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Decision 05-03-025 March 17, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

OPINION IMPLEMENTING AFFIDAVIT PROCESS FOR DIRECT ACCESS ACCOUNTS

TABLE OF CONTENTS

OPINION IMPLEMENTING AFFIDAVIT PROCESS FOR DIRECT ACCESS ACCOUNTS

I. Introduction and Background

This decision implements affidavit requirements as prescribed in Decision (D.) 04-07-025, in which we adopted rules governing Direct Access load growth. We adopt the affidavit format as set forth in Appendix 1 of this decision.

In D.04-07-025, we directed that an affidavit process be implemented as a means for DA customers to verify, under penalty of perjury, that they are not exceeding their contractual limits for DA usage.[1] D.04-07-025 also determined that a customer's total DA load must not exceed the volumes set forth in its DA contract executed on or before September 20, 2001.[2]

In order to implement the affidavit process, we directed that a Rule 22 Working Group Meeting be convened. The Rule 22 Working Group meeting was convened on October 13, 2004, to address the implementation of the affidavit process. The Meeting was moderated by the Commission's Energy Division and attended by participants representing: Alliance for Retail Energy Markets (AReM), California Large Energy Consumers Association (CLECA), California Manufacturers and Technology Association (CMTA), Constellation New Energy, ElectricAmerica, Hitachi, Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Sempra Energy Solutions, SBC, Southern

[1] D.04-07-025, p. 28 and FOF 14.

[2] D.04-07-025, p. 17 and CL 8.

California Edison, The Utility Reform Network (TURN), University of California/California State University, and Wal-Mart.

Meeting participants distributed and discussed two separate proposed versions of affidavits and implementation processes. One of the versions was sponsored by AReM. The other was sponsored jointly by the utilities. Meeting participants reached agreement on the majority of issues regarding the contents of the affidavit. The areas of parties' dispute are discussed below.

Participants submitted a Rule 22 Working Group Meeting Report (Report)[3] on October 28, 2004. The Report summarized: 1) discussions during the Meeting regarding the DA Load Growth Affidavit/Declaration, 2) areas of agreement and disagreement, and 3) communications subsequent to the Meeting. Copies of the two proposed affidavits were attached to the Report. Parties filed comments on the Report on November 15, 2004.

Based on our review of the Working Group Report and comments thereon, we resolve the disputes presented by parties, and adopt a final affidavit form as set forth in Appendix 1 for DA customers to attest that their DA load does not exceed permissible limits, as prescribed by Commission directives.

II. Affidavit Language and Format

A. Sections 1 and 2 of the Affidavit

Sections 1 and 2 of the Proposed Affidavit are not controversial, but merely set forth language concerning the customer's authority to execute the affidavit and personal knowledge of the facts contained in the affidavit.

[3] At the request of the participants, the Assigned Administrative Law Judge granted (via telephone) an opportunity to file comments on the Report by November 15, 2004.

B. Section 3 of the Affidavit

Section 3 of the proposed affidavit contains a sentence verifying that the customer entered into a DA service agreement with a certain Electric Service Provider (ESP) prior to the September 21, 2001 suspension date. Section 3 contains a second sentence verifying that the customer currently has a valid agreement for DA service in effect with either the same or a different ESP. All workshop participants agreed to this language, except as noted below.

1. Check-Box Requirement

After the workshop, PG&E recommended using a "check box" format for the affidavit instead of the "cross-out" format initially proposed. SDG&E supports PG&E's recommendation, arguing that the "check box" format is more understandable and easier for customers to complete. TURN does not contest PG&E's proposal to employ a "check box" format in Section 3 of the affidavit, but recommends that the line following the first check box in Section 3a be slightly revised to read as follows:

"Up to a maximum of _____ kW/kWh of load."

We shall adopt PG&E's check-box revision, and incorporate the above-referenced wording suggested by TURN. This wording will capture the possibility that the customer's DA contract provides for "full requirements" service, but only up to a stated ceiling amount.

2. Disclosure of Contractual Volumes in the Affidavit

In the version of the proposed affidavit in Attachment 3, the customer would not be required to disclose specific contractual volumes of load in its pre-suspension contract. AReM supports adoption of Attachment 3, arguing that the actual amount of DA load in the contract is not relevant, but that the key

provision is the customer's attestation that it has not exceeded the contractual volume. TURN disagrees, however, arguing that Attachment 3 does not comply

with D.04-07-025, which required the customer to "provide verification of the contracted amount of DA load" (D.04-07-025, Appendix 1, Principle 3). TURN instead offers language in Attachment 4, whereby the customer would be required to include the specific contracted kW or kWh volume in the affidavit, or else state that its contractual load is determined on a "full requirements" basis.

TURN argues that only Attachment 4 provides the correct form of affidavit for purposes of implementing D.04-07-025, which required that the affidavit provide both (1) verification of the contracted amount of DA load and (2) attestation that they have not exceeded contractual limits.

PG&E and SDG&E express no specific position on requiring contractual volumes to be disclosed in the affidavits, but seek clarification from the Commission as to whether or to its intent was to require disclosure of the quantity of the customer's contracted load in the affidavit. SCE originally took no position on requiring contractual volumes to be set forth in the affidavits. Given the conflicting information regarding the number of "full requirements"[4] contracts, however, as discussed below, SCE believes that TURN's proposed Section 3 may be appropriate.

More specifically, SCE expresses concerns about an apparent misstatement of fact made at a previous workshop on March 11, 2004, regarding DA Load Growth. At that workshop, one DA customer represented that all Electric Service Provider (ESP)/Customer contracts contained some indication of a maximum load amount. No other DA customer or ESP participant at the

[4] A "full requirements" contract provision means that no specific numerical figure is set forth in the contract for maximum volumes, but that volumes are delivered as required to meet the customer's demand requirements.

workshop disputed, denied, clarified or qualified this statement. SCE's previous endorsement of the DA Load Growth Principles adopted in D.04-07-025 was based on this representation. SCE also believes that reliance on this representation as fact helped lead to D.04-07-025, which essentially allows DA customers to increase their DA load up to the limit stated in their ESP/Customer contract.

At the October 13, 2004 Working Group Meeting to discuss implementation of the affidavit requirements set forth in D.04-07-025, however, all DA customers and ESPs present expressed the opposite view, indicating they were unaware of a single ESP/Customer contract that was not a "full requirements" contract. SCE argues that, as a result, there is essentially no limit on potential DA load growth on existing DA accounts in California. SCE believes that the Commission should determine how many "full requirements" ESP/Customer contracts currently are in effect, to assess whether D.04-07-025 and the DA Load Growth Principles need to be modified based on these subsequent factual revelations.

Other participants at the Rule 22 Meeting oppose required disclosure of a customer's contractual volume levels in the affidavit, claiming that the quantity terms of the ESP/Customer contracts constitute confidential and business proprietary information. AReM, in particular, argues that requiring such a statement of the customer's specific contracted volume in the affidavit is also unnecessary and impractical. AReM contends that the Commission already has the necessary rights to conduct investigatory and spot audits without the need for disclosure in the affidavit of specific contract volumes.

We shall adopt as Section 3 of the affidavit, the form set forth in Attachment 4, requiring the customer either to specify contractual volumes up to

a specified maximum amount, or indicating that the contract is on a "full requirements" basis.

As noted by TURN, in D.04-07-025, we expressly required that the affidavit provide *both* verification of the contracted amount of DA load *and* attestation to compliance with the load limit for customers exceeding a designated minimum load per customer, as set forth in Principle 3 of Appendix 1 of D.04-07-025. Parties do not have authority to unilaterally decide to delete a requirement from the affidavit that was imposed by the Commission in D.04-07-025.

Moreover, as a practical matter, it is not clear to what extent there would be a specific volume amount to disclose in a given affidavit. As noted by SCE, the most recent indications from DA parties are that most DA contracts do not set forth specific contractual volumes but merely specify a "full requirements" provision. In such a case, the customer would merely attest in the affidavit that its contractual volumes are determined on a "full requirements" basis.

AReM has raised the concern that contractual volumes are commercially sensitive data and argues that such data should not have to be disclosed in the affidavit. Yet, D.04-07-025 has already determined that the contractual load data must be verified in the affidavit. Thus, the time has passed for objection to inclusion of this data in the affidavit. The remaining question is what measures may be appropriate to protect the confidentiality of commercially sensitive data relating to contractual volumes set forth in the affidavit.

AReM claims that disclosure of customer-ESP confidential information *to any employees of the utilities* will permit the utilities to gain insight into the confidential operations of their competitors, the ESPs who serve direct access

customers on their respective systems. If the contractual amount is to be specified, AReM argues that the affidavit should be sent directly to the Commission, rather than the utilities.

We are unpersuaded by AReM's claims. We conclude that the protective safeguards already in place, together with the additional restrictions we adopt herein on utility employee access, sufficiently address legitimate concerns as to commercial sensitivity of data. As an initial observation, the utilities must already know how much power DA customers are currently using in order to bill them for transmission and distribution charges, and they also know who the customer's ESP is as a result of the DASR process.

In any event, the confidentiality issue only applies to the subset of ESP customers with over 500 MW of demand that have contracts with specific volume limits prescribed in the contract. As discussed above, for DA contracts that do not quantify specific contractual volumes, but rather are for "full requirements," there would be no specific volume amount disclosure.

In comments on the Draft Decision, the utilities note that they are already required to keep customer information confidential. D.90-12-121 requires that the utilities are not to release customer information to third parties without customer consent, or absent certain Commission-approved exceptions. The utilities likewise note that the ESP service agreement approved by the Commission already covers the protection of information marked as confidential and provided by an individual ESP to a utility. Moreover, the utilities argue that in any event, it is the customer, and not the ESP, that is filling out the affidavit form and providing information on contract limits. Therefore, the utilities oppose any requirement for a separate nondisclosure agreement with the ESP.

We agree that existing Commission directives already provide adequate protection against disclosure of confidential contract information to *outside third parties*. We recognize, however, that even though it is the customer that provides the affidavit information, the ESP still has an interest in maintaining the commercial sensitivity of confidential data in any contract in which it is a party. As the utilities point out, the ESP service agreement already provides for confidential protection of contract data with respect to outside third parties. Thus, there is no need for a separate agreement with the ESP with respect to disclosure to third parties. Yet, the concern expressed by AReM involves disclosure among employees *within the utility*, itself. AReM expresses concern that the utility could make use of the information for commercial advantage against the interests of the DA customer and its ESP. In order to address this concern, we shall require that access to any confidential volumetric data provided to the utility through the affidavit be restricted only to utility employees involved in checking affidavits for compliance with Commission requirements. We expressly prohibit the utility from disclosing any such volumetric data to other employees, including those involved in marketing activities.

Each utility shall designate those employees authorized to have access to confidential affidavit data, and shall restrict access accordingly. The list of designated utilities authorized to have access to confidential contract data shall be provided to each DA customer that provides such confidential contract data in its affidavit. These nondisclosure restrictions to limit access to volume data only to those employees responsible for checking affidavit compliance shall prohibit disclosure to employees in the marketing department.

We decline to adopt AReM's suggestion that Commission employees serve as the custodian for affidavit forms containing confidential information. We believe that the processing of affidavits can be administered more efficiently and appropriately by the utilities who are responsible for checking for compliance.

The Commission retains the option to conduct spot audits and investigatory inquiries, as deemed necessary, to assure that the attestation in the affidavit is true and correct. During such spot audits or investigatory inquiries, the Commission and its staff shall have the authority to obtain access to contractual volume data, consistent with the protections as set forth in Public Utilities Code Section 583.

C. Section 4 of the Affidavit

The Utilities' proposed language for Section 4 (set forth in Attachments 2 and 3 of the Report) would have the customer warrant that:

> "its total level of DA load on all DA accounts does not exceed the contracted level of load defined by the Agreement that was in effect as of September 20, 2001,….."

At the end of the Workshop, all participants agreed to this language. Although the Utilities and TURN continue to support the original language, AReM now proposes further changes to Section 4. Subsequent to the Workshop, AReM notified the other participants that it favored a deletion of the reference to the phrase: "Agreement that was in effect as of September 20, 2001." AReM argues that since the DA suspension decision was issued on September 20, 2001, it is illogical for the affidavit to state that a contract executed before that date could have been "entered into" in accordance with the subsequent Commission decision.

AReM's proposed alternative language for Section 4 (set forth in Attachment 1 of Workshop Report) thus deletes reference to the September 20, 2001 date. The customer would only warrant that:

> "its total DA load does not exceed contracted level of DA load defined by the terms of the customer's DA service contract entered into consistent with the Commission's DA suspension decisions."

The Utilities and TURN disagree with AReM's proposal to remove the reference to the September 20, 2001 date, arguing that to do so makes the affidavit less clear and poses greater difficulty for DA customers in checking all potentially relevant DA suspension decisions for compliance.

We shall adopt the Section 4 language as proposed by the Utilities and TURN, preserving the reference to the suspension date of September 20, 2001. In D.04-07-025 (at p. 37), the Commission specified that DA load and DA load growth are limited to those volumes under contract as of September 20, 2001. As stated therein, "we do not intend to prevent DA customers from increasing load on existing DA accounts so long as any such load increases do not exceed the volumes that were authorized under contractual arrangements executed on or before September 20, 2001. " (D.04-07-025 at 17.) Thus, it would be inconsistent with this intent to delete reference to the September 20, 2001 date in attesting to compliance under the affidavit process.

The Utilities' proposed language for Section 4 is sufficiently clear, and doesn't require the customer to review Commission decisions or ask the utility or ESP to explain the affidavit's intent. We do not believe that it is illogical to reference the date of September 20, 2001, in the Section 4 language, as argued by AReM. Such language merely means that the contract volumes are those in effect prior to the suspension date and that the contract is therefore valid under

the DA suspension decisions. As noted by TURN, it is simpler and clearer for the DA customer to affirm verification of the September 20, 2001 contractual volumes directly than to have to research all of the many DA suspension decisions in order to confirm its compliance. September 20, 2001 is the key date upon which this Commission has consistently relied in its interpretation of the DA suspension provisions of Water Code Section 80110.

D. Section 5 of the Affidavit

In Section 5 of the proposed affidavit, the customer affirms the understanding that the Commission may conduct spot audits or other inquiries regarding the contractual volumes in the customer's contracts. The customer also states that it understands that the Utilities may be required to provide certain information to the Commission. The customer agrees to maintain its pre-suspension contract, to the extent it has not previously been inadvertently lost or destroyed.

At the conclusion of the Workshop, participants agreed, in principle, to the language of Section 5, as included in Attachments 3 and 4 of the Workshop Report. Parties disagree, however, over the precise wording of the final sentence of Section 5 of the affidavit. Attachments 3 and 4 of the proposed affidavit both contain the following final sentence in Section 5:

> "Customer agrees to retain and make available, to the Commission, Customer's Agreement with ESP which was in effect as of September 20, 2001, as well as any subsequent DA agreements, to the extent not previously inadvertently lost or destroyed and currently not retrievable."

TURN suggests the following alternative wording:

> "Customer agrees to retain, and make available to the Commission upon request, Customer's Agreement with ESP,

> which was in effect as of September 20, 2001, as well as any subsequent DA agreements, and to make a good faith effort to obtain a copy of the Agreement if such a copy is not currently in Customer's possession."

AReM proposes to amend the Section 5 language to delete specific reference to September 20, 2001 date in reference to contractual agreements because a customer may have executed subsequent DA contract(s), in accordance with the terms of the Commission's previous DA suspension decisions.

We shall adopt language for the last sentence of Section 5 in the form proposed in Attachments 3 and 4, as set forth in the Workshop Report. This language appropriately preserves references the September 20, 2001 date as the basis for contractual limits, while acknowledging that any subsequent DA agreements are also covered under the affidavit.

CLECA/CMTA propose a slight modification to paragraph 5 of the affidavit as presented in the Draft Decision to make clear that the customer must retain and make available to the Commission the relevant provisions of the customer agreement with the ESP concerning contractual volumes. We agree and incorporate this proposed modification. To that end, the third line in paragraph 5 of affidavit is modified to read as follows: "Customer agrees to retain and make available, to the Commission, the relevant provisions of Customer's Agreement with ESP concerning contractual volumes, which was in effect…" This change limits the retention requirements to the contractual volumes portion of the contract, and is consistent with the intent of the Commission that the purpose of the Commission's audit or inquiry is to deal with claims concerning contractual volumes.

The Commission's interest in these contracts is limited to the volumetric provisions that are subject of DA suspension rules, and not in the various commercial arrangements between customers and suppliers.

E. Section 6 of the Affidavit

In Section 6 of the proposed affidavit, the customer acknowledges that it must take such actions as necessary to comply with existing DA-related decisions and requirements. All participants agreed to the language of Section 6, as included in both Attachments 3 and 4 of the Workshop Report. We approve the proposed language in Section 6.

III. Other Affidavit Implementation Issues

A. Limitations on Customer Requirement to Provide Contract Copy

AReM argues that the requirement for a customer to provide the Commission a copy of a contract should be restricted only to the situation referenced in Section 5 where "the Commission may conduct spot audits or informal investigative inquiry, as it deems necessary, to deal with any potential disputes concerning the accuracy of Customer's claims concerning contractual volumes."

AReM argues that the requirement to provide a contract should not enable the Commission to request contracts for any reason whatsoever. Just as the utilities are concerned about any disclosure of the terms of their procurement contracts, AReM argues that DA customers and their suppliers are similarly concerned about the confidentiality of their contracts. AReM thus asks that in the final form of approved affidavit, the Commission should limit the requirement to provide contracts to the case where there are, "disputes concerning the accuracy of Customer's claims concerning contractual volumes."

We acknowledge the concerns of AReM as to the confidentiality and commercial sensitivity of information contained in DA /ESP contracts. Accordingly, in connection with any action by the Commission to obtain access to such contracts in connection with spot audits or other investigatory action relating to the affidavit and load growth provisions of this decision, we shall take into account such concerns and apply appropriate confidentiality protections with respect to contract data.

Nonetheless, AReM's proposed restrictions on Commission authority to obtain access to DA contracts would unduly impede the Commission in carrying out its responsibilities. On the one hand, AReM seeks to limit Commission access to confidential data to those instances where there is a dispute as to contract amounts. Yet, AReM also opposes disclosure of specific contract amounts in the affidavit. Thus, AReM fails to explain how it would be possible for a utility even to form a basis for a dispute to the extent that specific contractual volumes are not disclosed in the affidavit.

To the extent the Commission was to be precluded from access to confidential contracts, it would unduly impede our ability to conduct spot audits. While the Commission must exercise due discretion in carrying out its oversight responsibilities, we must not adopt restrictions that will impede our ability to carry out necessary responsibilities. Moreover, restricting our authority to conduct spot audits only to those instances where a specific dispute had arisen would unduly impede the Commission in its ability to enforce applicable DA load growth rules in the context of DA suspension of new contracts. DA customers have an enhanced incentive to comply with the affidavit and related load growth rules knowing there is a possibility of a spot audit, not just in those limited cases where a specific dispute has arisen.

B. Restrictions on DA Customers that Must Sign the Affidavit

All workshop participants agreed that a minimum load requirement for customer affidavits should be imposed, such that only customers with at least one DA account in excess of 500 kW in demand would be required to sign an affidavit. TURN agreed to this threshold based on SCE's prior filings stating that approximately 70% of DA load in its service territory is due to accounts in excess of 500 kW demand. PG&E and SDG&E confirmed that their percentages are similar.

Parties disagree, however, concerning whether, in addition to the minimum load requirement, a minimum load growth trigger should be applied as a threshold to determine when a customer should be required to submit an affidavit.

AReM proposed originally that an affidavit not be required until the serving utility's DA load had exceeded a 15% growth trigger in 4 of the preceding 12 months, and then only for DA accounts that had demonstrated "significant" growth during the prior year (defined as greater than 15%). Other DA parties support AReM 's proposal, arguing that the affidavit requirement should not apply unless and until the "trigger" amount for overall DA load growth has been exceeded.

TURN and SCE disagree, arguing that nothing in D.04-07-025 supports such requirement. SCE believes the Commission only intended that a 15% aggregate growth trigger apply to the recalculation and reassessment of the 2.7 cents/kWh DA CRS cap under Principle 7. SCE argues that a 15% growth trigger would send the wrong signal to DA customers, erroneously leading them to believe that existing DA load may grow without restriction until the 15% threshold is exceeded.

In comments filed November 15, 2004, AReM offered a compromise between its original position and that of the utilities. Instead of its original proposal for a 4-out-of-12- month requirement for hitting the 15% trigger to account for seasonality, AReM now proposes simply that affidavits be required only in the event the 15% load growth "trigger" is activated.

As a further compromise, AReM proposes that if the load growth trigger is activated, then the affidavit process be applied to those customers over 500 kW shown to have experienced any load growth during the last year, rather than only to those who had experienced 15% load growth.

AReM advocates its proposed load growth trigger, particularly in view of the fact that DA load growth has not been observed on a statewide basis since the Commission suspended DA effective September 21, 2001. AReM thus argues that no actual problem with DA load growth exists, and consequently, the Commission should not mandate affidavit processes that may be unnecessary and unduly burdensome.

We decline to apply a 15% load growth trigger for purposes of limiting whether a DA customer must sign an affidavit. The affidavit shall be mandatory for customers with annual demand over 500 kW, as stated in D.04-07-025. D.04-07-025 specifies that the appropriate criterion for applying the affidavit requirement is a minimum load per customer, irrespective of the utility's aggregate system-average load growth. In this regard, D.04-07-025, Conclusion of Law 11 states:

> 11. A Rule 22 Working Group Meeting should be scheduled to develop an affidavit process whereby DA customers beyond a designated minimum load **must attest** to their contractual DA load limits, and that they have not exceeded contractual limits. The Working Group should seek consensus on the appropriate

> **minimum load per customer** per utility for applying the affidavit. (Emphasis added.)

The use of the word "must" implies a mandatory attestation, with only the *level* of the minimum load per customer cut-off left to be decided. Finding of Fact 14 of D.04-07-025 also affirms the mandatory nature of the affidavit:

> 14. An affidavit requirement for large DA customers provides a reasonable process for verification of contracted load and attention [*sic*, should read "attestation"] of compliance with contractual limits. (*Id.* at 41.)

The issue of a load growth "trigger" appears in an entirely separate section of D.04-07-025 (at pp. 29-30) and, as indicated in Principle 7, deals with the question of when the DA CRS accrual and cap should be subject to review.

Thus, in order to comply with the requirements of D.04-07-025, all DA customers that meet the minimum load threshold must submit an affidavit. By limiting the affidavit requirement to customers with annual demand over 500 kW, we avoid imposing undue burdens on the large numbers of DA customers with demand below the 500 kW threshold. AReM's proposal to further limit the affidavit requirement only to instances where a 15% load growth trigger is met goes beyond what is permitted under D.04-07-025, and thus shall not be adopted.

The issue of affidavit submission criteria was already decided in D.04-07-025. The stated purpose of this phase of the proceeding was only to address the limited issue of how the affidavit form was to be prescribed. It is beyond the limited scope of this decision to relitigate the criteria applicable to DA customers required to submit the DA affidavit. Accordingly, the previously established criteria in D.04-07-025 for the submission of the affidavit form remain in place.

C. IOU Obligations to Review Submitted Affidavits

TURN takes exception to the IOUs' statement, at page 4 of the Working Group Report, indicating that they will not be "reviewing, monitoring, interpreting or making recommendations regarding *such volumes*" (emphasis added). TURN argues that the IOUs' statement goes well beyond Principle 2 adopted in D.04-07-025, which indicates only that: "Utilities are not required to review, monitor, interpret or make recommendations regarding *ESP/customer DA contracts*" (emphasis added).

While the IOUs are not expected to review actual contracts, we agree with TURN that the IOU should review the affidavits and notify the Commission of any discrepancies between actual customer usage and the contract maximums stated in the affidavits. Of course, where the customer merely indicates that DA contracts are executed on a "full requirements" basis, there would not be specific numerical figures against which a comparison with contractual totals could be readily made. In any event, we retain the discretion to conduct spot audits on any DA customer contract as a measure to promote compliance and to ensure that DA load growth is consistent with Commission directives.

D. Schedule for Sending, Completing, and Submitting Affidavits

The utilities' proposed affidavit process also included the following steps:

- Utilities will coordinate the date on which affidavits are sent to customers, and will communicate the affidavit requirement to applicable customers within 60 days of the Commission's adoption of the affidavit and implementation process.
- Customers will have 60 days to complete and return the affidavit to the utilities.
- At the conclusion of the 60-day period, each utility will file a report to the Commission within 30 days. The report will contain the number of

customers contacted, the number of completed affidavit forms returned, and a listing of customers that did not return or refused to sign the affidavit.

The utilities also proposed that if the utility is made aware of a load growth situation (for a customer with at least one DA account with demand in excess of 500 kW) due to a service upgrade (i.e., a service panel upgrade, a larger transformer, etc.) and the customer has not previously signed an affidavit, the customer will be required to sign an affidavit.

All participants expressed agreement with these processes. We find these proposed processes and schedule to be reasonable and accordingly adopt them.

E. Recourse for Noncompliance with Affidavit Requirements

Workshop participants seek Commission guidance as to the process to be applied if customers do not return or refuse to sign the affidavit. The utilities seek to determine whether they should take further action in such a situation as sanctions. The utilities would like to include a statement in their cover letter describing the consequences of failing to return the affidavit so that customers are aware of what might occur if they do not return the affidavit.

Although parties seek Commission guidance as to the recourse for customers refusing to comply with the affidavit requirements, they have offered no proposals as to what they believe appropriate recourse would be. In the absence of any other record on this issue, we rely upon our statutory authority to impose penalties on corporations and persons, other than public utilities, which or who knowingly violate or fail to comply with an order or decision of this Commission. As prescribed in Public Utilities Code Section 2111, the Commission has the authority in such a case to impose a penalty of not less than $500 dollars nor more than $20,000 for each offense. The utilities should include

a statement in their cover letter concerning the Commission's authority and willingness to impose and enforce payment of penalties as prescribed in Section 2111 for DA customers that refuse or fail to comply with the adopted affidavit requirements. Also, the Commission has other remedies available, including contempt under Section 2113, and may do all things necessary to enforce the law and its decisions (Public Utilities Code Section 701).

CLECA/CMTA also propose that utility representatives be required to communicate the affidavit requirements directly to the appropriate DA customer contact. In some corporations, automated systems deal with billing, which means that a communication concerning the affidavit sent to the billing department may go unheeded. Since the customer faces potential penalties of a significant sum, CLECA/CMTA believe the utility should have an obligation to ensure that the forms and instructions are directed to the appropriate contact for each DA customer.

Second, before a customer is listed as being out of compliance with the affidavit process, CLECA/CMTA advocate that the utilities be required to send a second notice to those customers who have not responded at the end of the initial 60-day period. TURN does not object to CMTA/CLECA's suggesions that the affidavit requirement be communicated directly to the customer's designated DA contact, and that customers receive a second notice if they fail to comply. TURN would recommend, however, that the second notice be sent 10 days *prior to* the expiration of the 60-day compliance period, rather than after the failure to comply has already occurred.

We find it reasonable to impose notification requirements, as proposed by CLECA/CMTA. Accordingly, we shall require that utility representatives communicate the affidavit requirements directly to the appropriate DA customer

contact, and to ensure that the forms and instructions are directed to the appropriate contact for each DA customer. We shall also require that before a customer is listed as being out of compliance with the affidavit process, the utilities must send a second notice to those customers who have not responded ten days prior to the expiration of the initial 60-day period for compliance.

IV. Comments on Draft Decision

The Draft Decision of Administrative Law Judge (ALJ) Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on March 7, 2005 and reply comments on March 15, 2005. We have reviewed the comments and taken them into account in finalizing this order.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Thomas Pulsifer is the assigned ALJ in this proceeding.

Findings of Fact

1. D.04-07-025 adopted rules that required an affidavit process be implemented to provide confirmation that load growth on existing non-continuous DA accounts does not result in customer's total load exceeding the contracted level of DA load defined by the terms of customer's DA service contract.

2. The alternative draft affidavit versions provided by parties through the Rule 22 Working Group process provide a basis for determining and finalizing the language to be contained in the affidavit.

3. The language in Sections 1 and 2 of parties' proposed affidavit is not controversial, but merely describes the customer's authority to execute the

affidavit and the customer's personal knowledge of the facts contained in the affidavit.

4. Section 3 of the proposed affidavit verifies that the customer entered into a DA service agreement with an Electric Service Provider (ESP) on or before the September 20, 2001 suspension date, and that the customer currently has a valid agreement for DA service in effect with either the same or a different ESP.

5. The addition of PG&E's proposed "check box" format, with the revisions offered by TURN, provides a more understandable and easier affidavit form for customers to complete.

6. Section 4 of the proposed affidavit verifies that the customer's total level of DA load on all DA accounts does not exceed the contracted level of load defined by the Agreement in effect as of September 20, 2001, and entered into consistent with the Commission's suspension decisions.

7. Section 5 of the proposed affidavit affirms that the customer understands that the Commission may conduct spot audits or other inquiries regarding the contractual volumes in the customer's contracts, and that the utilities may be required to provide certain information to the Commission.

8. Section 6 of the proposed affidavit requires that the customer acknowledge that it must take such actions as necessary to comply with existing DA-related decisions and requirements.

9. A minimum load per customer of annual demand over 500 kW provides a reasonable threshold for purposes of determining which DA customers must sign the affidavit.

Conclusions of Law

1. The affidavit to be adopted in this decision should conform with the load growth principles adopted in D.04-07-025, and should promote compliance with Commission decisions relating to the September 21, 2001 suspension of DA.

2. The affidavit format, as set forth in Appendix 1 of this decision, should be adopted to provide confirmation that load growth on existing non-continuous DA accounts does not result in customer's total load exceeding the contracted level of DA load defined by the terms of customer's DA service contract.

3. While the IOUs are not expected to review actual contracts, the IOUs should review the submitted affidavits and notify the Commission of any discrepancies between actual customer usage and the contract maximums stated in the affidavits.

4. DA customers should be required to verify actual contract volumes in the affidavit (or to affirm that contract volumes are determined on a "full requirements" basis) and to attest that all DA accounts do not exceed the contracted level of load defined by the Agreement that was in effect as of September 20, 2001.

5. The language in the affidavit, in Sections 4 and 5, should specifically reference the September 20, 2001 date since that date provides a straightforward standard for purposes of verification and is the key date upon which the Commission has relied in interpreting the suspension provisions of Water Code Section 80110.

6. The affidavit should contain language requiring the customer to retain and make available to the Commission, upon request, the Customer's agreement with the ESP, in effect on September 20, 2001, as well as any subsequent contract

amendments, to the extent not previously inadvertently destroyed and currently not retrievable.

7. The requirement for the customer to provide the Commission a copy of the ESP contract for purposes of a spot audit should not be limited only to those instances where a dispute exists between the IOU and the customer regarding contract volumes.

8. In accordance with the requirements of D.04-07-025, a minimum load per customer should be established as a threshold for requiring DA customers to sign the affidavit, but there should not be a further limitation based upon whether a load growth trigger is met.

9. As prescribed in Public Utilities Code Section 2111, the Commission has the authority in cases of noncompliance with Commission rules to impose a penalty of not less than $500 dollars nor more than $20,000 for each offense.

10. DA customers that refuse or fail to comply with the Commission's affidavit requirements should be subject to sanctions and penalties as provided for in Public Utilities Code Section 2111.

11. The Commission has other remedies available, including contempt under Section 2113, and may do all things necessary to enforce the law and its decisions (Public Utilities Code Section 701).

12. D.90-12-121 requires the utilities not to release customer information to third parties without customer consent, or absent certain Commission-approved exceptions. Moreover, the ESP service agreement approved by the Commission already covers the protection of information marked as confidential and provided by an individual ESP to a utility.

13. As an additional measure to safeguard the confidentiality of volumetric contract data contained in the DA affidavit, access to any such confidential

volumetric data should be restricted only to utility employees involved in checking affidavits for compliance with Commission requirements. The utility should be prohibited from disclosing any such volumetric data to other employees, including those involved in marketing activities.

O R D E R

IT IS ORDERED that:

1. The affidavit form proposed in Attachment 4 of the Workshop Report, attached in Appendix 1 of this decision is hereby adopted for use in complying with the affidavit requirements of Decision 04-07-025.

2. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company shall coordinate the date on which affidavits are sent to customers and shall communicate the affidavit requirement to applicable customers within 60 days of the effective date of this decision.

3. Applicable customers receiving the affidavit shall have 60 days after receipt to complete and return the affidavit to the respective utility.

4. At the conclusion of the 60-day period, each utility shall file a report with the Commission within 30 days thereafter, identifying the number of customers contacted, the number of completed affidavit forms returned, and a listing of the customers that did not return or refused to sign the affidavit.

5. To the extent a Direct Access (DA) customer and/or Electric Service Provider believe that verification of contractual load volumes in the affidavit entails confidential information, they are authorized to execute a nondisclosure agreement with the utility to protect the confidentiality of such information.

6. If the utility is made aware of a load growth situation (for a customer with at least one DA account with demand in excess of 500 kW) due to a service

upgrade (i.e., a service panel upgrade, a larger transformer, etc.) and the customer has not previously signed an affidavit, the customer shall be required to sign an affidavit.

7. The utilities shall include a statement in their affidavit transmittal letter concerning the Commission's authority and willingness to impose and enforce payment of penalties as prescribed in Section 2111 for DA customers that willingly refuse to comply with the adopted affidavit requirements, as well as other remedies as necessary.

8. The utility shall have the obligation to ensure that the forms and instructions are directed to the appropriate contact for each DA customer, and before a customer is listed as being out of compliance with the affidavit process, the utilities must send a second notice to those customers who have not responded ten days prior to the expiration of the initial 60-day period for compliance.

9. Access to any confidential volumetric data provided in a DA affidavit should be restricted only to utility employees involved in checking affidavits for compliance with Commission requirements. The utility shall be prohibited from disclosing any such volumetric data to other employees, including those involved in marketing activities. The list of designated utilities authorized to have access to confidential contract data shall be provided to each DA customer that provides such confidential contract data in its affidavit.

This order is effective today.

Dated March 17, 2005, at San Francisco, California.

MICHAEL R. PEEVEY

President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Comr. Grueneich recused herself from this agenda item and was not part of the quorum in its consideration.

APPENDIX 1

Direct Access Customer Load Declaration for Customers with at Least One Direct Access Account that Exceeds 500 kW in Demand

1. Customer Declaration

I, _____, state as follows:

1. I am an authorized representative of _____ ("Customer") and I am authorized to make this declaration.

2. I have personal knowledge of the matters set forth herein and if called upon as a witness could and would testify competently thereto.

3a. On or before September 20, 2001, Customer entered into an agreement for direct access (DA) service (Agreement) with the following Electric Energy Service Provider (ESP), _____ for (check as many as apply):

- ☐ _____ kW/kWh of load
- ☐ Customer's full load requirements

3b. Customer currently has a valid agreement for DA service in effect with (check one):

- ☐ The same ESP
- ☐ The following ESP: _____

4. Customer warrants that its total level of DA load on all DA accounts does not exceed the contracted level of load defined by the Agreement that was in effect as of September 20, 2001, and entered into consistent with the California Public Utilities Commission's ("Commission") DA suspension decisions.

5. Customer understands that the Commission may conduct spot audits or informal investigative inquiry, as it deems necessary, to deal with any potential disputes concerning the accuracy of Customer's claims concerning contractual volumes. Customer understands that the Utility may be required to provide information to the Commission regarding Customer's electricity service and consumption on all Customer's DA accounts, including but not limited to, the applicable meter, account numbers, and the associated DA load. Customer agrees to retain and make available, to the Commission, the relevant provisions of Customer's Agreement with ESP concerning contractual volumes, which was in effect as of September 20, 2001, as well as any subsequent DA agreements, to the extent not previously inadvertently lost or destroyed and currently not retrievable.

6. Customer acknowledges and agrees that it must take such actions as necessary to comply with existing DA-related decisions and requirements.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this __ day of _____, ____ at _____, _____ [*city, state].*

_____ *[signature]*

_____ *[title]*

All customers with at least one DA account that exceeds 500 kW in demand shall execute this Direct Access Customer Load Declaration. This document may be submitted by fax, provided the originals are delivered to the Utility within 10 calendar days thereafter.