Decision 25-04-043 April 24, 2025

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Appeal of Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions from Citation No. E-4195-0113 in the Amount of $567,132.50 Issued on October 21, 2021 by Consumer Protection and Enforcement Division.	K.21-11-018

ORDER GRANTING REHEARING AND MODIFYING RESOLUTION ALJ-463

I. SUMMARY

This Order addresses the application for rehearing of Resolution ALJ-463 (Resolution)[1] filed by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions (Shell). In the Resolution, we denied Shell's appeal of Citation No. E-4195-0113 (Citation) issued by the Commission's Consumer Protection and Enforcement Division (CPED). CPED cited and fined Shell Energy $567,132.50 for failing to procure certain of its 2020 year-ahead local Resource Adequacy (RA) obligations after the Commission's Energy Division (ED) denied Shell Energy's request for a penalty waiver.

Shell timely filed an application for rehearing alleging the Resolution erred by: (1) applying the standard for evaluating RA penalty waiver requests to Shell's impossibility defense; (2) rejecting Shell's impossibility defense because it was based only on constrained market conditions; (3) concluding that Shell's impossibility defense is not supported by a preponderance of the evidence in light of the whole record; (4) denying access to relevant discovery; (5) assigning Shell the burden of proof as to the

[1] Unless otherwise noted, citations to Commission Resolutions issued since July 1, 2000 are to the official pdf versions, which are available on the Commission's website at: https://docs.cpuc.ca.gov/ResolutionSearchForm.aspx.

penalty factors; and (6) failing to separately state findings of fact as to Shell's impossibility defense and penalty factor analysis.

We have carefully considered all the arguments presented by the rehearing applicant and we are persuaded that granting rehearing is warranted as to whether the correct standard was applied in the citation appeal. However, we do not find it necessary to order further proceedings. Instead, based on the law, record evidence, and mitigating factors, we vacate and modify certain portions of Resolution ALJ-463 and reduce Shell's penalty to $10,000. Because we grant rehearing on one of the grounds, we do not address all of the issues Shell raises in its rehearing application.

II. BACKGROUND

On October 21, 2021, CPED issued Citation E-4195-0113 to Shell, assessing a penalty of $567,132.50 in accordance with the penalty schedule set out in Resolution E-4195, as modified,[2] for Shell's failure to comply with its 2020 year-ahead local RA requirements. On November 22, 2021, Shell filed a Notice of Appeal of Citation E-4195-0113. A detailed background and procedural history are set out in the Resolution and are adopted herein by reference. (*See* Resolution, pp. 1-4.)

III. DISCUSSION

A. The Resolution erroneously applied the standard for evaluating penalty waiver requests to Shell's impossibility defense.

Shell alleges that we abused our discretion by applying the standard for evaluating RA waivers to its impossibility defense. (Rehg. App., p. 8.) Shell's argument has merit.

Civil Code section 3531 states: "The law never requires impossibilities." That is, the law recognizes exceptions to statutory requirements due to impossibility of performance. (*See People v. Board of Supervisors* (1867) 33 Cal. 487, 492; *see also*

[2] Resolution E-4195 superseded and replaced Resolution E-4017 which initially established the citation program for enforcement of the RA program. Resolution E-4195 has been subsequently modified by several decisions, including D.10-06-036, D.11-06-022, D.14-06-050, and D.19-06-026.

County of San Diego v. Milotz (1953) 119 Cal.App.2d Supp. 871, 883-884 884 ["Where an act is impossible of performance, implied exceptions are recognized to mandatory requirements, but such exceptions are based upon impossibility."]; *see also* 73 Am.Jur.2d (2012) Statute, § 15: ["[W]here strict compliance with the terms of a statute is impossible, compliance as near as can be has been permitted on the principle that the law does not require impossibilities."].)

The California Supreme Court has recently held that "[i]mpossibility can occasionally excuse noncompliance with a statute, but in such circumstances, the excusal constitutes *an interpretation of the statute* in accordance with the Legislature's intent, not an invalidation of the statute." (*National Shooting Sports Foundation, Inc. v. State of California* (2018) 5 Cal.5th 428, 433 (emphasis in original).) Previously, the Supreme Court had "excused compliance with a state statute requiring drainage efforts that would have brought 'financial ruin' and 'irreparable injury' to an irrigation district and its landowners." (*Id.* at p. 434, citing *Sutro Heights Land Co. v. Merced Irrigation Dist.* (1931) 211 Cal. 670, 703.) The Court of Appeal, on the other hand, rejected a county's argument that "its financial straits leave it literally unable to comply with the [State's] mandate" because the evidentiary record did "not demonstrate impossibility sufficient to justify a preliminary injunction against complete enforcement of the statutory scheme." (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300.) The court noted that the administrative officer's uncontradicted evidence "do[es] not show that the County will *ever* be unable to make the … payments at the heart of the dispute." (*Ibid*.)

The burden of proving the facts upon which the defense of impossibility rests lies with the party claiming the defense. (*Oosten v. Hay Haulers Dairy Employees & Helpers Union* (1955) 45 Cal.2d 784; see Resolution E-4195, Appendix A, Sec. 2.7.7 and Resolution ALJ-377, Appendix B, p. 27.) The determination of whether the impossibility exception applies involves a fact-specific inquiry and depends on the obstacles faced by the party and their exercise of reasonable diligence in overcoming those obstacles. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580.) Thus, whether a party

established that compliance with a statute or requirement was impossible and whether the resulting penalty should be mitigated rests on the evidentiary record.

The Resolution relied extensively on our prior determination as to Shell's local RA waiver request that "Shell Energy did not use all commercially reasonable efforts to procure 2020 local RA capacity in the Stockton [Local Resource Area (LRA)] because it did not conduct an RFO." (Resolution, p. 6.) However, the standard for evaluating a penalty waiver[3] is distinct from the legal standard for the impossibility defense. In evaluating Shell's impossibility defense, the undisputed fact that Shell did not conduct a mass RFO should have been considered in light of the whole record and given appropriate weight. Once CPED established that Shell did not comply with the local RA requirements and the fine was correctly calculated pursuant to Resolution E-4195, we may consider whether the evidence in the record warrants mitigating Shell's penalty based on the five-factor test we established in D.98-12-075. (See *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-088* (1998) [D.98-12-075].)[4]

B. The Resolution erroneously placed the burden of proof on Shell in applying the five-factor test assessing the propriety of the penalty.

Shell asserts that the Resolution erroneously shifted to Shell the burden of proof under D.98-12-075's five-factor penalty analysis. (Rehg. App., p. 25, citing Resolution, p. 14.) Indeed, D.98-12-075 does not place a burden on any party to prove whether fines and in what amount are warranted. (D.98-12-075, pp. 34-39.) Instead,

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[3] D.06-06-064 requires load-serving entities (LSEs) who wish to obtain a local RA penalty waiver to demonstrate that (1) "the LSE reasonably and in good faith solicited bids" through a "Request for Offer or other form of solicitation" and (2) that "despite having actively pursued all commercially reasonable efforts to acquire the resources needed" it either received no bids or only bids below the applicable threshold. (*Opinion on Local Resource Adequacy Requirements* (2006) [D.06-06-064], p. 72.)

[4] Available at: https://files.cpuc.ca.gov/legacycpucdecisionsandresolutions/decisions/Decisions_D9507001_to_D9905055/D9812075_19981217_R9804009.pdf

D.98-12-075 sets out five "principles [that] distill the essence of numerous Commission decisions concerning penalties in a wide range of cases" and that can be used "as precedent in determining the level of penalty in the full range of Commission enforcement proceedings…." (*Id.* at p. 34.)[5]

The Resolution applied the five-factor test to consider whether there were any mitigating factors that would warrant a reduction in Shell's penalty. (Resolution, pp. 12-20.) Based on its reliance on our prior determination that Shell did not fulfill the requirements to obtain a local RA penalty waiver, the Resolution determined that mitigation of the penalty was not warranted. (*Ibid*.) But, as described above, the Resolution erroneously applied the standard for evaluating penalty waiver requests to Shell's impossibility defense. Therefore, we find that rehearing is warranted to reconsider whether Shell's penalty should be mitigated under our five-factor test.

C. The evidence in the record warrants reducing Shell's penalty from $567,132.50 to $10,000.

The five factors set out in D.98-12-075 are: (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. (D.98-12-075, pp. 36-39.) Based on the unique facts in the record before us, we find that mitigation of Shell's penalty is appropriate. We consider each factor in turn.

1. Severity of the offense.

The first factor includes several considerations: economic harm (particularly upon any victims), any unlawful benefits gained by the public utility, any actual or threatened physical harm, harm to the integrity of the regulatory process, and

[5] We also clarify that nothing in D.98-12-075 or other Commission decisions precludes the use of D.98-12-075's five-factor penalty analysis in citation appeals. Resolution E-4195 states that "[i]n the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Penalty." (Resolution E-4195, Appendix A, p. 10.) Thus, while CPED staff does not have discretion to deviate from the penalties schedule, we and the assigned ALJ are able to consider the five-factor test in determining the citation appeal and thereafter.

deliberate versus inadvertent wrongdoing. (D.98-12-075, pp. 55-57.) The Resolution concluded that Shell failed to meet "its burden to prove that it was impossible to comply with its RA obligations, nor did it prove that there was no local RA capacity available" and "[o]ther than stating that its violations were not deliberate, Shell Energy provides no evidence of 'inadvertent wrongdoing.'" (Resolution, p. 14.) The Resolution again cited to the prior finding in ED's local RA waiver process that Shell "did not use commercially reasonable efforts to comply with its RA requirement" as its basis for concluding that Shell failed to carry its burden on this factor. (Resolution, p. 14.)

As discussed above, however, the five-factor test does not impose upon Shell a burden of proof and "commercially reasonable efforts" is not the relevant legal standard for a citation appeal. Shell presented undisputed evidence of its unsuccessful attempts to procure local RA prior to February 7, 2020, as well as expert and circumstantial evidence regarding market conditions. (Ex. Shell-03, 3:3-5:20; Ex. Shell-03, Appendix A, Attachment B; Ex. Shell-01, 7:11-15:19; Ex. Shell-03, Appendix B, Attachment C, pp. 1-15.) Following ED's notice of non-compliance, and months before ED's denial of Shell's waiver request, the evidence demonstrates that Shell substantially increased its efforts to procure additional capacity for 2020 but was unsuccessful. (Ex. Shell-03, 3:3-6:11; Ex. Shell-03, Appendix B.)[6]

CPED's testimony was premised on Resolution E-5158, D.22-03-036, and D.22-08-055. Specifically, "that Shell Energy did not demonstrate that it pursued all commercially reasonable efforts as required by D.06-06-064, when it did not issue a solicitation via a Request for Offer (RFO)" and the conclusion that Shell "did not carry

[6] Shell also submitted evidence of its actions after February 7, 2020. (See Ex. Shell-03, 4:13-15; see also Appendix A, Attachment B, and Appendix B.) However, because this citation appeal pertains to Shell's 2020 year-ahead RA obligations and deficiencies, this Order does not consider evidence of Shell's actions after February 7, 2020 (the deadline for Shell to cure its 2020 year-ahead deficiencies). This is because the relevant question to the citation is whether it was possible for Shell to fulfill its year-ahead local RA obligations prior to the January 31, 2020 deficiency letter from ED or within the five-business day cure period (ending on February 7, 2020). Or, if Shell was unable to do so due to a lack of available local RA on the market. We do not reach the question of or make any determinations in this Order as to Shell's month-ahead compliance.

its burden to show that it undertook 'all' procurement efforts." (Ex. CPED-02, 2:9-13.) CPED largely did not dispute or otherwise address Shell's assertion of facts regarding its procurement efforts and the state of the local RA market in the Stockton LRA. (See Ex. CPED-02, 2:7-4:25.) CPED's conclusions were premised on the undisputed fact that Shell did not conduct a mass RFO for the purpose of obtaining a local RA waiver. It is also undisputed that Shell failed to comply with its local RA obligations.

Given that there was no economic or physical harm, no unlawful benefits gained by Shell, and no evidence that Shell's violations were deliberate, the only factor that weighs in the favor of a fine here is the harm to the integrity of the regulatory process. We have previously explained that because "compliance is absolutely necessary to the proper functioning of the regulatory process[,] … disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity." (D.98-12-075, p. 36.) We have regularly fined public utilities that failed to comply with various applicable statutes but have also often mitigated the amount of the fine based on the unique circumstances of each violation. (See *Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure* (2015) [D.15-04-008], p. 4 [imposing a penalty of $870,000 for knowingly failing to disclose information as demonstrated by evidence and testimony that exclusion "was not an accident"]; *Opinion Imposing Sanctions for Violations of Commission Ex Parte Rules* (2002) [D.02-12-003] [finding *ex parte* violation severe because of utilities' disregard for Commission rules but party conduct following violation mitigated the severity].)[7] As to violations of RA requirements specifically, we have previously held that deliberately rejecting bids is accorded a high level of severity. (*Order Denying Rehearing of Resolution ALJ-406* (2022) [D.22-07-025], p. 5.)

Here, although Shell concedes that it did not comply with its local RA requirement and that it filed its year-ahead compliance report with a known deficiency,

[7] Unless otherwise noted, citations to Commission Decisions issued since July 1, 2000 are to the official pdf versions, which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

there is no evidence demonstrating that the violation was deliberate, *i.e.*, that Shell deliberately failed to contract for local RA capacity. To the contrary, Shell sought to demonstrate its attempts at compliance and requested a local RA waiver at the same time as it filed its compliance report.

On the other hand, "[w]e adopted the RA program to ensure the reliability of electric service in California." (D.22-07-025, p. 4.) The purpose of the RA program is "to ensure that sufficient electrical power resources would be available to the California Independent System Operator (CAISO), to spur infrastructure development, and to effectively and fairly allocate procurement responsibilities among participants." (*Ibid*.) We specifically recognized "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." (D.05-10-042, p. 93.) Compliance with the RA program is, therefore, of utmost importance.

It is undisputed that Shell's citation was warranted. We also recognize that certain unique and unprecedented facts may hinder compliance efforts. In the absence of evidence in the record that Shell's failure to comply with our requirements was deliberate and that Shell could have fulfilled its requirements but did not (for example, by deliberately rejecting bids), the evidence slightly favors penalty mitigation.

2. Entity's conduct.

As provided in D.98-12-075, the second factor "recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation." (D.98-12-075, p. 56.) In considering a utility's actions to prevent a violation, we have stated that "[p]rudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives" and that we "will consider the utility's past record of compliance with Commission directives." (*Ibid*.) The Resolution concluded that Shell did not take reasonable steps to ensure compliance with its local RA requirements because its "initiations of RFOs in February 2020" were insufficient to mitigate its year-ahead local

RA deficiencies and penalties. (Resolution, p. 16.) Additionally, the Resolution concluded that Shell did not act to "prevent the violation" because it "did not use commercially reasonable efforts to procure local RA capacity." (*Ibid.*)

First, as discussed above, ED's denial of Shell's local RA waiver because Shell did not "use commercially reasonable efforts" by failing to conduct a mass RFO is only one factor to consider. There is other evidence in the record regarding Shell's solicitation efforts and the lack of available capacity in the local market. (Ex. Shell-03, 5:10-6:11; Ex. Shell-03, Appendix B, Attachment C, pp. 1-24; Energy Division Report, pp. 35, 40-41; Ex. Shell-01, 8:19-9:2, 9:14-16, 13:6-13:14, 15:16-19, 16:13-19; compare with Ex. CPED-02, 2:7-9, 3:6, 3:18-19, 4:23-24, 5:5-5:6, 6:7.) We have since clarified that a broad RFO is necessary as part of "all commercially reasonable" efforts showing of penalty waiver. (D.22-03-036, p. 3; see also Resolution E-5158, p. 6 [Shell "has held RFOs for its compliance year 2021 and 2022 local RA procurement, which complied with the waiver criteria contained in D.06-06-064"].) As to the unique facts before us, however, the evidence in the record also demonstrates that Shell timely notified ED of the deficiency, reasonably sought a local RA waiver, and thereafter sought to rectify the deficiency. (Ex. Shell-03, 4:11-15, Appendices A, B, and D.)

Second, and important in considering Shell's conduct here, there is no indication in the record that Shell was aware prior to June 2020, the date of ED's waiver denial letter to Shell, that its traditional procurement efforts were unreasonable or somehow insufficient absent a mass RFO, "notif[ying] a broad distribution list of RA market participants and potential sellers of [LSE's] need." (Resolution, p. 7; see also Resolution E-5158, pp. 5-6.) The evidence in the record reasonably supports Shell's arguments that it attempted to procure and then attempted to cure its year-ahead deficiencies through some efforts but was unsuccessful. There is also no evidence in the record of past violations. Thus, this factor weighs in favor of penalty mitigation.

3. Financial resources.

As to the third 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." (D.98-12-075, p. 57.) We "adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources." (*Id*. at p. 59.) The Resolution concluded that this factor was neither a mitigating or aggravating factor because Shell did "not argue that it lacks the financial resources to pay the penalty…." (Resolution, p. 17.)

Shell does not dispute this finding on rehearing. Thus, the Resolution properly concluded that this factor neither mitigates nor aggravates Shell's penalty.

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." (D.98-12-075, p. 60.) The Resolution concluded Shell did not cite to any precedent that "adjusted an RA citation penalty downward or upward, or otherwise deviated from the RA penalty schedule" therefore "this factor favors affirming the citation penalty based on the penalty schedule tied to the size of the deficiency." (Resolution, pp. 18-19.)

First, we have previously applied the five-factor test in only four RA citation appeals and while we did not adjust the penalty amount in any of those citation appeals, this was due to the unique facts of each citation appeal and not because we concluded that adjusting the penalties was generally inappropriate. Resolution E-4195 does not preclude our adjustments to the penalty schedule on appeal or rehearing. (Resolution E-4195, Appendix A, p. 10 ["[i]n the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Penalty"].)

Second, our precedent has been factually distinct from the evidence presented here. Prior citation appeals rejected LSEs' impossibility defenses based on evidence that LSEs failed to participate in RFOs or rejected bids. The evidence here, however, does not establish the same. (Ex. Shell-03, 3:3-5:15-20, Appendix B.) Because

there are sufficient differences between our precedent and the unique record here, we conclude that this factor neither mitigates nor aggravates Shell's penalty.

5. Totality of the circumstances.

D.98-12-075 requires us to "specifically tailor the package of sanctions, including any fine, to the unique facts of the case." (D.98-12-075, p. 59.) "In all cases, the harm will be evaluated from the perspective of the public interest." (D.98-12-075, p. 59.) The Resolution, citing Resolution ALJ-424, rejected Shell's "argument that the penalty has no deterrent effect" since the deficiencies were "caused by market conditions beyond its control, including that it was impossible to procure local RA, and due to the disaggregation of the PG&E Other area." (Resolution, pp. 19-20.)

The other cases discussed by Resolution ALJ-424 did not address impossibility based on the same facts as those presented here. For example, the cited LSE in Resolution ALJ-424 held its own RFO but "did not participate in any RFO solicitations offered by other market participants to procure for its 2021 local requirements," including at least five solicitations held by PG&E. (Resolution ALJ-424, pp. 9-10.) Based on the evidence in the record, we concluded that "Appellant deliberately failed to procure sufficient local RA capacity … [and did] not argue that it inadvertently failed to procure…." (Resolution ALJ-424, p. 8.) There is no evidence in the record here to support the conclusion that Shell's actions were deliberate. (Ex. Shell-03, 3:3-5:20, Appendix B.) Thus, this factor weighs in favor of penalty mitigation.

6. Shell's penalty should be reduced to $10,000 based on the five-factor test.

Shell was penalized a total of $567,132.50 for its 2020 year-ahead local RA deficiency in the Stockton LRA. (Citation, p. 4.) CPED determined that Shell partially decreased its local RA deficiencies for some months in 2020 by February 7, 2020. (*Id*. at p. 6.) Thus, consistent with the RA penalty schedule, Shell was partially fined for the deficiency it had timely cured and partially fined for those it was unable to timely cure, or cure at all. (*Id*. at p. 12.)

As discussed above, three of the five factors weigh in favor of penalty mitigation and two factors are neutral based on the evidence in the record before us. Shell's undisputed evidence demonstrates that Shell: began procurement in February 2019, participated in PG&E's RFO, did not reject any local RA offers based on price, was not aware of any entities with potential RA capacity to sell in Stockton LRA, unsuccessfully contacted 12 parties prior to October 2019, and continued contacting counterparties through February 7, 2020. (See generally Ex. Shell-03.)[8] Additionally, circumstantial evidence demonstrates that there was local RA capacity shortage and that shortage led to numerous LSEs seeking penalty waivers. (Energy Division Report pp. 35, 40-41; Ex. Shell-01, 7:11-15:19.)

CPED determined that Shell partially decreased its local RA deficiencies by the February 7, 2020 deadline to cure. (Citation, p. 6.) Thus, consistent with the RA penalty schedule, Shell was fined $10,000 for the local RA deficiency it timely cured. (*Id*. at p. 13.) Shell does not dispute that this portion of the fine was appropriate. (See November 22, 2021 *Notice of Appeal of Citation No. E-4195-0113 by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions* (Citation Appeal), pp. 2, 8 ["If any penalty is imposed on Shell Energy, the penalty should be limited to $10,000, which is the applicable fine for curing a portion of Shell Energy's local RA deficiency (more than 10 MW) within five business days of the Energy Division's deficiency notice."].)

As a result, we therefore find it reasonable to reduce Shell's penalty to $10,000.

IV. CONCLUSION

For the reasons stated above, good cause has been demonstrated to grant rehearing of Resolution ALJ-463. The Resolution is modified consistent with the discussion above and as reflected in Appendix A.

[8] As noted in footnote 6, *supra*, this Order does not consider Shell's actions after the February 7, 2020 deadline to cure 2020 year-ahead deficiencies because any actions Shell took after the deadline would have been untimely to comply with the year-ahead requirement.

THEREFORE, IT IS ORDERED that:

1. Rehearing of Resolution ALJ-463 is granted.

2. Sections of Resolution ALJ-463 that are inconsistent with this Order are vacated as reflected in Appendix A.

3. Resolution ALJ-463 is modified as reflected in Appendix A.

4. Shell Energy North America (US), L.P.'s penalty pursuant to Citation No. E-4195-0113 is reduced by $557,132.50 from $567,132.50 to $10,000.

5. The Commission's Fiscal Office shall refund to Shell Energy North America (US), L.P. $557,132.50 within 60 days of this Order.

6. This proceeding, K.21-11-018, is closed.

This order is effective today.

Dated April 24, 2025, at Sacramento, California.

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

APPENDIX A

Resolution ALJ-463
Resolves the Appeal K.21-11-018

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-463
Administrative Law Judge Division

R E S O L U T I O N

RESOLUTION ALJ-463. Resolves the Appeal K.21-11-018 of Citation E-4195-0113 by Shell Energy North America.

SUMMARY

This resolution resolves Shell Energy North America's (US), L.P. d/b/a Shell Energy Solutions' (Shell Energy or Appellant) appeal of Citation No. E-4195-0113 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation E-4195-0113 cites and fines Shell Energy for failing to procure certain of its 2020 local Resource Adequacy obligations. This Resolution grants, in part, the appeal and closes this proceeding.

BACKGROUND AND PROCEDURAL HISTORY

On October 31, 2019, Shell Energy submitted its year-ahead local Resource Adequacy (RA) compliance showing, as well as a waiver request via Advice Letter 20-E for its 2020 local RA requirement in three of the disaggregated Pacific Gas and Electric Company (PG&E) Other local areas.[1]

On January 31, 2020, the California Public Utilities Commission's (Commission) Energy Division sent Shell Energy a deficiency notice, indicating a need to procure additional megawatts of local RA for the 2020 compliance year in the Stockton local reliability area (LRA).[2] Energy Division provided a deadline of February 7, 2020 to come into compliance.

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[1] PG&E Other local areas refer to six local areas in PG&E's Transmission Access Charge area: Fresno, Kern, Sierra, Stockton, Humboldt, and North Coast/North Bay.

[2] While CPED submitted filings that redacted the deficiency type and location for this citation, subsequent filings by both parties disclosed this information.

On June 1, 2020, Energy Division's Director issued a letter denying Shell Energy's request for a waiver of its 2020 local RA obligation, stating that Shell Energy did not issue a Request for Offers (RFO) to solicit bids, "and therefore did not pursue all commercially reasonable efforts to acquire the resources needed to meet the [load-serving entity's] LSE's local procurement obligation."[3]

On June 8, 2020, Shell Energy submitted a letter for reconsideration of Energy Division's denial of the waiver request. On August 19, 2021, the Commission issued Resolution E-5158, which denied Shell Energy's letter for reconsideration of the waiver request denial for the 2020 RA compliance year and granted the letter for reconsideration of the waiver request denial for the 2021 and 2022 RA compliance years. In denying Shell Energy's letter for reconsideration for the 2020 RA year, the Resolution stated that: "Shell Energy did not make every commercially reasonable effort by not holding an RFO, therefore, does not meet the standards for granting their local waiver."[4]

On September 22, 2021, Shell Energy appealed Resolution E-5158 in an Application for Rehearing. On October 21, 2021, the Commission's Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-0113 to Shell Energy, assessing a penalty of $567,132.50 in accordance with the schedule of penalties in Resolution E-4195, as modified. On November 22, 2021, Shell Energy filed a Notice of Appeal of Citation E-4195-0113. On December 3, 2021, CPED filed its Compliance Filing in accordance with Resolution ALJ-377.

On November 24, 2021, Shell Energy filed a Motion For Stay of Appeal of Citation E-4195-0113 until the Commission acts on Shell Energy's September 22, 2021 Application for Rehearing of Resolution E-5158. On December 8, 2021, the Administrative Law Judge (ALJ) granted the motion to stay. On March 17, 2022, the Commission issued Decision (D.) 22-03-036, modifying Resolution E-5158 and denying the rehearing of Resolution E-5158. On April 13, 2022, Shell Energy filed a Motion to Continue Stay of Appeal of Citation E-4195-0113 until Shell Energy exhausts its remedies as to D.22-03-036.

On April 18, 2022, Shell Energy filed an Application for Rehearing of D.22-03-036. On April 28, 2022, an ALJ's ruling granted Shell Energy's motion to continue stay of the

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[3] Energy Division Letter to Marcie Milner, June 1, 2020, available at: https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/resource-adequacy-homepage/resource-adequacy-compliance-materials/local-waivers/sena-al-20-e-2020-ya-local-waiver-letter.pdf.

[4] Resolution E-5158 at 6.

citation appeal until the Commission issues a decision on the Application for Rehearing of D.22-03-036.

On August 26, 2022, the Commission issued D.22-08-055, dismissing Shell Energy's Application for Rehearing as procedurally improper, finding that the second Application for Rehearing amounted to a "second-round application" that raised no new issues.[5]

On January 23, 2023, the proceeding was reassigned from ALJ Peter Wercinski to ALJ Syche Cai. On April 11, 2023, the ALJ issued a ruling requesting a joint submission on various issues, including identifying facts in dispute. On April 28, 2023, a Joint Response of Shell Energy and CPED was filed (Joint Response). On July 26, 2023, the ALJ issued a Ruling Setting Schedule and Scope of Issues.

On September 8, 2023, Shell Energy submitted a subpoena request for personnel from Energy Division to produce certain documents. On October 25, 2023, the ALJ issued a Ruling Denying the Subpoena Request as outside the scope of the proceeding and as vague and overly broad. On November 13, 2023, Shell Energy filed a Motion for Reconsideration of the ALJ's Ruling Denying the Subpoena Request.

Prepared testimony was served by Shell Energy to the service list on November 15, 2023. Reply testimony was served by CPED on November 30, 2023.

On December 14, 2023, Shell Energy and CPED submitted a Joint Response to Administrative Law Judge's Ruling Setting Schedule and Scope of Issues (Second Joint Response). In the Second Joint Response, both CPED and Shell Energy stated that they conferred and determined that there are no material facts in dispute, any remaining disputed issues are issues of law that can be addressed through briefing, and that evidentiary hearings are not needed.

Opening briefs were submitted on January 22, 2024. Reply briefs were submitted on February 5, 2024. The record was submitted on February 5, 2024, upon the submission of reply briefs.

On July 2, 2024, the proceeding was reassigned from ALJ Syche Cai to ALJ Debbie Chiv. On July 26, 2024, the assigned ALJ issued a ruling addressing parties' respective motions to admit evidence, motions to file confidential exhibits under seal, motions to file confidential documents under seal, and motion for official notice. On August 13,

[5] D.22-08-055 at 2-3.

2024, the ALJ issued a Ruling Denying the Motion for Reconsideration of the ALJ's Ruling Denying the Subpoena Request.

STANDARD OF REVIEW

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

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

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

In D.05-10-042, the Commission adopted a penalty regime for LSEs that fail to procure sufficient system RA capacity.[6] Resolution E-4017 established a citation program to enforce the RA program's 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. The burden of proving an affirmative defense, including impossibility, rests with the party claiming the defense.[7] The burden of proof required of appellant is the same as that required of Commission staff – by a preponderance of the evidence.

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

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[6] D.05-10-042 at Conclusion of Law 21.

[7] Resolution E-4195, Appendix A, Sec. 2.7.7; Resolution ALJ-377, Appendix B, p. 27.

circumstances in the public interest.[8] The five-factor test is applicable in reviewing this citation appeal.

DISCUSSION

As a preliminary matter, the Commission notes that prior to and including the instant citation appeal, Shell Energy's 2020 local RA deficiencies in the Stockton LRA have been the subject of an extensive appellate process before the Commission, spanning four years. The appellate is history is summarized as follows:

(1) In October 2019, Shell Energy requested a local waiver from Energy Division for deficiencies in meeting its 2020 local requirements in the Stockton LRA.

- In June 2020, Energy Division's Director denied the waiver, stating that Shell Energy did not issue an RFO and therefore did not pursue all commercially reasonable efforts to procure to meet its local RA obligations.
- In June 2020, Shell Energy filed a letter for reconsideration of the denial of the waiver request.
- In August 2021, the Commission issued Resolution E-5158, denying the letter for reconsideration and affirming Energy Division's denial of the local waiver.

(2) In September 2021, Shell Energy filed its first Application for Rehearing of Resolution E-5158.

- In March 2022, the Commission issued D.22-03-036, modifying and denying the rehearing of Resolution E-5158.

(3) In April 2022, Shell Energy filed a second Application for Rehearing of D.22-03-036.

- In August 2022, the Commission issued D.22-08-055, dismissing Shell Energy's second Application for Rehearing of D.22-03-036 as procedurally improper.

(4) In October 2021, CPED issued Citation E-4195-0113 for Shell Energy's 2020 local RA deficiencies in the Stockton LRA.

[8] *See* D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *52-59.

- In November 2021, Shell Energy filed the instant appeal of Citation E-4195-0113.

The Commission has reviewed and affirmed Energy Division's denial of Shell Energy's waiver request for its 2020 local deficiencies three separate times with Resolution E-5158, D.22-03-036 and D.22-08-055. As we stated in the July 26, 2023, Administrative Law Judge's Ruling Setting Schedule and Scope of Issues, arguments relitigating the denial of the local waiver request will not be considered here.[9]

Shell Energy does not dispute "that it did not conduct an RFO and that the Commission concluded that as a result of this omission Shell Energy did not take all commercially reasonable efforts and that Shell Energy was not entitled to a waiver as a result."[10] Thus, in considering the instant citation appeal, we underscore the Commission's non-appealable determination: Shell Energy did not use all commercially reasonable efforts to procure 2020 local RA capacity in the Stockton LRA because it did not conduct an RFO.

The issues to be addressed in the instant citation appeal are: (1) whether the citation correctly identified Shell Energy's deficiencies in meeting its local RA obligations, and (2) whether the citation penalty for Shell Energy's local RA deficiencies was correctly calculated and lawfully assessed based on the five-factor test identified in D.98-12-075.

1. The Citation Correctly Identified and Calculated Shell Energy's 2020 Local RA Deficiencies

CPED and Shell Energy both agree that the citation correctly identified Shell Energy's 2020 year-ahead local RA deficiencies and that the citation correctly applied the RA penalty schedule to those deficiencies when calculating the penalty amount.[11] As such, CPED has met its burden to demonstrate that Shell Energy's 2020 local RA procurement was deficient by the amount shown on the citation and that the penalty amount was correctly calculated based on the established penalty schedule.

Under Resolution ALJ-377, once the Commission staff has met its initial burden, Appellant then has the burden to prove any affirmative defenses or introduce evidence supporting its argument that mitigation of the penalty is warranted.

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[9] Administrative Law Judge's Ruling Setting Schedule and Scope of Issues, July 26, 2023, at 3.

[10] Shell Energy Opening Brief at 1.

[11] Shell Energy Notice of Appeal to Citation No. E-4195-0113 at 8, Joint Response at 3.

2. <u>Although Past Commission Decisions Have Rejected an Affirmative Defense of Impossibility Based on Market Conditions Alone, the Undisputed Evidence in the Record Differentiates This Proceeding</u>

First, we address Shell Energy's argument that it "should not be subjected to substantial fines for failing to procure required RA when compliance was impossible due to market conditions."[12] CPED responds that several past Commission decisions have repeatedly stated that market conditions do not excuse non-compliance with RA requirements.[13] Shell Energy counters that these past Commission decisions are distinguishable to the instant citation appeal because those decisions involved system RA deficiencies (not local RA), the appellants argued that it was commercially impracticable to procure (not "literally impossible"), and those decisions do not involve the evidence in this appeal (*e.g.*, eleven other LSE waiver requests, the disaggregation of PG&E Other areas).[14] For the reasons discussed, we find the instant citation appeal distinguishable from past Commission decisions addressing RA citation appeals.

In Resolution ALJ-442, system RA resources were available for procurement through the investor-owned utilities (IOU) RFO solicitations but San Diego Community Power "opted not to participate in all available IOU solicitations," "rejected offers that would have partially reduced its system RA deficiency," and "rejected available RA resources that it deemed were too expensive."[15]

In Resolution ALJ-459, system RA resources were available for procurement through IOU RFOs but Desert Community Energy "failed to participate in the available IOU solicitations," rejected a majority of 38 competitively priced bids as "commercially unreasonable," and rejected eight bilateral offers, all without explanation.[16]

In Resolution ALJ-432, San Diego Community Power "opted not to participate in all available IOU solicitations," bid "far below what it knew, or should have known, was

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[12] Shell Energy Opening Brief at 2. *See also* Shell Opening Brief at 13 ("As shown by the number of waivers granted by Energy Division, the market conditions in the Stockton LRA meant that compliance would be impossible for a significant portion of LSEs.").

[13] CPED Opening Brief at 14.

[14] Shell Energy Reply Brief at 6.

[15] Resolution ALJ-442, *Resolves the Appeal of K.21-03-005 of Citation E-4195-0098 by San Diego Community Power* (2023) pp. 4-5.

[16] Resolution ALJ-459, *Resolves the Appeal of K-23-05-017 of Citation E-4195-0133 by Desert Community Energy* (2024) pp. 7-11.

necessary to procure RA resources, which resulted in rejected offers," and "rejected available RA resources that it deemed were too expensive."[17]

In Resolution ALJ-406, the cited LSE "rejected bids that would have met its system RA obligations on the basis that it considered their terms and prices to be commercially impracticable."[18]

In Resolution ALJ-298: (1) the cited LSE did not assert or seek to establish by a preponderance of the evidence an affirmative impossibility defense, and (2) the appeal disputed the appropriate fine amount, not whether compliance was impossible.[19]

In Resolution ALJ-424, the cited LSE held its own RFO but "did not participate in any RFO solicitations offered by other market participants to procure for its 2021 local requirements," including at least five solicitations held by PG&E.[20] Resolution ALJ-424 noted that "[b]ased on the evidence, … Appellant deliberately failed to procure sufficient local RA capacity … [and did] not argue that it inadvertently failed to procure…."[21]

In contrast to the above cases, the undisputed evidence here demonstrates that Shell participated in the PG&E RFO, did not place unreasonable bids, and did not reject any offers.[22]

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

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. Shell presented considerable evidence, largely

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[17] Resolution ALJ-432, *Resolves the Appeal of K.21-11-001 of Citation E-4195-0107 by San Diego Community Power* (2023) pp. 4-7.
[18] Resolution ALJ-406, *Resolves K.20-04-005, the Appeal of City of San Jose, administrator of San José Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division* (2021) p. 1.
[19] Resolution ALJ-298, *Affirming the Penalty Assessed Against 3 Phases Renewables in Citation E-4195 as Modified by Decision 11-06-022* (2014) pp. 1-3.
[20] Resolution ALJ-424, *Resolves the Appeal K.21-08-001 of Citation E-4195-100 by Commercial Energy* (2022) pp. 9-10.
[21] Resolution ALJ-424, p. 8.
[22] Ex. Shell-03, 3:3-6:11.

undisputed, supporting its argument that the unique facts of this citation appeal warranted a reduction of the penalty assessed by CPED.[23] We address each factor in turn.

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.

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].

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." The Commission also distinguished a utility's conduct as "deliberate" versus "inadvertent" wrong-doing, stating that "[d]eliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor."

In this case, Shell presented undisputed evidence of its unsuccessful attempts to procure local RA prior to February 7, 2020, as well as expert and circumstantial evidence regarding market conditions.[24] Following Energy Division's notice of non-compliance, and months before Energy Division's denial of Shell's waiver request, the

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[23] November 22, 2021 *Notice of Appeal of Citation No. E-4195-0113 by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions*, pp. 20-23.

[24] Ex. Shell-03, 3:3-5:20; Ex. Shell-03, Appendix A, Attachment B; Ex. Shell-01, 7:11-15:19; Ex. Shell-03, Appendix B, Attachment C, pp. 1-15.

evidence demonstrates that Shell substantially increased its efforts to procure additional capacity for 2020 but was unsuccessful.[25]

CPED's testimony was premised on Resolution E-5158, D.22-03-036, and D.22-08-055. Specifically, "that Shell Energy did not demonstrate that it pursued all commercially reasonable efforts as required by D.06-06-064, when it did not issue a solicitation via a Request for Offer (RFO)" and the conclusion that Shell "did not carry its burden to show that it undertook 'all' procurement efforts."[26] CPED largely did not dispute or otherwise address Shell's assertion of facts regarding its procurement efforts and the state of the local RA market in the Stockton LRA.[27] CPED's conclusions were premised on the undisputed fact that Shell did not conduct a mass RFO for the purpose of obtaining a local RA waiver. However, this undisputed fact must be considered in light of the whole record, including Shell's undisputed evidence.

Given that there was no economic or physical harm, no unlawful benefits gained by Shell, and no evidence that Shell's violations were deliberate, the only factor that weighs in the favor of a fine here is the harm to the integrity of the regulatory process. Generally, "disregarding a statutory or Commission directive, regardless of the effects on the public, [is] accorded a high level of severity."[28] The Commission has regularly fined public utilities that failed to comply with various applicable statutes but have also often mitigated the amount of the fine based on the unique circumstances of each violation.[29] As to violations of RA requirements specifically, the Commission has previously held that deliberately rejecting bids is accorded a high level of severity.[30]

Here, although Shell concedes that it did not comply with its local RA requirement and that it filed its year-ahead compliance report with a known deficiency, there is no

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[25] Ex. Shell-03, 3:3-6:11; Ex. Shell-03, Appendix B.
[26] Ex. CPED-02, 2:9-13.
[27] See Ex. CPED-02, 2:7-4:25.
[28] D.98-12-075, p. 36.
[29] See *Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure* (2015) [D.15-04-008], p. 4 [imposing a penalty of $870,000 for knowingly failing to disclose information as demonstrated by evidence and testimony that exclusion "was not an accident"]; *Opinion Imposing Sanctions for Violations of Commission Ex Parte Rules* (2002) [D.02-12-003] [finding ex parte violation severe because of utilities' disregard for Commission rules but party conduct following violation mitigated the severity].
[30] *Order Denying Rehearing of Resolution ALJ-406* (2022) [D.22-07-025], p. 5.

evidence demonstrating that the violation was deliberate, *i.e.*, that Shell deliberately failed to contract for local RA capacity. To the contrary, Shell sought to demonstrate its attempts at compliance and requested a local RA waiver at the same time as it filed its compliance report. Therefore, while Shell's citation was warranted, the evidence is in favor of penalty mitigation.

3.2. The Entity's Conduct

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

First, as discussed above, Energy Division's denial of Shell's local RA waiver because Shell did not "use commercially reasonable efforts" by failing to conduct a mass RFO is only one factor to consider. There is no indication in the record that a mass RFO would have rectified the lack of available capacity in the local market.[31] However, the Commission has subsequently required a mass RFO as part of establishing reasonable procurement efforts. As to the facts in the record here, the evidence in the record demonstrates that Shell timely notified Energy Division of the deficiency, reasonably sought a local RA waiver, and thereafter sought to rectify the deficiency.[32]

Second, and important in considering Shell's conduct here, there is no indication in the record that Shell was aware prior to June 2020 that its traditional procurement efforts were unreasonable or somehow insufficient absent a mass RFO.[33] The evidence in the record reasonably supports Shell's arguments that it attempted to procure and then attempted to cure its deficiencies but was unsuccessful. There is also no evidence in the record of past violations. Thus, this factor weighs in favor of penalty mitigation.

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[31] Ex. Shell-03, 5:10-6:11; Ex. Shell-03, Appendix B, Attachment C, pp. 1-24; Energy Division Report, pp. 35, 40-41; Ex. Shell-01, 8:19-9:2, 9:14-16, 13:6-13:14, 15:16-19, 16:13-19; compare with Ex. CPED-02, 2:7-9, 3:6, 3:18-19, 4:23-24, 5:5-5:6, 6:7.

[32] Ex. Shell-03, 4:11-15, Appendices A, B, and D.

[33] Notice of Appeal, pp. 5-8.

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." The Commission "intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources."

Shell Energy argues that the penalty amount is disproportionate and excessive relative to the size of its energy services business in California and that Shell Energy serves a relatively small share of statewide load. CPED counters that Shell Energy did not present evidence regarding its overall size in terms of its ability to pay the penalty, nor did Shell Energy argue that it does not have the financial resources to procure sufficient RA or pay the citation penalty.

As this factor considers fine levels based on each utility's financial resources, the Commission notes that Shell Energy does not argue that it does not have the financial resources to pay the penalty, nor did Shell Energy present evidence as to its financial resources.

The Commission finds that Shell Energy's smaller share of statewide load has no bearing on this factor. Pub. Util. Code Section 380, which established the RA program, provides that the RA requirements must be applied to each LSE equally and enforced in a non-discriminatory manner. Moreover, the Commission has previously rejected consideration of the size of an LSE's customer base in applying this factor, stating that "the size of [appellant's] customer base or how recently [appellant] became an RA market participant cannot be a consideration for enforcement of the RA requirements, and therefore, does not inform this factor."

In addition, while Shell Energy argues that the penalty "is disproportionate and excessive" relative to the size of its energy business in California, we note that the RA penalty structure is based on a formula that calculates a penalty based on the amount of the LSE's RA deficiency. Therefore, the penalty amount is proportionate to the size of Shell Energy's local RA deficiency.

As Shell Energy 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." Thus, this factor calls for consideration of previously issued Commission decisions that impose sanctions as precedent for future Commission decisions that impose sanctions.

First, the Commission has previously applied the five-factor test in only four RA citation appeals and while the Commission did not adjust the penalty amount in any of those citation appeals, this was due to the unique facts of each citation appeal and not because the Commission concluded that adjusting the penalties was generally inappropriate. Resolution E-4195 does not preclude the Commission's adjustments to the penalty schedule on appeal or rehearing.[34]

Second, the Commission's precedent has been factually distinct from the evidence presented here. Prior citation appeals rejected LSEs' impossibility defenses based on evidence that LSEs failed to participate in RFOs or rejected bids. The evidence here, however, does not establish the same.[35] Because there are sufficient differences between our precedent and the unique record here, this factor neither mitigates nor aggravates Shell's penalty.

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

[34] Resolution E-4195, Appendix A, p. 10 ["[i]n the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Penalty"].
[35] Ex. Shell-03, 3:3-5:15-20, Appendix B.

> well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.[36]

Shell argues that imposing a penalty here would have no deterrent effect because Shell's deficiency was caused by market conditions beyond its control, including that it was impossible to procure local RA and due to the disaggregation of the PG&E Other area.[37] Shell Energy further states that there is no deterrent purpose for the penalty as "there was nothing more that Shell Energy could have done to have secured the required local RA…."[38]We agree. There is no evidence in the record here to support the conclusion that Shell's actions were deliberate.[39] Thus, this factor weighs in favor of penalty mitigation.

CONCLUSION

Based on the five-factor test in D.98-12-075, three of the five factors weigh in favor of penalty mitigation and two factors are neutral based on the evidence in the record before us. Shell's undisputed evidence demonstrates that Shell: began procurement in February 2019, participated in PG&E's RFO, did not reject any local RA offers based on price, was not aware of any entities with potential RA capacity to sell in Stockton LRA, unsuccessfully contacted 12 parties prior to October 2019, and continued contacting counterparties through February 7, 2020.[40] Additionally, circumstantial evidence demonstrates that there was local RA capacity shortage and that shortage led to numerous LSEs seeking penalty waivers.[41]

CPED determined that Shell partially decreased its local RA deficiencies by the February 7, 2020 deadline to cure.[42] Thus, consistent with the RA penalty schedule, Shell was fined $10,000 for the local RA deficiency it timely cured.[43] Shell does not

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[36] D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *59.

[37] Shell Energy Opening Brief at 17.

[38] Shell Energy Reply Brief at 10.

[39] Ex. Shell-03, 3:3-5:20, Appendix B.

[40] See generally Ex. Shell-03. The Commission does not consider Shell's actions after the February 7, 2020 deadline to cure 2020 year-ahead deficiencies because any actions Shell took after the deadline would have been untimely to comply with the year-ahead requirement.

[41] Energy Division Report pp. 35, 40-41; Ex. Shell-01, 7:11-15:19.

[42] Citation, p. 6.

[43] *Id*. at p. 13.

dispute that this portion of the fine was appropriate.[44] As a result, the Commission finds it reasonable to reduce Shell's penalty to $10,000.

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.

On September 5, 2024, Shell Energy served comments on the Draft Resolution.

FINDINGS OF FACT

1. On October 21, 2021, CPED issued Citation E-4195-0113 to Shell Energy. A penalty of $567,132.50 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified.
2. On November 22, 2021, Shell Energy filed a Notice of Appeal of Citation E-4195-0113.
3. Citation E-4195-0113 correctly identifies Shell Energy's deficiencies in procurement of its local RA obligations.
4. Citation E-4195-0113 correctly calculates the penalties pursuant to the penalty schedule adopted in Resolution E-4195, as modified.
5. CPED and Shell Energy agree that there are no disputes of material facts.
6. Shell Energy sought to comply with its 2020 year-ahead local RA obligations by participating in PG&E's August 27, 2019 RA capacity solicitation, conducting its own targeted solicitation for local RA capacity in all Local Capacity Areas within "PG&E Other", including the Stockton LRA, directly contacting eighteen other LSEs, via phone and email, to solicit bilateral deals for available RA, and engaging two experienced RA brokerages that have worked extensively with multiple LSEs.
7. Shell Energy continued its best efforts to procure 2020 local RA capacity for the Stockton LRA after October 31, 2019.

[44] See November 22, 2021 *Notice of Appeal of Citation No. E-4195-0113 by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions* (Citation Appeal), pp. 2, 8 ["If any penalty is imposed on Shell Energy, the penalty should be limited to $10,000, which is the applicable fine for curing a portion of Shell Energy's local RA deficiency (more than 10 MW) within five business days of the Energy Division's deficiency notice."].

8. Shell Energy did not turn down or reject any offers for RA in the Stockton LRA based on price.
9. Shell was not aware of any entities with potential RA capacity to sell in the Stockton local capacity area that Shell Energy failed to reach with either a targeted solicitation, direct bilateral communication, or outreach through a broker.

CONCLUSIONS OF LAW

1. Decision 98-12-075 identifies five factors the Commission may 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.
2. Shell presented considerable evidence, largely undisputed, supporting its argument that the unique facts of this citation appeal warranted a reduction of the penalty assessed by CPED.
3. Shell Energy was appropriately fined pursuant to the penalty schedule outlined in Resolution E-4195 and D.11-06-022 for the local RA deficiency that it partially cured for some months of 2020 prior to February 7, 2020.
4. Based on review of the evidence and testimony, the citation was appropriately issued.
5. Based on review of the evidence and testimony, and consistent with the five factors set out in Decision 98-12-075, the penalty amount should be reduced by $557,132.50 from $567,132.50 to $10,000.
6. All motions not otherwise addressed during the course of this proceeding should be denied.
7. The citation should be affirmed.

Therefore**, IT IS ORDERED** that:

1. Citation E-4195-0113 is affirmed.
2. All motions not otherwise addressed during the course of this proceeding are deemed denied.
3. Shell Energy North America (US), L.P. shall pay a fine of $10,000 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.
4. K.21-11-018 is closed.

This resolution is effective today.

APPENDIX B

Resolution ALJ-463
Resolves the Appeal K.21-11-018

(REDLINE)

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-463
Administrative Law Judge Division
~~October 17, 2024~~

R E S O L U T I O N

RESOLUTION ALJ-463. Resolves the Appeal K.21-11-018 of Citation E-4195-0113 by Shell Energy North America.

SUMMARY

This resolution resolves Shell Energy North America's (US), L.P. d/b/a Shell Energy Solutions' (Shell Energy or Appellant) appeal of Citation No. E-4195-0113 by the California Public Utilities Commission's Consumer Protection and Enforcement Division. Citation E-4195-0113 cites and fines Shell Energy for failing to procure certain of its 2020 local Resource Adequacy obligations. This Resolution ~~denies~~ grants, in part, the appeal and closes this proceeding.

BACKGROUND AND PROCEDURAL HISTORY

On October 31, 2019, Shell Energy submitted its year-ahead local Resource Adequacy (RA) compliance showing, as well as a waiver request via Advice Letter 20-E for its 2020 local RA requirement in three of the disaggregated Pacific Gas and Electric Company (PG&E) Other local areas.[1]

On January 31, 2020, the California Public Utilities Commission's (Commission) Energy Division sent Shell Energy a deficiency notice, indicating a need to procure additional megawatts of local RA for the 2020 compliance year in the Stockton local reliability area

[1] PG&E Other local areas refer to six local areas in PG&E's Transmission Access Charge area: Fresno, Kern, Sierra, Stockton, Humboldt, and North Coast/North Bay.

(LRA).[2] Energy Division provided a deadline of February 7, 2020 to come into compliance.

On June 1, 2020, Energy Division's Director issued a letter denying Shell Energy's request for a waiver of its 2020 local RA obligation, stating that Shell Energy did not issue a Request for Offers (RFO) to solicit bids, "and therefore did not pursue all commercially reasonable efforts to acquire the resources needed to meet the [load-serving entity's] LSE's local procurement obligation."[3]

On June 8, 2020, Shell Energy submitted a letter for reconsideration of Energy Division's denial of the waiver request. On August 19, 2021, the Commission issued Resolution E-5158, which denied Shell Energy's letter for reconsideration of the waiver request denial for the 2020 RA compliance year and granted the letter for reconsideration of the waiver request denial for the 2021 and 2022 RA compliance years. In denying Shell Energy's letter for reconsideration for the 2020 RA year, the Resolution stated that: "Shell Energy did not make every commercially reasonable effort by not holding an RFO, therefore, does not meet the standards for granting their local waiver."[4]

On September 22, 2021, Shell Energy appealed Resolution E-5158 in an Application for Rehearing. On October 21, 2021, the Commission's Consumer Protection and Enforcement Division (CPED) issued Citation E-4195-0113 to Shell Energy, assessing a penalty of $567,132.50 in accordance with the schedule of penalties in Resolution E-4195, as modified. On November 22, 2021, Shell Energy filed a Notice of Appeal of Citation E-4195-0113. On December 3, 2021, CPED filed its Compliance Filing in accordance with Resolution ALJ-377.

On November 24, 2021, Shell Energy filed a Motion For Stay of Appeal of Citation E-4195-0113 until the Commission acts on Shell Energy's September 22, 2021 Application for Rehearing of Resolution E-5158. On December 8, 2021, the Administrative Law Judge (ALJ) granted the motion to stay. On March 17, 2022, the Commission issued Decision (D.) 22-03-036, modifying Resolution E-5158 and denying the rehearing of Resolution E-5158. On April 13, 2022, Shell Energy filed a Motion to Continue Stay of

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[2] While CPED submitted filings that redacted the deficiency type and location for this citation, subsequent filings by both parties disclosed this information.

[3] Energy Division Letter to Marcie Milner, June 1, 2020, available at: https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/resource-adequacy-homepage/resource-adequacy-compliance-materials/local-waivers/sena-al-20-e-2020-ya-local-waiver-letter.pdf.

[4] Resolution E-5158 at 6.

Appeal of Citation E-4195-0113 until Shell Energy exhausts its remedies as to D.22-03-036.

On April 18, 2022, Shell Energy filed an Application for Rehearing of D.22-03-036. On April 28, 2022, an ALJ's ruling granted Shell Energy's motion to continue stay of the citation appeal until the Commission issues a decision on the Application for Rehearing of D.22-03-036.

On August 26, 2022, the Commission issued D.22-08-055, dismissing Shell Energy's Application for Rehearing as procedurally improper, finding that the second Application for Rehearing amounted to a "second-round application" that raised no new issues.[5]

On January 23, 2023, the proceeding was reassigned from ALJ Peter Wercinski to ALJ Syche Cai. On April 11, 2023, the ALJ issued a ruling requesting a joint submission on various issues, including identifying facts in dispute. On April 28, 2023, a Joint Response of Shell Energy and CPED was filed (Joint Response). On July 26, 2023, the ALJ issued a Ruling Setting Schedule and Scope of Issues.

On September 8, 2023, Shell Energy submitted a subpoena request for personnel from Energy Division to produce certain documents. On October 25, 2023, the ALJ issued a Ruling Denying the Subpoena Request as outside the scope of the proceeding and as vague and overly broad. On November 13, 2023, Shell Energy filed a Motion for Reconsideration of the ALJ's Ruling Denying the Subpoena Request.

Prepared testimony was served by Shell Energy to the service list on November 15, 2023. Reply testimony was served by CPED on November 30, 2023.

On December 14, 2023, Shell Energy and CPED submitted a Joint Response to Administrative Law Judge's Ruling Setting Schedule and Scope of Issues (Second Joint Response). In the Second Joint Response, both CPED and Shell Energy stated that they conferred and determined that there are no material facts in dispute, any remaining disputed issues are issues of law that can be addressed through briefing, and that evidentiary hearings are not needed.

Opening briefs were submitted on January 22, 2024. Reply briefs were submitted on February 5, 2024. The record was submitted on February 5, 2024, upon the submission of reply briefs.

[5] D.22-08-055 at 2-3.

On July 2, 2024, the proceeding was reassigned from ALJ Syche Cai to ALJ Debbie Chiv. On July 26, 2024, the assigned ALJ issued a ruling addressing parties' respective motions to admit evidence, motions to file confidential exhibits under seal, motions to file confidential documents under seal, and motion for official notice. On August 13, 2024, the ALJ issued a Ruling Denying the Motion for Reconsideration of the ALJ's Ruling Denying the Subpoena Request.

STANDARD OF REVIEW

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

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

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

In D.05-10-042, the Commission adopted a penalty regime for LSEs that fail to procure sufficient system RA capacity.[6] Resolution E-4017 established a citation program to enforce the RA program's 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. The burden of proving an affirmative defense, including impossibility, rests with the party claiming the defense.[7] ~~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~~

[6] D.05-10-042 at Conclusion of Law 21.

[7] Resolution E-4195, Appendix A, Sec. 2.7.7; Resolution ALJ-377, Appendix B, p. 27.

~~issue or that the amount of the penalty is inappropriate."[8]~~ The burden of proof required of appellant is the same as that required of Commission staff – by a preponderance of the evidence.

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.[9] The five-factor test is applicable in reviewing this citation appeal.

DISCUSSION

As a preliminary matter, the Commission notes that prior to and including the instant citation appeal, Shell Energy's 2020 local RA deficiencies in the Stockton LRA have been the subject of an extensive appellate process before the Commission, spanning four years. The appellate is history is summarized as follows:

(1) In October 2019, Shell Energy requested a local waiver from Energy Division for deficiencies in meeting its 2020 local requirements in the Stockton LRA.

- In June 2020, Energy Division's Director denied the waiver, stating that Shell Energy did not issue an RFO and therefore did not pursue all commercially reasonable efforts to procure to meet its local RA obligations.
- In June 2020, Shell Energy filed a letter for reconsideration of the denial of the waiver request.
- In August 2021, the Commission issued Resolution E-5158, denying the letter for reconsideration and affirming Energy Division's denial of the local waiver.

(2) In September 2021, Shell Energy filed its first Application for Rehearing of Resolution E-5158.

- In March 2022, the Commission issued D.22-03-036, modifying and denying the rehearing of Resolution E-5158.

~~[8] ALJ-377, Appendix A.~~

[9] *See* D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *52-59.

(3) In April 2022, Shell Energy filed a second Application for Rehearing of D.22-03-036.

- In August 2022, the Commission issued D.22-08-055, dismissing Shell Energy's second Application for Rehearing of D.22-03-036 as procedurally improper.

(4) In October 2021, CPED issued Citation E-4195-0113 for Shell Energy's 2020 local RA deficiencies in the Stockton LRA.

- In November 2021, Shell Energy filed the instant appeal of Citation E-4195-0113.

The Commission has reviewed and affirmed Energy Division's denial of Shell Energy's waiver request for its 2020 local deficiencies three separate times with Resolution E-5158, D.22-03-036 and D.22-08-055. As we stated in the July 26, 2023, Administrative Law Judge's Ruling Setting Schedule and Scope of Issues, arguments relitigating the denial of the local waiver request will not be considered here.[10]

Shell Energy does not dispute "that it did not conduct an RFO and that the Commission concluded that as a result of this omission Shell Energy did not take all commercially reasonable efforts and that Shell Energy was not entitled to a waiver as a result."[11] Thus, in considering the instant citation appeal, we underscore the Commission's non-appealable determination: Shell Energy did not use all commercially reasonable efforts to procure 2020 local RA capacity in the Stockton LRA because it did not conduct an RFO.

The issues to be addressed in the instant citation appeal are: (1) whether the citation correctly identified Shell Energy's deficiencies in meeting its local RA obligations, and (2) whether the citation penalty for Shell Energy's local RA deficiencies was correctly calculated and lawfully assessed based on the five-factor test identified in D.98-12-075.

1. The Citation Correctly Identified and Calculated Shell Energy's 2020 Local RA Deficiencies

CPED and Shell Energy both agree that the citation correctly identified Shell Energy's 2020 year-ahead local RA deficiencies and that the citation correctly applied the RA

[10] Administrative Law Judge's Ruling Setting Schedule and Scope of Issues, July 26, 2023, at 3.

[11] Shell Energy Opening Brief at 1.

penalty schedule to those deficiencies when calculating the penalty amount.[12] As such, CPED has met its burden to demonstrate that Shell Energy's 2020 local RA procurement was deficient by the amount shown on the citation and that the penalty amount was correctly calculated based on the established penalty schedule.

Under Resolution ALJ-377, once the 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~~ then has the burden to prove any affirmative defenses or introduce evidence supporting its argument that mitigation of the penalty is warranted.

~~2. Appellant Failed to Meet its Burden to Prove that It Was "Impossible" to Procure RA Resources in the Stockton Local Reliability Area~~

~~Shell Energy asserts an affirmative defense that compliance was "impossible" because local RA capacity in the Stockton LRA was not available for the 2020 RA compliance year.[13] For the reasons discussed, we find that Shell Energy fails to meet its burden to prove that it was "impossible" to procure 2020 local RA capacity in the Stockton LRA.~~

~~2.1. By Failing to Use Commercially Reasonable Efforts to Procure and By Failing to Conduct an RFO, Appellant Fails to Meet its Burden to Prove Compliance was "Impossible"~~

~~We recognize that Shell Energy opted to use various methods to procure 2020 local RA capacity, such as "contact[ing] 18 other LSEs," conducting "targeted solicitations," and bidding into PG&E's August 2019 RFO, and that it was unsuccessful in meeting its RA obligations using these methods.[14] However, by failing to conduct an RFO for 2020 local RA capacity, Shell Energy failed to notify a broad distribution list of RA market participants and potential sellers of its need for 2020 local RA capacity in the Stockton LRA. In failing to conduct an RFO and widely notify RA market participants of its need for local RA capacity, we find that Shell Energy fails to demonstrate that it was impossible to procure 2020 local RA capacity.~~

~~This is consistent with past Commission decisions in which we determined that by failing to participate in an RFO solicitation, the appellant "failed to even attempt to procure available system RA resources" and therefore, the appellant's "argument that it~~

[12] Shell Energy Notice of Appeal to Citation No. E-4195-0113 at 8, Joint Response at 3.

~~[13] Shell Energy Opening Brief at 1, 2.~~

~~[14] *See* Shell Energy Opening Brief at 9.~~

was 'impossible' to procure September 2021 system resources is unavailing."[15] Similarly, in Resolution ALJ-459, the Commission determined that an appellant that "failed to participate in two RFO solicitations for available Q3 2023 system RA resources" failed to meet its burden to prove that it was "impossible" to procure RA resources.[16]

Moreover, the Commission has already affirmed that Shell Energy did not use all commercially reasonable efforts to procure 2020 local RA capacity in the Stockton LRA. Shell Energy argues that it can fail to use commercially reasonable efforts to meet its local RA requirements, and simultaneously demonstrate that it was impossible to comply with those same local RA requirements. This argument is without merit. By failing to use all commercially reasonable efforts to procure local RA capacity, Shell Energy fails to meet its burden to prove it was also "impossible" to procure RA resources.

2.2. Appellant Fails to Meet its Burden to Prove Compliance was "Impossible" Because RA Capacity Was Not Available to Procure

Shell Energy next argues that it was "impossible" to comply with its RA obligations because "local RA capacity in the Stockton LRA was not available for purchase for RA compliance year 2020."[17] Shell Energy argues, in other words, that even if it had used commercially reasonable efforts to comply with its RA requirements (which it did not), there was no 2020 local RA capacity available to procure before the October 31 RA filing deadline. For the reasons discussed, Shell Energy fails to demonstrate that there was no 2020 local RA available to procure for the Stockton LRA.

First, Shell Energy contends that eleven other LSEs submitted local waiver requests for the Stockton LRA for 2020 local RA requirements, indicating it was impossible to comply with the local requirements.[18] This argument is without merit. The standard for submitting a local waiver request is not whether it was impossible to procure RA capacity, nor is it that there was no RA capacity available to procure. As Shell Energy

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[15] Resolution ALJ-442, *Resolves the Appeal of K.21-03-005 of Citation E-4195-0098 by San Diego Community Power*, at 4.

[16] Resolution ALJ-459, *Resolves the Appeal of K-23-05-017 of Citation E-4195-0133 by Desert Community Energy*, at 8. *See also* Resolution ALJ-432, *Resolves the Appeal of K.21-11-001 of Citation E-4195-0107 by San Diego Community Power*, at 4 ("By voluntarily choosing not to participate in SCE's solicitation for available RA resources, [appellant] fails to demonstrate that it was 'impossible' to procure" RA resources.).

[17] Shell Energy Opening Brief at 9.

[18] Shell Energy Opening Brief at 2, 9.

points out, pursuant to D.06-06-064, an LSE may seek a local waiver request if an LSE can demonstrate that despite pursuing all commercially reasonable efforts, the LSE (1) did not receive any bids, or (2) did not receive bids under a certain dollar amount or (3) received bids but those bids included what the LSE believes were unreasonable terms or conditions.[19] Thus, the fact that an LSE requests a local waiver does not demonstrate that it was "impossible" for the LSE to comply with the RA requirements or that there was no local RA capacity available to procure.

Second, Shell Energy argues that the Commission's modification of the PG&E Other disaggregated areas in D.20-06-031 "is further evidence of the impossibility for LSEs" to meet the local RA requirements in the PG&E Other LRAs.[20] The Commission disagrees. In D.20-06-031, the Commission recognized "challenges LSEs face in meeting local requirements for the six LCAs…" and adopted a modification to the local waiver process specifically for the PG&E Other local areas.[21] The Commission did not state, however, that there was no local RA capacity available for procurement in the PG&E Other local areas, or that it was impossible for LSEs to comply with the local requirements.

Indeed, to address the "challenges" LSEs may face, the Commission adopted a modified local waiver for the PG&E Other areas. Using this modified waiver from D.20-06-031, or the local waiver process adopted in D.06-06-064, an LSE could avail itself of the local waiver process, so long it met the minimum requirements that, among other things, it

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[19] Shell Energy Reply Brief at 3 (citing D.06-06-064 at 73). Section 3.3.12 of D.06-06-064 established the following requirements that LSEs must meet to be eligible for a waiver from its Local Capacity Requirement (LCR) obligations:

(1) a demonstration that the LSE reasonably and in good faith solicited bids for its RAR capacity needs along with accompanying information about the terms and conditions of the Request for Offer or other form of solicitation, and

(2) a demonstration that despite having actively pursued all commercially reasonable efforts to acquire the resources needed to meet the LSE's local procurement obligation, it either:

(a) received no bids, or

(b) received no bids for an unbundled RA capacity contract of under $40 per kW-year or for a bundled capacity and energy product of under $73 per kW-year, or

(c) received bids below these thresholds but such bids included what the LSE believes are unreasonable terms and/or conditions, in which case the waiver request must demonstrate why such terms and/or conditions are unreasonable.

[20] Shell Energy Opening Brief at 11.

[21] D.20-06-031 at 63.

~~"actively pursued all commercially reasonable efforts" to comply. As is well-documented in this proceeding, Shell Energy failed to demonstrate this baseline effort for its 2020 local RA obligations.~~

~~Shell Energy also claims that Energy Division's January 13, 2020 State of the RA Market Report indicated that disaggregation of the PG&E Other areas made it impossible to procure RA in those local areas.[22] We disagree. Energy Division's Report states that "the introduction of a multiyear requirement as well as disaggregation of the PG&E Other local area" may have been factors in the increased number of waivers over a three-year period in the six PG&E Other LRAs. Energy Division's statement does not indicate that disaggregation of the PG&E Other local areas made it impossible to procure 2020 local RA capacity in any local area but rather, that disaggregation may have been one factor in an uptick in waivers. As discussed, a request for a local waiver does not mean that RA capacity was not available to procure.~~

~~Moreover, Energy Division's Report does not state that it was not possible to procure in the Stockton LRA. In fact, Energy Division's Report concluded that "there is currently sufficient capacity on the system, and compliance with RA requirements is possible…."[23] The Report refers to sufficient capacity on the system, which includes local RA capacity as local RA capacity count towards system RA requirements. Therefore, Energy Division's Report does not support that it was impossible to procure local RA in the Stockton LRA.~~

~~As such, in weighing Shell Energy's evidence, we find that Shell Energy fails to demonstrate by a preponderance of evidence that it was impossible to meet its local RA requirements in the Stockton LRA.…~~

~~3.~~2. Although Past Commission Decisions Have Rejected an Affirmative Defense of Impossibility Based on Market Conditions Alone, the Undisputed Evidence in the Record Differentiates This Proceeding

First, we address Shell Energy's ~~further argues~~ argument that it "should not be subjected to substantial fines for failing to procure required RA when compliance was

~~[22] Shell Energy Opening Brief at 9.~~

~~[23] Energy Division State of the Market Report, January 13, 2020, at 41 (Energy Division's Report), available at: https://www.cpuc.ca.gov/-/media/cpucwebsite/divisions/energy-division/documents/resource-adequacy-homepage/ra_marketreportrevised-final.pdf.~~

impossible due to market conditions."[24] CPED responds that several past Commission decisions have repeatedly stated that market conditions do not excuse non-compliance with RA requirements.[25] Shell Energy counters that these past Commission decisions are distinguishable to the instant citation appeal because those decisions involved system RA deficiencies (not local RA), the appellants argued that it was commercially impracticable to procure (not "literally impossible"), and those decisions do not involve the evidence in this appeal (*e.g.*, eleven other LSE waiver requests, the disaggregation of PG&E Other areas).[26] For the reasons discussed, we ~~are not persuaded by Shell Energy's attempt to distinguish~~find the instant citation appeal distinguishable from past Commission decisions addressing RA citation appeals.

~~We first note that, as discussed above, Shell Energy fails to prove that it was "literally impossible" to comply with its local RA requirements. Nevertheless, the Commission has repeatedly held that market conditions alone do not excuse non-compliance with the RA requirements, regardless of whether an appellant argues it was "impossible" or "commercially impracticable" to meet the RA requirements. In Resolution ALJ-406, the Commission refused to reduce or waive an RA penalty due to "tight market conditions" stating that:[27]~~

> ~~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.~~

~~In Resolution ALJ-432, the appellant asserted that it was "'impossible' for it to obtain the necessary RA resources" due to "the lack of available resources" and the lack of~~

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[24] Shell Energy Opening Brief at 2. *See also* Shell Opening Brief at 13 ("As shown by the number of waivers granted by Energy Division, the market conditions in the Stockton LRA meant that compliance would be impossible for a significant portion of LSEs.").

[25] CPED Opening Brief at 14.

[26] Shell Energy Reply Brief at 6.

[27] ~~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 (emphasis added).~~

~~"necessary resources at any price."[28] The Commission stated that "[appellant's] argument that it was unable to procure RA resources because resources could not be found in the market has been repeatedly denied by the Commission as a basis for mitigating or excusing an LSE's failure to comply with its RA requirements."[29]~~

~~Likewise, in Resolution ALJ-442, the appellant argued that it was "impossible" to procure the necessary RA resources due to a "well-documented lack of available supply in the capacity market."[30] The Commission rejected the argument that it must consider RA market conditions in assessing the citation appeal, affirming again that the Commission has been clear "that market conditions do not excuse non-compliance with the RA requirements."[31] Further, in Resolution ALJ-298, the Commission rejected appellant's argument that it was "impossible to comply with the second deadline" to meet its RA requirements, ultimately determining that "[f]ines under Resolution E-4195 need not take market conditions into account."[32]~~

~~In addition, the Commission has determined that market conditions alone do not excuse non-compliance with both local RA requirements, as well as system RA requirements. In Resolution ALJ-424, involving a citation appeal for local RA deficiencies, the Commission determined that "[o]utside of the local RA waiver process, the Commission has been clear that market conditions do not excuse non-compliance with the RA requirements."[33]~~

~~In summary, these resolutions stand for the Commission's policy that solely relying on market conditions is a fatal flaw in arguing an impossibility or commercial impracticability defense to excuse non-compliance with RA obligations.~~

~~Accordingly, we find that Shell Energy fails to meet its burden to demonstrate that it was "impossible" to procure 2020 local RA capacity for the Stockton LRA.~~

~~[28] Resolution ALJ-432 at 3.~~

~~[29] *Id.* at 11.~~

~~[30] Resolution ALJ-442 at 4.~~

~~[31] *Id.* at 10.~~

~~[32] Resolution ALJ-298, *Affirming the Penalty Assessed Against 3 Phases Renewables*, at 3, Conclusion of Law 3.~~

~~[33] Resolution ALJ-424, *Resolves the Appeal of K.21-08-001 of Citation E-4195-100 by Commercial Energy*, at 16, 18.~~

In Resolution ALJ-442, system RA resources were available for procurement through the investor-owned utilities (IOU) RFO solicitations but San Diego Community Power "opted not to participate in all available IOU solicitations," "rejected offers that would have partially reduced its system RA deficiency," and "rejected available RA resources that it deemed were too expensive."[34]

In Resolution ALJ-459, system RA resources were available for procurement through IOU RFOs but Desert Community Energy "failed to participate in the available IOU solicitations," rejected a majority of 38 competitively priced bids as "commercially unreasonable," and rejected eight bilateral offers, all without explanation.[35]

In Resolution ALJ-432, San Diego Community Power "opted not to participate in all available IOU solicitations," bid "far below what it knew, or should have known, was necessary to procure RA resources, which resulted in rejected offers," and "rejected available RA resources that it deemed were too expensive."[36]

In Resolution ALJ-406, the cited LSE "rejected bids that would have met its system RA obligations on the basis that it considered their terms and prices to be commercially impracticable."[37]

In Resolution ALJ-298: (1) the cited LSE did not assert or seek to establish by a preponderance of the evidence an affirmative impossibility defense, and (2) the appeal disputed the appropriate fine amount, not whether compliance was impossible.[38]

In Resolution ALJ-424, the cited LSE held its own RFO but "did not participate in any RFO solicitations offered by other market participants to procure for its 2021 local requirements," including at least five solicitations held by PG&E.[39] Resolution ALJ-424

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[34] Resolution ALJ-442, *Resolves the Appeal of K.21-03-005 of Citation E-4195-0098 by San Diego Community Power* (2023) pp. 4-5.
[35] Resolution ALJ-459, *Resolves the Appeal of K-23-05-017 of Citation E-4195-0133 by Desert Community Energy* (2024) pp. 7-11.
[36] Resolution ALJ-432, *Resolves the Appeal of K.21-11-001 of Citation E-4195-0107 by San Diego Community Power* (2023) pp. 4-7.
[37] Resolution ALJ-406, *Resolves K.20-04-005, the Appeal of City of San Jose, administrator of San José Clean Energy, to Citation E-4195-0074 issued on March 10, 2020 by Consumer Protection and Enforcement Division* (2021) p. 1.
[38] Resolution ALJ-298, *Affirming the Penalty Assessed Against 3 Phases Renewables in Citation E-4195 as Modified by Decision 11-06-022* (2014) pp. 1-3.
[39] Resolution ALJ-424, *Resolves the Appeal K.21-08-001 of Citation E-4195-100 by Commercial Energy* (2022) pp. 9-10.

noted that "[b]ased on the evidence, … Appellant deliberately failed to procure sufficient local RA capacity … [and did] not argue that it inadvertently failed to procure…."[40]

In contrast to the above cases, the undisputed evidence here demonstrates that Shell participated in the PG&E RFO, did not place unreasonable bids, and did not reject any offers.[41]

~~4.~~3. Application of the Five-Factor Test Warrants Affirming the Citation ~~and the~~but Reducing the Penalty.

~~As discussed in Section 1, 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."[42] The burden of proof required of appellant is the same as that required of Commission staff – by a preponderance of the evidence. We consider whether Shell Energy 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. Shell presented considerable evidence, largely undisputed, supporting its argument that the unique facts of this citation appeal warranted a reduction of the penalty assessed by CPED.[43] We address each factor in turn.

~~4.1.~~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

[40] Resolution ALJ-424, p. 8.

[41] Ex. Shell-03, 3:3-6:11.

~~[42] ALJ-377, Appendix A.~~

[43] November 22, 2021 *Notice of Appeal of Citation No. E-4195-0113 by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions*, pp. 20-23.

> 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.[44]

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].[45]

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."[46] The Commission also distinguished a utility's conduct as "deliberate" versus "inadvertent" wrong-doing, stating that "[d]eliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor."[47]

~~Shell Energy argues "there is no evidence that Shell Energy's violation was in any way deliberate" and that the record demonstrates that Shell Energy's deficiency was due to a lack of available RA, which was caused by the Commission's decision to disaggregate the PG&E Other areas.[48] The Commission is not persuaded by this argument. As discussed in Section 2, Shell Energy did not meet its burden to prove that it was impossible to comply with its RA obligations, nor did it prove that there was no local RA capacity available.~~

~~Further, Shell Energy bears the burden to demonstrate that its violation was an "inadvertent," not "deliberate," wrongdoing, particularly when it has already been established that Shell Energy failed to use commercially reasonable efforts to procure RA capacity. Other than stating that its violations were not deliberate, Shell Energy~~

~~[44] D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *54.~~

~~[45] *Id.* at *55.~~

~~[46] *Id.* at *56.~~

~~[47] *Id.* at *57.~~

~~[48] Shell Energy Opening Brief at 12.~~

~~provides no evidence of "inadvertent wrongdoing." For example, the Commission has found inadvertent error in an RA citation appeal when an LSE committed a "simple typographical or numerical error" when it "entered the incorrect resource adequacy values."[49] As Shell Energy did not use commercially reasonable efforts to comply with its RA requirements, and has presented no evidence that its deficiency was due to an inadvertent error, we find that Shell Energy's violation was deliberate. As the Commission has previously held, "the deliberate failure to meet RA requirements is accorded a high level of severity."[50]~~

~~Shell Energy also argues that there was no physical or economic harm, as its deficiency did not present any reliability risk, and that the California Independent System Operator (CAISO) did not issue a capacity procurement mechanism designation to mitigate the deficiency.[51] We are not persuaded by this argument. The Commission has previously held that "[r]egardless of whether Appellant's violations resulted in backstop procurement by the [CAISO] or resulted in actual harm to grid reliability, the deliberate failure to meet RA requirements is accorded a higher level of severity."[52] The Commission has also determined that harm to the regulatory process is accorded a high level of severity, "regardless of the practical effects or effects on the public…"[53] Here, the harm was to the integrity of the regulatory process, regardless of whether CAISO was required to backstop the deficiency or whether there was actual harm to grid reliability.~~

~~The Commission finds that by failing to use commercially reasonable efforts to meet its local RA requirements, Shell Energy harmed the regulatory process by disregarding a Commission directive and that Shell Energy's violation was deliberate. Accordingly, under this factor, Shell Energy's deliberate violation threatened the reliability of the electrical grid and harmed the integrity of the regulatory process; therefore, the violation is accorded a high level of severity and is considered an aggravating factor.~~

In this case, Shell presented undisputed evidence of its unsuccessful attempts to procure local RA prior to February 7, 2020, as well as expert and circumstantial

~~[49] Resolution ALJ-394, *Resolves K.20-05-005, the Appeal of Clean Power Alliance of Southern California from Citation No. E-4195-82*, at 5.~~

~~[50] Resolution ALJ-424 at 8. *See also* Resolution ALJ-406 at 5.~~

~~[51] Shell Energy Opening Brief at 12.~~

~~[52] Resolution ALJ-424 at 8.~~

~~[53] Resolution ALJ-406 at 5.~~

evidence regarding market conditions.[54] Following Energy Division's notice of non-compliance, and months before Energy Division's denial of Shell's waiver request, the evidence demonstrates that Shell substantially increased its efforts to procure additional capacity for 2020 but was unsuccessful.[55]

CPED's testimony was premised on Resolution E-5158, D.22-03-036, and D.22-08-055. Specifically, "that Shell Energy did not demonstrate that it pursued all commercially reasonable efforts as required by D.06-06-064, when it did not issue a solicitation via a Request for Offer (RFO)" and the conclusion that Shell "did not carry its burden to show that it undertook 'all' procurement efforts."[56] CPED largely did not dispute or otherwise address Shell's assertion of facts regarding its procurement efforts and the state of the local RA market in the Stockton LRA.[57] CPED's conclusions were premised on the undisputed fact that Shell did not conduct a mass RFO for the purpose of obtaining a local RA waiver. However, this undisputed fact must be considered in light of the whole record, including Shell's undisputed evidence.

Given that there was no economic or physical harm, no unlawful benefits gained by Shell, and no evidence that Shell's violations were deliberate, the only factor that weighs in the favor of a fine here is the harm to the integrity of the regulatory process. Generally, "disregarding a statutory or Commission directive, regardless of the effects on the public, [is] accorded a high level of severity."[58] The Commission has regularly fined public utilities that failed to comply with various applicable statutes but have also often mitigated the amount of the fine based on the unique circumstances of each

[54] Ex. Shell-03, 3:3-5:20; Ex. Shell-03, Appendix A, Attachment B; Ex. Shell-01, 7:11-15:19; Ex. Shell-03, Appendix B, Attachment C, pp. 1-15.
[55] Ex. Shell-03, 3:3-6:11; Ex. Shell-03, Appendix B.
[56] Ex. CPED-02, 2:9-13.
[57] See Ex. CPED-02, 2:7-4:25.
[58] D.98-12-075, p. 36.

violation.[59] As to violations of RA requirements specifically, the Commission has previously held that deliberately rejecting bids is accorded a high level of severity.[60]

Here, although Shell concedes that it did not comply with its local RA requirement and that it filed its year-ahead compliance report with a known deficiency, there is no evidence demonstrating that the violation was deliberate, *i.e.*, that Shell deliberately failed to contract for local RA capacity. To the contrary, Shell sought to demonstrate its attempts at compliance and requested a local RA waiver at the same time as it filed its compliance report. Therefore, while Shell's citation was warranted, the evidence is in favor of penalty mitigation.

~~4.2.~~3.2. The Entity's Conduct

As provided in D.98-12-075, this factor "recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation."[61] 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."[62]

~~Shell Energy argues that it "continued its best efforts to procure local RA capacity for the Stockton LRA after October 31, 2019, and even after the February 7, 2020, deadline set in the Energy Division's January 31, 2020 deficiency letter."[63] Shell Energy states~~

[59] See *Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure* (2015) [D.15-04-008], p. 4 [imposing a penalty of $870,000 for knowingly failing to disclose information as demonstrated by evidence and testimony that exclusion "was not an accident"]; *Opinion Imposing Sanctions for Violations of Commission Ex Parte Rules* (2002) [D.02-12-003] [finding ex parte violation severe because of utilities' disregard for Commission rules but party conduct following violation mitigated the severity].

[60] *Order Denying Rehearing of Resolution ALJ-406* (2022) [D.22-07-025], p. 5.

[61] ~~D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *56.~~

[62] ~~*Ibid.*~~

[63] ~~Shell Energy Opening Brief at 14.~~

~~that it substantially reduced its deficiencies due to these efforts. Shell Energy further states that it immediately implemented RFOs in its 2021 and 2022 RA procurement efforts after Energy Division's denial of its local waiver.~~

~~The Commission notes that although LSEs submit RA compliance filings on October 31 of each year, LSEs have until Energy Division's deficiency notice is issued (and up to five days after) to cure deficiencies to avoid penalties. In addition, year-ahead and month-ahead RA obligations are distinct requirements and penalties for year-ahead and month-ahead violations are assessed separately. Thus, an LSE is incentivized to procure local RA after the year-ahead deadline to meet its 100% month-ahead local RA obligations and avoid separate penalties, or to demonstrate that it used commercially reasonable efforts if it intends to request a month-ahead local waiver.~~

~~Here, Shell Energy was incentivized to continue procuring local capacity even after submitting a deficient RA filing on October 31, up until Energy Division's February 7 deadline, to avoid penalties. Shell Energy's initiation of RFOs in February 2020 were efforts undertaken to procure for month-ahead local RA deficiencies. As such, the Commission is not persuaded that Shell Energy's continued efforts to procure past the October 31 filing deadline mitigates its year-ahead local RA deficiencies and penalty.~~

~~Lastly, in considering Shell Energy's conduct to "prevent the violation" under this factor, the Commission has determined that Shell Energy did not use commercially reasonable efforts to procure local RA capacity. Accordingly, under this factor, the Commission finds that Shell Energy did not take "reasonable steps to ensure compliance with Commission directives" to prevent the violation.[64]~~

First, as discussed above, Energy Division's denial of Shell's local RA waiver because Shell did not "use commercially reasonable efforts" by failing to conduct a mass RFO is only one factor to consider. There is no indication in the record that a mass RFO would have rectified the lack of available capacity in the local market.[65] However, the Commission has subsequently required a mass RFO as part of establishing reasonable procurement efforts. As to the facts in the record here, the evidence in the record

~~[64] *See* D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *57.~~

[65] Ex. Shell-03, 5:10-6:11; Ex. Shell-03, Appendix B, Attachment C, pp. 1-24; Energy Division Report, pp. 35, 40-41; Ex. Shell-01, 8:19-9:2, 9:14-16, 13:6-13:14, 15:16-19, 16:13-19; compare with Ex. CPED-02, 2:7-9, 3:6, 3:18-19, 4:23-24, 5:5-5:6, 6:7.

demonstrates that Shell timely notified ~~ED~~Energy Division of the deficiency, reasonably sought a local RA waiver, and thereafter sought to rectify the deficiency.[66]

Second, and important in considering Shell's conduct here, there is no indication in the record that Shell was aware prior to June 2020 that its traditional procurement efforts were unreasonable or somehow insufficient absent a mass RFO.[67] The evidence in the record reasonably supports Shell's arguments that it attempted to procure and then attempted to cure its deficiencies but was unsuccessful. There is also no evidence in the record of past violations. Thus, this factor weighs in favor of penalty mitigation.

~~4.3.~~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."[68] The Commission "intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources."[69]

Shell Energy argues that the penalty amount is disproportionate and excessive relative to the size of its energy services business in California and that Shell Energy serves a relatively small share of statewide load.[70] CPED counters that Shell Energy did not present evidence regarding its overall size in terms of its ability to pay the penalty, nor did Shell Energy argue that it does not have the financial resources to procure sufficient RA or pay the citation penalty.[71]

As this factor considers fine levels based on each utility's financial resources, the Commission notes that Shell Energy does not argue that it does not have the financial resources to pay the penalty, nor did Shell Energy present evidence as to its financial resources.

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[66] Ex. Shell-03, 4:11-15, Appendices A, B, and D.

[67] Notice of Appeal, pp. 5-8.

~~[68] *See id.* at *59.~~

~~[69] *Ibid.*~~

~~[70] Shell Energy Opening Brief at 15.~~

~~[71] CPED Opening Brief at 13.~~

The Commission finds that Shell Energy's smaller share of statewide load has no bearing on this factor. Pub. Util. Code Section 380, which established the RA program, provides that the RA requirements must be applied to each LSE equally and enforced in a non-discriminatory manner.[72] Moreover, the Commission has previously rejected consideration of the size of an LSE's customer base in applying this factor, stating that "the size of [appellant's] customer base or how recently [appellant] became an RA market participant cannot be a consideration for enforcement of the RA requirements, and therefore, does not inform this factor."[73]

In addition, while Shell Energy argues that the penalty "is disproportionate and excessive" relative to the size of its energy business in California, we note that the RA penalty structure is based on a formula that calculates a penalty based on the amount of the LSE's RA deficiency. Therefore, the penalty amount is proportionate to the size of Shell Energy's local RA deficiency.

As Shell Energy 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.

~~4.4.~~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."[74] Thus, this factor calls for consideration of previously issued Commission decisions that impose sanctions as precedent for future Commission decisions that impose sanctions.

~~[72] Pursuant to Pub. Util. Code § 380(e):~~

> ~~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.~~

~~[73] Resolution ALJ-459 at 16.~~

~~[74] D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *60.~~

Shell Energy argues that the eleven other LSEs that sought local waivers for 2020 local RA obligations are precedents that are relevant to Shell Energy's appeal "[b]ecause these waiver requests also concerned the 2020 local RA market…."[75] CPED counters that the Commission has repeatedly stated that "constrained market conditions do not excuse non-compliance with RA requirements."[76]

The Commission disagrees with Shell Energy that third-party LSEs' waiver requests are relevant precedents under D.98-12-075. Local waiver requests submitted by third-party entities are not "previously issued decisions" by the Commission, as provided under this factor in D.98-12-075.[77] Further, the letter approving or denying a third-party entities' local waiver request that is issued by Energy Division's Director, pursuant to D.06-06-064,[78] is not a "previously issued decision" voted out by the Commission.

In addition, the Commission has previously rejected the argument that other LSEs' local waiver requests are relevant to another LSE's citation appeal, or are evidence of market constraints under D.98-12-075. In Resolution ALJ-424, the Commission stated that "[t]he fact that other LSEs applied for a local waiver does not inform our review of Appellant's citation, nor does it substantiate claims of market power."[79] Therefore, other entities' waiver requests or the letters from Energy Division's Director approving or denying the waiver requests are not relevant precedent under D.98-12-075.

CPED argues that Commission precedent heavily favors affirming the citation penalty, as several Commission resolutions and decisions addressing RA citation appeals have upheld the citation and penalty.[80] The Commission agrees that in numerous Commission resolutions addressing RA citation appeals, we 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.[81] Shell Energy has provided no Commission precedent that adjusted an RA

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[75] Shell Energy Opening Brief at 16.

[76] CPED Reply Brief at 5.

[77] D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *60.

[78] D.06-06-064 at 73, 87.

[79] Resolution ALJ-424 at 16.

[80] CPED Opening Brief at 14.

[81] *See e.g.*, Resolution ALJ-459, Resolution ALJ-432, Resolution ALJ-424, Resolution ALJ-406.

~~citation penalty downward or upward, or otherwise deviated from the RA penalty schedule.~~

~~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.~~

First, the Commission has previously applied the five-factor test in only four RA citation appeals and while the Commission did not adjust the penalty amount in any of those citation appeals, this was due to the unique facts of each citation appeal and not because the Commission concluded that adjusting the penalties was generally inappropriate. Resolution E-4195 does not preclude the Commission's adjustments to the penalty schedule on appeal or rehearing.[82]

Second, the Commission's precedent has been factually distinct from the evidence presented here. Prior citation appeals rejected LSEs' impossibility defenses based on evidence that LSEs failed to participate in RFOs or rejected bids. The evidence here, however, does not establish the same.[83] Because there are sufficient differences between our precedent and the unique record here, this factor neither mitigates nor aggravates Shell's penalty.

~~4.5.~~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.[84]

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[82] Resolution E-4195, Appendix A, p. 10 ["[i]n the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Penalty"].

[83] Ex. Shell-03, 3:3-5:15-20, Appendix B.

[84] D.98-12-075, 1998 Cal. PUC LEXIS 1018, at *59.

Shell argues that imposing a penalty here would have no deterrent effect because Shell's deficiency was caused by market conditions beyond its control, including that it was impossible to procure local RA and due to the disaggregation of the PG&E Other area.[85] Shell Energy further states that there is no deterrent purpose for the penalty as "there was nothing more that Shell Energy could have done to have secured the required local RA…."[86] ~~We disagree. Shell Energy did not use all commercially reasonable efforts to procure RA capacity and failed to conduct an RFO. As such, there was certainly more that Shell Energy could have done to secure local RA capacity. Further, Shell Energy fails to demonstrate that it was impossible to procure local RA.~~

~~The Commission has previously rejected arguments that a RA citation penalty has no deterrent effect when the appellant did not use commercially reasonable efforts to procure RA capacity.[87] In Resolution ALJ-424, the Commission stated that "[a]ppellant's argument that the penalty is not an effective deterrent when it did not pursue all commercially reasonable efforts to obtain RA capacity, if anything, favors increasing the fine amounts."[88] Thus, we are not persuaded by Shell Energy's argument that the penalty has no deterrent effect.~~

~~As Shell Energy acknowledges, it is within the Commission's discretion to allocate weight to the five factors.[89] 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 Shell Energy's deficiency amount. As such, Shell Energy's assessed citation shall not be excused and the penalty shall not be reduced.~~
We agree. There is no evidence in the record here to support the conclusion that Shell's actions were deliberate.[90] Thus, this factor weighs in favor of penalty mitigation.

CONCLUSION

[85] Shell Energy Opening Brief at 17.

[86] Shell Energy Reply Brief at 10.

[87] *See* Resolution ALJ-424 at 13.

[88] *Id*. *See also* Resolution ALJ-459 at 18 (the Commission rejected appellant's argument that "no penalty can deter noncompliance where compliance is impossible," stating that appellant failed to demonstrate it was "impossible" to procure RA resources); Resolution ALJ-432 at 12 (same).

[89] Shell Energy's Comments on Draft Resolution, September 5, 2024, at 11.

[90] Ex. Shell-03, 3:3-5:20, Appendix B.

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

three of the five factors weigh in favor of penalty mitigation and two factors are neutral based on the evidence in the record before us. Shell's undisputed evidence demonstrates that Shell: began procurement in February 2019, participated in PG&E's RFO, did not reject any local RA offers based on price, was not aware of any entities with potential RA capacity to sell in Stockton LRA, unsuccessfully contacted 12 parties prior to October 2019, and continued contacting counterparties through February 7, 2020.[91] Additionally, circumstantial evidence demonstrates that there was local RA capacity shortage and that shortage led to numerous LSEs seeking penalty waivers.[92]

CPED determined that Shell partially decreased its local RA deficiencies by the February 7, 2020 deadline to cure.[93] Thus, consistent with the RA penalty schedule, Shell was fined $10,000 for the local RA deficiency it timely cured.[94] Shell does not dispute that this portion of the fine was appropriate.[95] As a result, the Commission finds it reasonable to reduce Shell's penalty to $10,000.

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.

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[91] See generally Ex. Shell-03. The Commission does not consider Shell's actions after the February 7, 2020 deadline to cure 2020 year-ahead deficiencies because any actions Shell took after the deadline would have been untimely to comply with the year-ahead requirement.

[92] Energy Division Report pp. 35, 40-41; Ex. Shell-01, 7:11-15:19.

[93] Citation, p. 6.

[94] *Id*. at p. 13.

[95] See November 22, 2021 *Notice of Appeal of Citation No. E-4195-0113 by Shell Energy North America (US), L.P. d/b/a Shell Energy Solutions* (Citation Appeal), pp. 2, 8 ["If any penalty is imposed on Shell Energy, the penalty should be limited to $10,000, which is the applicable fine for curing a portion of Shell Energy's local RA deficiency (more than 10 MW) within five business days of the Energy Division's deficiency notice."].

On September 5, 2024, Shell Energy served comments on the Draft Resolution. ~~Shell Energy's comments have been carefully considered. In comments, Shell Energy relitigates arguments made during the proceeding, with attempts to supplement those arguments. Shell Energy had ample opportunity to raise arguments during the nearly two-year pendency of the proceeding and the Commission has thoroughly considered those arguments. As the matter was submitted upon the submission of reply briefs, we decline to consider the relitigation of arguments made during the proceeding.~~

~~Shell Energy comments that the Draft Resolution "fails to acknowledge that once the burden of proof shifts, Shell Energy has the same burden as Commission staff, i.e., it need only prove its case 'by a preponderance of the evidence.'"[96] In the Draft Resolution, the Commission provides the burden of proof standard in a citation appeal, which is that Commission staff must demonstrate by a "preponderance of the evidence" the case supporting the issuance of the citation. Once that burden has been met, the burden shifts to the appellant to demonstrate that the violation did not occur, the citation should not issue, or that the penalty is inappropriate. To be clear, Appellant must make its demonstration with the same burden of proof standard required of Commission staff – by a preponderance of the evidence. The Draft Resolution has been modified to make clear that Appellant is held to the same burden of proof standard as Commission staff under Resolution ALJ-377. As we concluded in the Draft Resolution, Shell Energy failed to meet its burden of proof.~~

~~Shell Energy acknowledges that it is undisputed that "Shell failed to act in a commercially reasonable manner by failing to conduct a utility-style RFO…"[97] Shell Energy comments that this undisputed fact does not preclude Shell Energy from demonstrating its impossibility defense. In the Draft Resolution, we do not state that Shell Energy was somehow precluded from demonstrating "impossibility." The Commission, however, found that Shell Energy failed to meet its burden to demonstrate impossibility based on several reasons that are outlined in the Draft Resolution, one of which is the undisputed fact that Shell Energy did not act in a commercially reasonable manner to procure local RA.~~

~~Shell Energy reiterates that Energy Division's January 13, 2020 State of the RA Market Report stated that "[o]n a local level, however, it may not be possible for LSEs to meet requirements in all local areas due to a mismatch between 2020 local requirements and~~

~~[96] *Id.* at 4.~~

~~[97] *Id.* at 3.~~

~~NQC values for solar and wind resources due to the adoption of revised ELCC values and disaggregation of the PG&E Other local area."[98] Energy Division's statement does not state that it was impossible to meet local requirements in the Stockton local area. In fact, Energy Division's Report concludes that: "there is currently sufficient capacity on the system, and compliance with RA requirements is possible…."[99] The Report refers to sufficient capacity on the system, which includes local RA capacity as local RA capacity counts towards system RA requirements. Therefore, Energy Division's Report does not support that it was impossible to procure local RA in the Stockton LRA. The Commission stands by its position that Shell Energy failed to demonstrate by a preponderance of evidence that it was impossible to procure local resources in the Stockton local area. The Draft Resolution has been modified to include these references to Energy Division's Report.~~

~~Shell Energy disputes the numerous past Commission resolutions that denied an RA citation appeal by determining that market conditions alone do not excuse non-compliance with RA requirements.[100] Shell Energy argues that these past resolutions are distinguishable to the "extreme case" presented here. We disagree, for the reasons outlined in the Draft Resolution. We underscore that these past resolutions stand for the Commission's policy that solely relying on market conditions is a fatal flaw in arguing an impossibility or commercial impracticability defense to excuse non-compliance with RA obligations. The Draft Resolution is modified to reflect this.~~

~~Shell Energy comments that the Draft Resolution states its findings in a conclusory manner and makes no effort to assess whether the evidence on one side outweighs the evidence on the other side. We disagree. The Commission has thoroughly considered all of the evidence presented by CPED and Shell Energy through testimony and briefs. Throughout over 20 pages in the Draft Resolution, we have explained our rationale for the outcome. Shell Energy acknowledges that "[t]he Commission is certainly within its discretion to allocate weight to the five factors as it chooses…."[101] We agree that the Commission has discretion to allocate weight to the five factors, as the Commission also has discretion in weighing the submitted evidence. The fact that Shell Energy does not agree with the outcome does not somehow demonstrate that the Commission has not carefully weighed all of the evidence submitted in this proceeding. As was stated in the Draft Resolution, Shell Energy had the burden to persuade that the citation penalty should be reduced or excused, and Shell Energy failed to meet that burden.~~

~~[98] *Id.* at 6 (citing Energy Division's Report at 40).~~

~~[99] Energy Division's Report at 41.~~

~~[100] Shell Energy Comments on Draft Resolution at 9.~~

~~[101] *Id.* at 11.~~

FINDINGS OF FACT

1. On October 21, 2021, CPED issued Citation E-4195-0113 to Shell Energy. A penalty of $567,132.50 was assessed in accordance with the schedule of penalties in Resolution E-4195, as modified.
2. On November 22, 2021, Shell Energy filed a Notice of Appeal of Citation E-4195-0113.
3. Citation E-4195-0113 correctly identifies Shell Energy's deficiencies in procurement of its local RA obligations.
4. Citation E-4195-0113 correctly calculates the penalties pursuant to the penalty schedule adopted in Resolution E-4195, as modified.
5. CPED and Shell Energy agree that there are no disputes of material facts.
6. Shell Energy sought to comply with its 2020 year-ahead local RA obligations by participating in PG&E's August 27, 2019 RA capacity solicitation, conducting its own targeted solicitation for local RA capacity in all Local Capacity Areas within "PG&E Other", including the Stockton LRA, directly contacting eighteen other LSEs, via phone and email, to solicit bilateral deals for available RA, and engaging two experienced RA brokerages that have worked extensively with multiple LSEs.
7. Shell Energy continued its best efforts to procure 2020 local RA capacity for the Stockton LRA after October 31, 2019.
8. Shell Energy did not turn down or reject any offers for RA in the Stockton LRA based on price.
9. Shell was not aware of any entities with potential RA capacity to sell in the Stockton local capacity area that Shell Energy failed to reach with either a targeted solicitation, direct bilateral communication, or outreach through a broker.

CONCLUSIONS OF LAW

1. Decision 98-12-075 identifies five factors the Commission may 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.
2. Shell presented considerable evidence, largely undisputed, supporting its argument that the unique facts of this citation appeal warranted a reduction of the penalty assessed by CPED. ~~Shell Energy 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.~~

3. Shell Energy was appropriately fined pursuant to the penalty schedule outlined in Resolution E-4195 and D.11-06-022 for the local RA deficiency that it partially cured for some months of 2020 prior to February 7, 2020.
4. Based on review of the evidence and testimony, the citation was appropriately issued.
5. Based on review of the evidence and testimony, and consistent with the five factors set out in Decision 98-12-075, the penalty amount should be reduced by $557,132.50 from $567,132.50 to $10,000.

~~1. All rulings by the assigned ALJ should be affirmed.~~

~~1.~~6. All motions not otherwise addressed during the course of this proceeding should be denied.

~~2.~~7. The citation should be affirmed.

Therefore**, IT IS ORDERED** that:

1. Citation E-4195-0113 is affirmed.

~~2. All rulings by the assigned Administrative Law Judge are affirmed.~~

~~3.~~2. All motions not otherwise addressed during the course of this proceeding are deemed denied.

~~4.~~ Shell Energy North America (US), L.P. shall pay a fine of $~~567,132.50~~10,000 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.

~~5.~~4. K.21-11-018 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 October 17, 2024, the following Commissioners voting favorably thereon:~~

~~/s/ RACHEL PETERSON~~

~~Rachel Peterson~~
~~Executive Director~~

~~ALICE REYNOLDS~~
~~President~~
~~DARCIE L. HOUCK~~
~~JOHN REYNOLDS~~
~~KAREN DOUGLAS~~
~~MATTHEW BAKER~~
~~Commissioners~~