Commission staff has met its initial burden, the burden shifts to Appellant to demonstrate that a violation did not occur and the citation should not issue, or that the amount of the penalty is inappropriate. Appellant also has the burden to prove any affirmative defenses.

² D.05-10-042 at Conclusion of Law (COL) 21.

³ ALJ-377, Appendix A.

⁴ See D.98-12-075, 1998 Cal. PUC LEXIS 1018, at 52-59.

⁵ Joint Response of DCE and CPED Pursuant to ALJ's Scoping Memo, November 17, 2023, at 1.

2. Appellant Failed to Meet its Burden to Prove that It Was “Commercially Impracticable” or “Impossible” to Procure RA Resources

DCE asserts an affirmative defense that it was “impossible” and/or “commercially impracticable” for it to obtain the necessary RA resources. We address each of these separately.

2.1. “Commercial Impracticability” as an Affirmative Defense

DCE contends that “[c]ommerical impracticability serves as an outright defense to an alleged breach of a performance obligation where performance could have occurred only at an excessive and unreasonable cost.”⁶ The Commission disagrees with DCE’s interpretation of “commercial impracticability” as an affirmative defense applicable to this proceeding.

DCE cites *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710 (1955), to support its claim that “commercial impracticability” is a defense where “performance could have occurred only at an excessive and unreasonable cost.”⁷ As CPED points out, *City of Vernon* involved a contract dispute between two parties where in evaluating the defense of legal impossibility, the Court considered parties’ awareness of the expenses and costs of operation at the time the contract was negotiated.⁸ DCE acknowledges that “[t]his sub-doctrine of commercial impracticability can function as an affirmative defense *to a breach of contract claim* where performance is commercially infeasible or extremely burdensome for the party to perform.”⁹

This citation does not involve a breach of contract claim. As there is no contract at issue in this proceeding, there are no contractual terms for which to consider whether performance could only occur at excessive and unreasonable costs. Rather, the instant citation stems directly from DCE’s failure to comply with the Commission’s requirements, compliance that is required for participation in the RA program.

DCE also cites the Uniform Commercial Code (UCC) to support its claim of commercial impracticability.¹⁰ DCE’s argument that the UCC is somehow applicable strains credulity. The UCC is a model set of laws whose purpose is to “simplify, clarify, and

⁶ DCE Opening Brief, January 12, 2024, at 9.

⁷ *Id.*

⁸ 45 Cal.2d 710, 719; CPED Reply Brief, February 2, 2024, at 6.

⁹ Appeal of DCE from Citation No. E-4195-0133, May 17, 2023 (Citation Appeal) at 7 (emphasis added).

¹⁰ DCE Opening Brief at 11.

modernize the law governing commercial transactions” across the states.¹¹ The UCC does not govern a load-serving entity’s compliance with state regulations, compliance that is required to participate in the RA program under Pub. Util. Code § 380.

DCE next cites Resolution ALJ-382 to support its claim that “the Commission has previously recognized commercial impracticability as a valid affirmative defense in the context of appealing an RA Citation.”¹² It is unclear how Resolution ALJ-382 supports DCE’s position. In Resolution ALJ-382, which has since been vacated by the Commission and is pending a rehearing, the term “commercial impracticability” does not appear anywhere in the decision. The decision references the appellant’s claim that there were “commercially unreasonable” prices to procure RA requirements. However, the Commission then rejects this as a defense:

[San Jose Clean Energy (SJCE)] asserts that unfavorable market conditions made it commercially unreasonable for it to meet its system and flexible RA requirements and argues that this should be considered as a mitigating factor for its failure to do so. To the contrary, the cost of operating as an LSE as required by law is not a mitigating factor for failure to meet these requirements.¹³

Further, in D.21-12-066, vacating Resolution ALJ-382 and granting a rehearing, the term “commercial impracticability” does not appear anywhere in the decision. Despite what DCE claims, that decision does not recognize as a defense that compliance was “commercially unreasonable, if not impossible.”¹⁴ D.21-12-066 merely grants rehearing to give the appellant an opportunity to prove its assertions.¹⁵

DCE also cites D.22-07-025, which upheld Resolution ALJ-406, and claims that the Commission “considered SJCE’s commercial impracticability defense...but found that SJCE failed to show an abuse of market power that led to the excessive RA pricing.”¹⁶ It is again unclear how D.22-07-025 supports DCE’s position. As DCE admits in a footnote to its brief, “[t]he Commission ultimately rejected SJCE’s commercial impracticability defense....”¹⁷

¹¹ See Article 1 of the Uniform Commercial Code, § 1-103.

¹² DCE Opening Brief at 10.

¹³ Resolution ALJ-382, *Resolves the Appeal of K-19-03-024 of Citation E-4195-0052 by San Jose Clean Energy*, at 5.

¹⁴ DCE Opening Brief at 10.

¹⁵ D.21-12-022 at 6.

¹⁶ DCE Opening Brief at 10.

¹⁷ *Id.* at Footnote 51.

To be clear, Resolution ALJ-406 not only denied SJCE's claim of commercial impracticability but expressly rejected the defense of commercial impracticability in the context of RA citation appeals. Responding to the appellant's argument that noncompliance should be excused "when market conditions render it commercially impracticable to procure system RA," the Commission stated:¹⁸

To the contrary, none of these decisions endorse the principle that commercial impracticability due to market conditions alone excuses compliance with RA requirements. Rather, the decisions uniformly emphasize that, while the Commission will act to protect ratepayers from the failure of the market due to market power, tight market conditions alone are not reason to excuse compliance with RA compliance.

Moreover, the decision found that the Commission *cannot reduce or waive a penalty* for RA deficiencies on the basis of commercially impracticable costs and terms without notice to stakeholders in the RA Rulemaking:¹⁹

Waiving or reducing [San Jose Clean Energy's] penalty for system RA deficiencies on the basis that tight market conditions render costs and terms commercially impracticable would in effect countermand the Commission's prior decisions implementing the RA requirements without notice to the stakeholders in violation of Pub. Util. Code § 1708.

In addition to Resolution ALJ-406, we underscore that the Commission has previously denied commercial impracticability as an affirmative defense against failure to comply with RA requirements on numerous occasions.²⁰

For all of these reasons, the Commission concludes that "commercial impracticability" is not a recognized affirmative defense for failing to comply with the Commission's RA requirements. Accordingly, DCE has failed to meet its burden to prove that

¹⁸ Resolution ALJ-406, *Resolves K.20-04-005, the Appeal of City of San Jose, administrator of San Jose Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division*, at 3.

¹⁹ Resolution ALJ-406 at Conclusion of Law 2.

²⁰ See Resolution ALJ-442, *Resolves the Appeal of K.21-03-005 of Citation E-4195-0098 by San Diego Community Power*, at 10; Resolution ALJ-432, *Resolves the Appeal of K.21-11-001 of Citation E-4195-0107 by San Diego Community Power*, at 11; Resolution ALJ-424, *Resolves the Appeal of K.21-08-001 of Citation E-4195-100 by Commercial Energy*, at 16.

“commercial impracticability” is an affirmative defense recognized by the Commission in the context of RA citation appeals.

Lastly, we observe that DCE uses the term “commercial impracticability” interchangeably with various other terms, such as “unreasonable terms and conditions,” “excessive and unreasonable cost,” and “unreasonable expense.”²¹ DCE provides no legal basis to demonstrate that “unreasonable” terms, conditions, or expenses serve as an affirmative defense in this context. DCE also provides no definition as to what “unreasonable” terms, conditions, and costs means in the context of this proceeding. The Commission also finds that DCE has failed to meet its burden to prove that “unreasonable” terms, conditions, and costs is an affirmative defense recognized by the Commission in the context of RA citation appeals.

2.2. “Impossibility” as an Affirmative Defense

DCE argues that “it was impossible for DCE to comply with its final 2023 [year-ahead] obligation by Commission-imposed deadlines due to a lack of commercially reasonable conforming RA products in a failing RA market.”²² We note that DCE uses the term “legal impossibility” interchangeably with “commercial impracticability;” for example, DCE contends that “[t]he doctrine of legal impossibility (i.e., commercial impracticability) is a valid legal defense where performance could have occurred only at an excessive and unreasonable cost.”²³ Yet DCE also argues that impossibility is a defense “where performance was literally impossible....”²⁴

To the extent that DCE is arguing that “impossibility” is the same as “commercial impracticability,” as we discussed above, the Commission does not recognize commercial impracticability as an affirmative defense in this context. However, we will consider whether DCE has met its burden to prove “literal impossibility” as an affirmative defense. For the reasons discussed below, the Commission finds that DCE has failed to meet its burden.

2.2.1. DCE Failed to Bid into Investor-Owned Utility Solicitations

First, the Commission finds that July, August, and September 2023 (hereinafter referred to as 3rd Quarter or Q3) system RA resources were available for procurement through investor-owned utilities’ (IOU) requests for offer (RFO) solicitations issued in 2021 and 2022. However, DCE failed to participate in the available IOU solicitations. According

²¹ See DCE Opening Brief at 9, 11, 16.

²² DCE Opening Brief at 9.

²³ DCE Reply Brief, February 2, 2024, at 9.

²⁴ DCE Opening Brief at 9.

to CPED's testimony, San Diego Gas and Electric Company (SDG&E) issued an RFO solicitation on September 30, 2021 and Southern California Edison (SCE) issued a RFO solicitation on August 12, 2022, both of which included Q3 2023 system RA resources.²⁵ Yet, DCE failed to bid into either SDG&E's or SCE's solicitations.²⁶ In response to CPED's testimony, DCE offers no explanation as to why it failed to participate in two RFO solicitations for available Q3 2023 system RA resources and/or how failing to participate in these solicitation fits within DCE's claim that it was "impossible" to procure system RA resources.

By opting not to participate in SCE's or SDG&E's solicitations for available Q3 2023 system RA resources, and by providing no explanation why it failed to do so, DCE has failed to meet its burden to prove that it was impossible to procure Q3 2023 system RA.

2.2.2. DCE Rejected Competitively-Priced Bids

Second, DCE testifies that in response to three RFOs it issued for 2023 system RA resources, DCE received 38 bids from third parties.²⁷ DCE claimed that it rejected the majority of these bids because they "were submitted at commercially unreasonable prices or for terms and volumes that did not align with DCE's risk management policies or needs."²⁸

In reviewing the 38 bids DCE rejected, however, several bids for Q3 2023 system RA were rejected despite DCE describing the bids as "pricing competitive."²⁹ Specifically, DCE rejected at least two bids submitted for its July 26, 2021 RFO with the following rationale: "Declined - pricing competitive but narrowly edged out."³⁰ It is unclear why DCE declined competitively-priced bids and DCE provides no other explanation for these rejections.

Further, in its brief, DCE states that it was "able to procure a majority of its Summer Months RA and did so at prices in the Six Dollar (\$6) to Seven Dollar and Fifty Cents (\$7.50) per kilowatt-month (kW-month) range."³¹ Yet several bids for Q3 2023 system RA submitted for the July 26, 2021 RFO were within the \$6.00 - \$7.50 price range but

²⁵ CPED Opening Brief at 11-12 (citing Exhibit CPED-2C, Prepared Testimony of Vicky Zhong at 8 (Zhong Testimony), Attachment 22 (SCE's August 12, 2022 Solicitation) and Attachment 19 (SDG&E's 2023 RA Solicitation Result)).

²⁶ *Id.* at Attachment 11 (DCE's Supplemental Response to CPED's DR_ELE-00217-1).

²⁷ Exhibit DCE-01, Opening Testimony of Ryan Belgram (Belgram Testimony), at 5-6.

²⁸ *Id.*

²⁹ See Exhibit CPED-2C, Zhong Testimony, at Attachment 11, Reference Item 1.1.c,1.1.j.

³⁰ See *id.*

³¹ DCE Opening Brief at 5.

still rejected by DCE as “price too high.”³² In addition, at least two bids priced between \$6.00 - \$7.50 were declined without any explanation.³³ It is unclear why DCE declined bids priced within \$6.00 - \$7.50, a range which DCE testified was an acceptable price range.

Additionally, several bids in response to DCE’s July 2021 RFO were rejected as priced “above market” or “too high.”³⁴ However, one year later, DCE submitted bids for Q3 2023 system RA in response to third-party solicitations at well-above the July 2021 bid prices.³⁵ It appears that DCE rejected bids in summer 2021 at what it deemed at the time to be “above market” prices - only to find that in summer 2022 (with the October 31 RA compliance deadline just a few months away) DCE would need to offer bids at much higher prices than what it would have paid in July 2021.

By rejecting competitively-priced bids and bids within the \$6.00-\$7.50/kW-month range, DCE fails to demonstrate that it was impossible to procure Q3 2023 system RA. Moreover, DCE’s interpretation of an “above market” RA price shifted depending on the procurement timeline, and perhaps, depending on the proximity to the October 31 compliance filing deadline.

2.2.3. DCE Rejected Available Bilateral Offers

Third, DCE argues that its procurement agent The Energy Authority, Inc. (TEA) was unable to secure sufficient Q3 2023 RA through bilateral negotiations as “efforts mostly resulted in DCE being informed that Summer Months RA was simply not available.”³⁶ In its testimony, however, CPED points to eight bilateral offers that TEA rejected between June 2021 and October 2022.³⁷ Each of these offers included Q3 2023 system RA resources and several were priced between the \$6.00-\$7.50/kW-month range. Based on TEA’s responses to third-party brokers via chat messenger, DCE’s broker provides little explanation as to why these competitively-priced offers for Q3 2023 system RA were rejected. For example:³⁸

³² See Exhibit CPED-2C, Zhong Testimony, at Attachment 11, Reference Item 1.1.c.

³³ See *id.* at Attachment 11, Reference Items 1.1.c; 1.1.c,1.1.h.

³⁴ See, e.g., *id.* at Attachment 11, Reference Item 1.1.c,1.1.l, Reference Item 1.1.c.

³⁵ See, e.g., *id.* at Attachment 11, Reference Items 2.1.c-e, Reference Item 2.2.c, Reference Item 2.3.b.2.5.e.

³⁶ DCE Opening Brief at 4.

³⁷ Exhibit CPED-2C, Zhong Testimony at 9-10 (citing Attachment 26 (TEA and Karbone Bilateral Negotiation Transcript) and Attachment 27 (TEA and Tullett Prebon Bilateral Negotiation Transcript)).

³⁸ See *id.*

1. TEA's response to a June 17, 2021 offer: "thanks, but no interest that far out at this point."
2. TEA's response to a October 14, 2021 offer: "thanks for showing, but no interest at the moment."
3. TEA's response to a January 6, 2022 offer: "A little too far out for me at this point."
4. TEA's response to a February 8, 2022 offer: "I think I'm good on 2023 till summer time...would like to see actual needs before buying or selling anything else."
5. TEA's response to a May 25, 2022 offer: "someone will be interested, but it doesn't fit me too well."

DCE provided no response to CPED's testimony as to why these bilateral offers were rejected and/or how rejecting these offers fits within DCE's claim that it was "impossible" to procure system RA resources.

Additionally, for numerous bilateral offers sent to TEA that included Q3 2023 system RA, no response was provided by TEA on behalf of DCE. DCE asserts that if a third-party broker made an offer related to DCE's procurement over chat messenger and TEA's response was redacted, "there was no further discussion in regards to that broker's offer," at least as it "related to DCE's procurement."³⁹ DCE adds that "many offers are not seen, evaluated, considered, or provided a response."⁴⁰ For example, in chat messages between TEA and a Tullett Prebon broker, it appears that over 20 offers for Q3 2023 system RA were sent to DCE's broker between November 2021-September 2022 "related to DCE's procurement" and no response was provided on behalf of DCE.⁴¹ Likewise, in chat messages between DCE's broker and a Karbone broker, over ten offers for Q3 2023 system RA were sent to DCE's broker between October 2020-July 2022 related to DCE's procurement and no response was provided on behalf of DCE.⁴²

As DCE's broker failed to provide a response on behalf of DCE for a large number of bilateral offers that included Q3 2023 system RA, DCE has failed to demonstrate that it was impossible to procure Q3 2023 system RA.

³⁹ DCE's Response to Administrative Law Judge's Email Ruling Directing DCE to File a Response Regarding Basis for Redactions to Attachments, February 26, 2024, at 7-11.

⁴⁰ *Id.*

⁴¹ See e.g., Exhibit CPED-2C, at Attachment 27 (chat messages dated November 29, 2021, December 13, 2021, January 6, 2022, January 13, 2022, January 20, 2022, June 13, 2022).

⁴² See e.g., *id.* at Attachment 26 (chat messages dated October 6, 2020, February 10, 2021, September 27, 2021, January 5, 2022, February 17, 2022).

In summary, the evidence clearly demonstrates that Q3 2023 system RA resources were available to DCE for procurement throughout 2021 and 2022. However, DCE failed to participate in either SCE's or SDG&E's RFO solicitation for available resources, rejected bids that were priced competitively and/or within \$6.00-\$7.50/kW-month, rejected bids in summer 2021 that were priced far below prices it would later accept in summer 2022, and failed to respond to numerous bilateral offers for available resources through its broker. For these reasons, DCE fails to demonstrate that it was "impossible" to procure Q3 2023 system RA resources to meet its RA obligations.

Lastly, the Commission finds that several of the representations made by DCE in its filings are misleading and concerning, including misrepresenting what the Commission stated in a decision or resolution, and submitting witness testimony that is unsupported by the facts in evidence. We caution DCE that its representations before the Commission may implicate Rule 1.1 of the Commission's Rules of Practice and Procedure.⁴³

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

As discussed in Section 1 of the Standard of Review, pursuant to Resolution ALJ-377, Commission staff has the burden to prove by a preponderance of evidence the case supporting issuance of a citation. Once that initial burden is met, the burden shifts to the appellant "to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate."⁴⁴ We next consider whether DCE has otherwise satisfied its burden to demonstrate that the citation should not issue or that the amount of the penalty is inappropriate.

In D.98-12-075, the Commission identified five factors to consider in assessing the appropriate level of a fine: (1) the severity of the offense, (2) the entity's conduct, (3) the entity's financial resources, (4) the role of precedent, and (5) the totality of the circumstances in the public interest. We address each factor in turn.

⁴³ See Rule 1.1 of the Commission's Rules of Practice and Procedure:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

⁴⁴ ALJ-377, Appendix A.

3.1. Severity of the Offense

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

Economic harm reflects the amount of expense which was imposed upon the victims, as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. In comparison, violations which caused actual physical harm to people or property are generally considered the most severe, with violations that threatened such harm closely following.⁴⁵

The Commission further observed:

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm may not be to consumers but rather to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities: [citing Pub. Util. Code Section 702].⁴⁶

The Commission noted that “[s]uch compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.”⁴⁷

Based on the evidence, we find that DCE deliberately failed to procure sufficient system RA capacity to meet the Commission’s RA requirements. DCE does not argue that it inadvertently failed to procure sufficient RA capacity.

DCE argues that its year-ahead deficiencies were not severe because it satisfied its 2023 system RA obligations for nine of 12 months.⁴⁸ As we have previously stated, “the RA program was established in the wake of the 2000 Western energy crisis and was designed to ensure that LSEs secure sufficient electrical capacity to maintain grid

⁴⁵ D.98-12-075 at 54.

⁴⁶ *Id.* at 55.

⁴⁷ *Id.*

⁴⁸ DCE Reply Brief at 3.

reliability.”⁴⁹ The RA program was designed to ensure there was sufficient electricity for 12 months of the year and thus, LSEs are required to meet RA obligations for 12 months of the year. The Commission finds that DCE’s deliberate failure to meet its year-ahead RA requirements for three months of the year – and particularly during the critical summer months - threatened the reliability of the electrical grid and was a severe violation. As the Commission has previously held, “the deliberate failure to meet RA requirements is accorded a high level of severity.”⁵⁰

DCE also argues that its year-ahead deficiencies were not severe because it was able to close its July position before submitting its July 2023 month-ahead RA showing.⁵¹ DCE’s argument is without merit. In the RA program, year-ahead and month-ahead RA obligations are distinct requirements that are equally critical for grid reliability and penalties for year-ahead and month-ahead violations are assessed separately. The fact that DCE met its July 2023 month-ahead system obligation does not mitigate its year-ahead July 2023 penalty. Rather, if DCE had not met its July 2023 month-ahead obligation, it would have been subject to additional penalties if the deficiency was incremental to the year-ahead deficiency.

The Commission also finds that DCE’s deliberate violations harmed the integrity of the Commission’s regulatory processes. In establishing the RA penalty program, the Commission underscored the importance of holding LSEs that participate in the RA program accountable for non-compliance: “A regulatory program that imposes significant procurement obligations upon LSEs cannot be expected to succeed unless those LSEs have reason to believe there are consequences for noncompliance that outweigh the costs of compliance.”⁵²

In summary, we find that DCE’s deliberate failure to procure sufficient RA capacity for three months of the year threatened grid reliability and harmed the integrity of the regulatory process, and therefore, is accorded a high level of severity.⁵³

3.2. The Entity’s Conduct

As stated in D.98-12-075, this factor “recognizes the important role of the public utility’s conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing

⁴⁹ Resolution ALJ-424 at 8.

⁵⁰ *Id.* See also Resolution ALJ-406 at 5.

⁵¹ DCE Reply Brief at 3.

⁵² D.05-10-042 at 93.

⁵³ See D.98-12-075 at 56; Resolution ALJ-406 at 5; Resolution ALJ-424 at 8.

and rectifying the violation.”⁵⁴ In considering a utility’s actions to prevent a violation, the Commission states that “[p]rudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives” and that the Commission “will consider the utility’s past record of compliance with Commission directives.”⁵⁵ In considering a utility’s actions to detect a violation, the Commission states that “[d]eliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor.”⁵⁶

DCE argues that its penalty should be reduced because, in addition to meeting its July 2023 month-ahead requirement, DCE sought RA even after the Commission deadline had passed.⁵⁷ We are not persuaded. As discussed above, meeting a month-ahead RA obligation is a requirement of the RA program. In addition, although LSEs submit their RA compliance filing to the Commission on October 31, LSEs have until Energy Division’s issuance of a deficiency notice (and up to five days after) to cure any deficiencies and avoid penalties. Therefore, DCE’s continued efforts to procure RA past the October 31 deadline does not mitigate its deficiencies or penalties.

DCE also argues that it took its RA requirements seriously and “made all commercially reasonable efforts to satisfy its RA obligations....”⁵⁸ First, we note that “commercially reasonable efforts” is not a standard by which the Commission evaluates system RA compliance. Second, as discussed in Section 2 above, Q3 2023 system RA resources were available to DCE for procurement. However, DCE failed to participate in either SCE’s or SDG&E’s RFO solicitation for available resources, rejected bids that were priced competitively, rejected bids in summer 2021 that were priced far below prices it would later accept in summer 2022, and failed to respond to numerous bilateral offers for available resources through TEA. The evidence demonstrates that DCE passed up numerous opportunities to procure available system RA resources and did not take “reasonable steps to ensure compliance with Commission directives.”⁵⁹

The Commission has previously determined that under this factor, where appellant’s “failure to meet its regulatory requirements was deliberate, as opposed to inadvertent,”

⁵⁴ D.98-12-075 at 56.

⁵⁵ *Id.*

⁵⁶ *Id.* at 57.

⁵⁷ DCE Opening Brief at 12.

⁵⁸ DCE Reply Brief at 4.

⁵⁹ *See* D.98-12-075 at 56.

this is considered an aggravating factor.⁶⁰ As such, DCE's deliberate failure to meet its RA obligations is an aggravating factor.

Under this factor, we also consider a utility's "past record of compliance with Commission directives."⁶¹ We note that DCE has been assessed two additional citations from CPED for RA violations since the issuance of the instant citation appeal.⁶² However, as DCE is currently appealing these citations, the additional citations do not inform this factor.

3.3. Financial Resources

Under this factor, D.98-12-075 states that "[e]ffective deterrence also requires that the Commission recognize the financial resources of the public utility in setting a fine which balances the need for deterrence with the constitutional limitations on excessive fines."⁶³ The Commission "intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources."⁶⁴

DCE argues that its financial resources "support dismissal or reduction because DCE is a small retail seller of electricity with fewer resources than the IOUs and larger CCAs and with a smaller customer base across which to spread its costs."⁶⁵ CPED contends that DCE "has not stated it did not have the financial resources to procure sufficient system RA."⁶⁶

The Commission agrees that DCE does not argue that it does not have the financial resources to procure sufficient RA or to pay the penalty. That DCE has a smaller customer base or that DCE is a newer entrant to the RA program has no bearing on this factor. Indeed, Pub. Util. Code Section 380, which established the RA program, provides that the RA requirements must be applied to each LSE equally in a non-discriminatory manner. Pursuant to Pub. Util. Code § 380(e):

⁶⁰ Resolution ALJ-424 at 8; Resolution ALJ-406 at 5.

⁶¹ See D.98-12-075 at 56.

⁶² See UEB's Energy Citations Issued, available at: [Enforcement Actions Spreadsheet – January 2024.xlsx \(ca.gov\)](#).

⁶³ See D.98-12-075 at 56.

⁶⁴ *Id.*

⁶⁵ DCE Opening Brief at 13.

⁶⁶ CPED Opening Brief, January 12, 2024, at 14.

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

As such, the size of DCE's customer base or how recently DCE became an RA market participant cannot be a consideration for enforcement of the RA requirements, and therefore, does not inform this factor. As DCE does not argue that it lacks the financial resources to pay the penalty, this factor is neither a mitigating nor aggravating factor in our analysis.

3.4. Role of Precedent

D.98-12-075 provides that: "In future decisions which impose sanctions, the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome."⁶⁷

CPED argues that the role of precedent does not favor mitigation because the Commission has not mitigated the RA penalties of other LSEs, and because precedent is clear that the size of the penalty is based on a penalty schedule tied to the deficiency size.⁶⁸ DCE acknowledges that Commission precedent does not favor mitigation because the Commission has not mitigated the RA penalties of other LSEs.⁶⁹

In several Commission resolutions addressing RA appeals, the Commission determined that: (1) the appellant deliberately failed to procure sufficient RA capacity to meet its obligations, and (2) upheld the citation and penalty based on the penalty tied to the size of the deficiency.⁷⁰ DCE has provided no Commission precedent that adjusted an RA citation penalty downward or upward, or otherwise deviated from the RA penalty schedule.

⁶⁷ D.98-12-075 at 60.

⁶⁸ CPED Opening Brief at 15.

⁶⁹ DCE Reply Brief at 5.

⁷⁰ See Resolution ALJ-432; Resolution ALJ-424; Resolution ALJ-406.

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

3.5. Totality of the Circumstances

D.98-12-075 provides that:

Setting a fine at a level which effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.⁷¹

DCE contends that upholding the citation “will not serve the public interest” because it will not encourage compliance with the RA program.⁷² DCE further argues that “[n]o amount of penalty can deter noncompliance where compliance is impossible.”⁷³ The Commission is not persuaded by this argument because, as discussed in Section 2, DCE failed to demonstrate it was impossible to procure the sufficient RA resources.

DCE also argues that it would be counterproductive to uphold the penalty related to July 2023 RA because that “would discourage LSEs in the future from attempting to close open RA positions once they receive a YA RA citation.”⁷⁴ This argument is without merit. As discussed above, month-ahead and year-ahead RA obligations are separate requirements with separate penalties. Therefore, LSEs that fail to close open year-ahead RA positions in the month-ahead RA time frame can be assessed an additional penalty.

Based on the totality of the circumstances, including the previous four factors, we find no mitigating factors and one aggravating factor. Despite the aggravating factor, the Commission finds that the established RA penalty schedule should apply to DCE’s deficiency amount. As such, DCE’s assessed citation shall not be excused and the penalty shall not be reduced. DCE should be aware that continued non-compliance

⁷¹ D.98-12-075 at 59.

⁷² DCE Opening Brief at 14.

⁷³ *Id.*

⁷⁴ DCE Reply Brief at 6.

with Commission programs and orders may result in penalties that exceed the penalty schedule.

CONCLUSION

Based on the five-factor test in D.98-12-075, DCE failed to meet its burden to rebut CPED's demonstration that the violations occurred and DCE failed to meet its burden of persuasion that the citation penalty should be reduced or excused. The citation appeal is hereby denied.

COMMENTS

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

FINDINGS OF FACT

1. On April 17, 2023, CPED issued Citation E-4195-0133 to DCE. A penalty of \$374,647.20 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified.
2. On May 18, 2023, DCE filed a Notice of Appeal of Citation E-4195-0133.
3. Citation E-4195-0133 correctly identifies DCE's deficiencies in procurement of its June, July, and August 2023 year-ahead system RA obligations.
4. Citation E-4195-0133 correctly calculates the penalties pursuant to the penalty schedule adopted in Resolution E-4195, as modified.

CONCLUSIONS OF LAW

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

Therefore, **IT IS ORDERED** that:

1. Citation E-4195-0133 is affirmed.

2. Desert Community Energy shall pay a fine of \$374,647.20 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102 within 30 days of the effective date of this resolution.
3. K.23-05-017 is closed.

This resolution is effective today.

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

Rachel Peterson
Executive Director

ALJ/DBB/sgu

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RESOLUTION ALJ-459. Resolves the Appeal K.23-05-017 of
Citation E-4195-0133 by Desert Community Energy.

INFORMATION REGARDING SERVICE

I have electronically served all persons on the attached official service list who have provided an e-mail address for K.23-05-017.

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

Dated April 9, 2024, at San Francisco, California.

/s/ SHANE GUTTO

Shane Gutto

N O T I C E

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

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

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

Resolution ALJ-459 ALJ/DBB/sgu

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***** SERVICE LIST *****

**Last Updated on 09-APR-2024 by: KB3
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