

Decision 10-06-002 June 3, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding Policies and Protocols for Demand Response Load Impact Estimates, Cost-Effectiveness Methodologies, Megawatt Goals and Alignment with California Independent System Operator Market Design Protocols.

Rulemaking 07-01-041
(Filed January 25, 2007)

DECISION ON PHASE FOUR DIRECT PARTICIPATION ISSUES

1. Summary

Orders 719¹ and 719-A² of the Federal Energy Regulatory Commission (FERC) require Independent System Operators such as the California Independent System Operator (CAISO) to modify their tariffs to allow retail customers to bid Demand Response (DR) directly into their wholesale electric and ancillary services markets, either on their own behalf or through aggregators, if the relevant state or regional authorities do not prohibit such direct bidding. In today's decision, the California Public Utilities Commission

¹ *Wholesale Competition in Regions with Organized Electric Markets* (FERC Order 719), issued on October 17, 2008, in Docket Nos. RM07-19 and AD07-7, available at http://elibrary.ferc.gov/idmws/file_list.asp?document_id=13656106.

² *Wholesale Competition in Regions with Organized Electric Markets* (Order 719-A), issued on July 16, 2009 in Docket No. RM07-19, available at <http://www.ferc.gov/whats-new/comm-meet/2009/071609/E-1.pdf>.

(Commission or CPUC) directs the Investor Owned Utilities (IOUs) to prepare to bid DR from existing Participating Load Pilot (PLP) programs into the CAISO's wholesale market as soon as is feasible if the FERC approves tariff language that is acceptable to the CPUC, but prohibits further participation by IOU retail customers until the CPUC develops ratepayer protections and other relevant rules and protocols pursuant to the Commission's existing jurisdiction. This decision does not prohibit electric service providers ("ESPs") from engaging in direct bidding of retail DR on behalf of their own customers, either on their own or through third party Demand Response Providers (DRPs), but bars DRP representation of bundled IOU customers for the time being. DRPs, however, may provide direct bidding services if they contract with an ESP to provide such services for ESP customers.

Thus, this decision establishes the initial conditions under which the Commission will oversee retail direct demand response bidding participation, including the CPUC's duties to oversee the relationships between DRPs, ESPs, IOUs and retail customers. This decision also outlines the issues that must be resolved as the Commission considers allowing direct bidding of retail DR in the CAISO markets, including Commission oversight of programs and policies that apply generally to load-serving entities. The Commission will separately consider additional proposals³ for direct bidding beyond the conversion of the existing PLP programs. This decision puts load-serving entities that choose to engage in direct bidding on notice that they may be subject to CPUC oversight related to the short and long-term reliability of directly bid resources for

³ SDG&E advice letter 2152-E and PG&E advice letter 3635-E.

long-term procurement analysis, counting conventions of directly bid resources for Resource Adequacy (RA) credit, compliance with environment related procurement statutes and policies, and consumer protection issues.

2. Background

Federal Energy Regulatory Commission (FERC) Orders 719 and 719-A require Regional Transmission Operators (RTOs) and Independent System Operators (ISOs) to amend their market rules to permit retail customers to bid demand response⁴ services directly into the RTO's or ISO's organized wholesale markets. Specifically, these orders require that end use customers, either on their own or through a Demand Response Provider (DRP)⁵ be allowed to bid directly into these wholesale markets to the extent that the laws or regulations of the relevant electric retail regulatory authority do not prohibit a retail customer's participation. FERC recognized the significant role of state and local retail regulatory authorities in the design and implementation of such proposed direct bidding tools.⁶ The California Public Utilities Commission (Commission or CPUC) is such a retail electric regulatory authority. In the absence of intervening regulations from the Commission, the FERC orders allow for direct participation

⁴ "Demand response can be defined as changes to electric usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity over time, to incentive payments, or to reliability conditions." *Assigned Commissioner and Administrative Law Judges' Ruling Amending Scoping Memo*, issued in Rulemaking (R.) 07-01-041 on November 9, 2009.

⁵ FERC Order 719 and 719A use the term Aggregator of Retail Customers, or ARC. For the purposes of this decision, DRP is synonymous with ARC.

⁶ Order No. 719-A at ¶ 54.

of Demand Response (DR) in California's wholesale markets without any additional requirements or rules.

California's electric grid is operated by the California Independent System Operator (CAISO). The CAISO's primary efforts to implement direct participation of DR currently come in the form of the development of tariff language for its proposed Proxy Demand Resource (PDR) product.⁷ The CAISO's PDR product would allow DRPs to aggregate the demand response of retail end-use customers, which would then be bid into the CAISO markets through a Scheduling Coordinator. As proposed in the CAISO's tariff filing, the load of these end-use customers would continue to be served by their respective Load Serving Entity (LSE). Because of the similar treatment afforded a PDR resource and a generator, the CAISO refers to PDR as a pseudo-generating resource. Since PDR would rely on an aggregation of retail end-use customers served by Commission-jurisdictional IOUs and non-jurisdictional ESPs, and may affect the composition of California LSE's long-term energy supply procurement plans, this new product creates many questions that the Commission must address.

On November 9, 2009, the scoping memo in R.07-01-041 was amended to initiate the Direct Participation Phase of this proceeding.⁸ The Amended Scoping Memo directed that a workshop be held to address certain issues and established

⁷ CAISO *Tariff Amendment To Implement Proxy Demand Resource Product*, filed in Docket No. ER10-765 on February 16, 2010.

⁸ *Assigned Commissioner And Administrative Law Judges' Ruling Amending Scoping Memo, Establishing A Direct Participation Phase Of This Proceeding, And Requesting Comment On Direct Participation Of Retail Demand Response In CAISO Electricity Markets (Amended Scoping Memo)*, available at <http://docs.cpuc.ca.gov/efile/RULINGS/109611.pdf>.

a schedule to complete this phase of the proceeding by March 2010. The CAISO subsequently delayed its proposed PDR implementation date until May 1, 2010, prompting the Commission's Energy Division to propose a new schedule that allowed for the filing of legal briefs and two sets of reply comments so as to develop a more complete record. On April 16, 2010, FERC issued a notice of deficiency regarding the CAISO's PDR tariff proposal, including three discrete areas of concern.⁹ Thus, it is unclear when or in what form the CAISO's PDR product may be approved by the FERC.

Participants in the workshop included the Alliance for Retail Energy Markets (AReM), CAISO, California Energy Storage Alliance (CESA), California Large Energy Consumers Association (CLECA), the Direct Access Customer Coalition (DACC), the Division of Ratepayer Advocates (DRA), Energy Curtailment Specialist (ECS), the Environmental Defense Fund (EDF), Joint Parties (EnerNoc Inc., CPower Inc., and Energy Connect Inc.), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E). Parties' participation focused on four key questions:

1. What is the Commission's jurisdictional authority with respect to the retail customer's direct participation as DR bidders in the CAISO markets?
2. What rules should be established to properly address dual participation in Commission-authorized DR programs and the CAISO's PDR product?

⁹ Letter from the FERC Office of Energy Market Regulation to the CAISO, filed in Docket No. ER10-765.

3. What communications protocols are needed to ensure that retail customers are properly and transparently paid and billed for DR, and that double-procurement is avoided?
4. Is there a need for an additional financial settlement between the LSE and DRP to ensure that the LSE is not paying for excess power that is not needed?

The following discussion addresses these four issues.

3. Discussion

3.1. Jurisdiction

The November 9, 2009 Amended Scoping Memo states that part of the purpose of Phase Four of this rulemaking is to “begin the [Commission’s] effort to determine whether existing state procurement laws, decisions, rules or practices may directly or indirectly conflict with potential direct bidding by retail Demand Response into CAISO wholesale markets.”¹⁰ This question prompted an in-depth briefing and discussion at the workshops of whether and what jurisdiction the Commission may have over direct bidding activities.¹¹

In their opening briefs, PG&E and DRA argue that the Commission may reasonably conclude that DRPs qualify as public utilities because their activities are closely connected, intertwined, and integrated with retail electricity services; and because DRPs will have dedicated their property to public use as a public utility. DRA argues that even if DRPs do not qualify as public utilities, they may

¹⁰ Amended Scoping Memo at 5.

¹¹ On January 22, 2010, the following parties submitted opening briefs regarding Commission jurisdiction over direct bidding of DR resources by retail customers into the wholesale energy markets run by the CAISO: SCE, PG&E, DRA, Joint Parties, and AReM. On January 29, 2010 PG&E, Joint Parties, AReM, SDG&E, and DRA submitted reply briefs on this same subject.

alternatively fit within the definition of ESPs. PG&E argues that even if the Commission were to determine that DRPs are not public utilities, the Commission has the authority over the relationship between DRPs and retail end-use customers.

AReM argues that DRPs cannot be defined as public utilities under California Public Utilities Code Section 216 because bidding retail DR resources into the CAISO's markets does not entail the use of "electric plant" as defined in Section 217.¹² AReM further argues that engaging in direct bidding will not cause a DRP to fall within the statutory definition of an ESP because the direct bidding of retail DR resources into the CAISO's markets does not entail the provision of "electrical service" as that term is used in Section 218.3. Finally, AReM argues that third-party DR aggregators are not "aggregators" as defined in Section 331, and are therefore not ESPs under Section 365.1 because bidding retail customers DR resources into CAISO markets does not involve the aggregation of customer loads, and such activities do not entail "direct transactions" as that term is used in CPUC Section 365.1.

In its post-workshop comments and reply comments, AReM states that the Commission has no jurisdiction over contracts signed between an ESP and its direct access customer (or a DRP) and no authority over the rates, terms or conditions of service offered by ESPs. AReM reasons that direct access customers procure no energy from IOUs and are therefore free to participate directly in CAISO markets through any avenue they desire without Commission

¹² Unless otherwise stated, all statutory references herein are to the California Public Utilities Code.

oversight. AReM further argues that because ESPs are free to develop their own DR programs, these programs would not be subject to Commission jurisdiction. Finally, AReM sees no legal or policy basis to restrict the participation of direct access customers in CAISO markets, provided such customers are not enrolled in any IOU DR programs.

In its opening brief the Joint Parties state that the Commission does not have jurisdiction over DRPs because DRPs are not “public utilities” or ESPs. The Joint Parties note that the Legislature has never prescribed that DRPs are an “additional class” of public utility subject to Commission regulation. Finally, the Joint Parties argue that there is no rational basis to impose consumer protection rules for the CAISO’s markets beyond the consumer protection laws applicable to businesses operating in California, including DRPs.

In its reply brief, the Joint Parties argue that according to the plain language of the relevant statutes, the legislature has never included DRPs within the legal definitions of “public utilities” or ESP. The Joint Parties conclude that any consumer protection rules deemed by the Commission or the CAISO to be required for DRPs beyond the current law applicable to California businesses should be addressed through rules governing participation in jurisdictional utility programs.

In its opening brief, SCE asserts that DR aggregators do not meet the statutory definition of public utilities. SCE urges, however, that DRPs qualify as ESPs. SCE argues that, even if the Commission were to determine that third-party DR aggregators are not ESPs, it can and should assure consumer protection by regulating the terms and conditions under which IOUs can approve its customer’s participation in a direct bidding program.

In its reply brief, SDG&E asserts that DR service providers are within the definition of an ESP and as such are subject to the Commission's jurisdiction over ESPs for consumer protection purposes as indicated in Sections 394.2 and 394.25(e).

In sum, the parties take markedly different positions regarding whether DRPs should be treated as public utilities or ESPs, and whether such a determination conclusively establishes Commission jurisdiction. The Commission need not provide a comprehensive analysis of the Commission's jurisdiction over direct bidding in California at this juncture.¹³ We agree with SCE, PG&E, DRA, and SDG&E that this Commission can impose reasonable terms and conditions on the IOUs' approval of its end-use customer's participation in a direct bidding program. As SCE points out, and contrary to the claims of AReM, participation in a direct bidding program can impact the reliability, cost, safety and maintenance of utility service. Similarly, DRA argues that the IOUs Resource Adequacy and Long Term Procurement Plans may also be compromised if CPUC oversight over direct bidding is not effective. Moreover, while ESPs are not subject to the same Commission jurisdiction as IOUs, ESPs are subject to significant CPUC regulation related to reliability, RA, and long-term procurement, as well as programs related to environmental issues such as the Renewables Portfolio Standards.¹⁴

¹³ Commission jurisdiction in this area shall be further examined in subsequent phases of this or other proceedings as particular regulations and protocols are developed for this nascent type of product.

¹⁴ In Reply Comments on the Proposed Decision, Joint Parties point out that RA and LTPP only apply to load-serving entities.

No party disputes that the Commission has authority over the potential impacts of direct bidding on consumer protection, long-term procurement, resource adequacy requirements, or Loading Order¹⁵ related issues. As FERC aptly explains:

We recognize that demand response is a complex matter that is subject to the confluence of state and federal jurisdiction. The Final Rule's intent and effect are neither to encourage or require actions that would violate state laws or regulations nor to classify retail customers and their representatives as wholesale customers. The Final Rule also does not make findings about retail customers' eligibility, under state or local laws, to bid demand response into the organized markets, either independently or through an ARC [Aggregator of Retail Customers]. The Commission also does not intend to make findings as to whether ARCs may do business under state or local laws, or whether ARCs' contracts with their retail customers are subject to state and local law. Nothing in the Final Rule authorizes a retail customer to violate existing state laws or regulations or contract rights. In that regard, we leave it to the appropriate state or local authorities to set and enforce their own requirements.¹⁶

The CAISO agrees with FERC's assessment,¹⁷ as does this Commission. The Commission will develop rules as appropriate to establish the terms and conditions by which the IOUs may authorize their bundled customers' participation in a DRPs direct bidding program and account for direct bidding

¹⁵ See *Energy Action Plan II[:]* *Implementation Roadmap For Energy Policies*, issued October 2005 by the Commission and the California Energy Commission (CEC), available at http://docs.cpuc.ca.gov/word_pdf/REPORT/51604.doc.

¹⁶ Order No. 719-A at paragraph 54.

¹⁷ *Reply Brief Of The California Independent System Operator Corporation On Jurisdictional Issues*, submitted in the instant proceeding on January 29, 2010 at 3-4.

within the Commission's long-term procurement¹⁸ and Resource Adequacy¹⁹ duties. In particular, the Commission may, among other things, resolve customer complaints related to DRPs, establish financial responsibility standards for DRPs, and require DRPs to inform customers that enrolling with the DRP will mean that they will be unenrolled from DR programs offered by an IOU.

3.2. Dual Participation

Dual participation can be said to occur where a customer that is already enrolled in an IOU DR program also bids as a DR resource directly in CAISO markets, either individually or through a DRP. While the CAISO makes clear that its "Demand Response System will only allow one service account per demand response provider,"²⁰ the CAISO also acknowledges that multiple arrangements can be made against the performance of a particular resource. Dual participation arrangements can be quite complex. In reality, allowing dual participation at the start of a new direct participation program may be more burdensome than beneficial. This reality was not lost on the parties.

SCE argues that there are substantial complexities around dual participation in the context of direct participation in the CAISO markets, and asserts that dual participation should be considered only after the DRPs have

¹⁸ See e.g., California Pub. Util. Code, § 454.5, subd. (b)(1) (electrical procurement plans must account for utility owned generation, power purchase agreements, demand response contracts, electricity-related products and open positions to be served by spot market transactions).

¹⁹ See California Pub. Util. Code, § 380 (requiring the Commission to design and implement a Resource Adequacy program).

²⁰ CAISO Comments at 4.

experience with bidding resources into PDR.²¹ PG&E identifies several forms that dual participation could take and identifies potential costs and inequities that could arise in each instance. PG&E then concludes that “until the CAISO’s program is well established, the Commission should not allow [Customer Service Accounts] that participate in a program run by an IOU to also be a part of a PDR for a non-IOU DRP.”²²

In spite of these complexities, most parties support, albeit conditionally, eventual integration of dual participation. In reply comments, PG&E argues that, rather than burden all parties with attempting to resolve the issues of dual or multiple participation at this time, the Commission should consider the issue after sufficient experience is gained with PDR.²³ EDF supports third party participation on claims that allowing DRPs access to accounts that are also managed by LSEs will maximize the amount of DR available to the grid. EDF cautions that dual participation should be allowed in a way that maximizes grid reliability by, among other things, avoiding double counting and allowing LSEs to rely on their contracted resources. DRA strongly agrees with principles that go to: 1) ensuring that only DR that actually performs is paid, and 2) ensuring that DR that does perform does not receive duplicative payments for the same load reductions from one or more source. DRA goes on to propose various rules for the Commission to adopt that would establish DRP registration requirements

²¹ SCE Comments at 7.

²² PG&E Comments at 15.

²³ PG&E Reply Comments at 4.

and general guidelines for DRP service.²⁴ Energy Connect Inc. supports dual participation provided that the rules are “simple enough to be easily administered, reasonably immune to gaming, and easily understood by customers.”²⁵

The Commission finds these arguments to be persuasive. We determine that dual participation in IOU and DRP programs shall be implemented only after California has had reasonable and successful experience with single PDR program participation. Until this Commission orders otherwise, customers engaged in an IOU DR program will not be permitted to also participate in direct bidding of their DR resource into CAISO markets. Furthermore, ESP customers that are enrolled in IOU DR programs may not participate in the IOU program and bid directly into the CAISO market place. If an ESP customer wishes to bid into the CAISO market on their own or through a DRP, they must first exit the IOU DR program. Upon exiting the IOU program, an ESP customer may participate directly in the CAISO market to the extent that their contract with the ESP allows. However, because the Commission does not currently have a counting convention for direct participating load, the ESP will continue to be required to meet all RA and resource portfolio standards.

3.3. Communications and Settlement Issues

Communications issues concern what information flow is necessary between the LSE, the DRP (if any), and the customer providing the load drop to

²⁴ DRA is concerned that utility ratepayers could be saddled with making duplicative payments due to the lack of oversight during daily market operations.

²⁵ Energy Connect Inc., Supplemental Comments on the Workshop Report at 6. Energy Connect Inc. is one of the Joint Parties.

identify the roles, interactions and responsibilities of all parties, and the need for consumer protections. Settlement issues generally address ensuring just compensation, appropriate mechanisms for transfers, minimum credit assurances, and whether pro forma contracts that address many of these concerns are necessary and/or appropriate. The interaction of these various issues and interests creates substantial complexity and warrants a cautious approach to implementing direct bidding.

With regard to settlements, as noted by the CAISO, “[m]ost parties, if not all, agreed in workshop discussions that a standard contract, versus multiple bilateral negotiations, should be developed to govern pertinent terms of the relationship between the Commission jurisdictional load-serving entities and the third-party demand response providers.”²⁶ This agreement was reflected in the parties’ comments on the workshop: most parties agreed that facilitating direct participation of DR in the CAISO markets requires addressing the operational and communication needs of the various stakeholders. SCE identifies various process and system concerns that need to be resolved prior to direct bidding of retail DR.²⁷ PG&E urges the Commission to adopt a pro-forma contract that sets the default amount, terms and conditions for the transfer of this amount, settlement mechanism for transfers, minimum credit and performance assurances, and other terms.²⁸ DRA argues that general communication and settlement concerns should be overseen by the Commission because the CAISO

²⁶ CAISO Comments at 5.

²⁷ SCE Comments at 2-3.

²⁸ PG&E opposes the direct billing approach which it attributes to SCE.

would only track PDR performance results at the aggregated level, and would not analyze the performance of underlying customers that make up a PDR.²⁹

DRA identifies under-collection, which it refers to as the “missing money” problem, as one of several issues that warrant additional discussion and some actual experience.³⁰ This was the communications issue most discussed by the parties. EDF explains that “the way the CAISO has structured its PDR settlement process has led to the LSEs asking that they be compensated by third-party DRPs for the energy they purchased for their customers that was not consumed because of demand response.”³¹ As explained by PG&E, this problem would arise under the following circumstances:

...a DRP may bid DR into the CAISO’s markets using PDRs comprised of portions of the LSE’s load. If a DRP’s bid for a PDR is accepted, then the DRP is compensated for its accepted load reduction bid just as though the PDR had a scheduled delivery of that amount of energy into the CAISO system.

As a consequence, the LSE pays for load it does not place on the CAISO grid, and the DRP receives payment for energy it does not deliver into the CAISO grid.³²

DRA, therefore, recommends identifying different types of participation frameworks and that the Commission allow only those frameworks that have been properly tested and refined in a PDR pilot.

²⁹ DRA Comments at 3.

³⁰ DRA at 4-5.

³¹ EDF Comments at 4.

³² PG&E Comments at 6.

Since the complexities identified by parties in this proceeding cannot be resolved at this time, we will defer the development of the necessary customer protections until a subsequent phase of this proceeding. This action has the added benefit of allowing parties and the Commission to learn from the participation of the pilot programs before coming to conclusions which will impact the DR community at-large.

3.4. Implementation Timing

The Commission has regulatory oversight over IOU DR programs and contracts, and authority over long-term resource portfolio planning and retail sales of electricity. In existing retail DR programs, the IOU acts as the intermediary between the CAISO's markets and the customer or aggregator that is providing the DR resource. While these DR programs have not provided for a customer or aggregator to directly bid DR resources into the CAISO wholesale markets,³³ the Commission has directed the IOUs to better integrate their existing DR resources into the CAISO's energy and ancillary services markets.³⁴ Acting expeditiously to allow end use customers or aggregators to bid DR resources directly in these markets (to the extent that the laws or regulations applicable to the relevant electric retail regulatory authority do not prohibit a retail customer's participation) is consistent with our identification of DR as one of the state's preferred means of meeting growing energy needs.³⁵

³³ The Commission has authorized three Participating Load Pilot (PLP) programs in which the IOUs bid DR load reductions into the CAISO ancillary service markets.

³⁴ See Decision (D.) 09-08-027.

³⁵ See *Energy Action Plan II[:] Implementation Roadmap For Energy Policies*, issued October 2005 by the Commission and the California Energy Commission (CEC), available at http://docs.cpuc.ca.gov/word_pdf/REPORT/51604.doc.

The CAISO has urged the Commission to identify what must be done to achieve some level of direct participation during the summer of 2010 and what must be resolved over the long term. The CAISO states that priorities should include modifying rules and tariffs to enable direct participation.³⁶ PG&E identifies various issues that must be addressed prior to the implementation of PDR, and argues that PDR should not be fully implemented until several months after the decision in this phase of the proceeding so that parties have adequate time to prepare to implement Commission directives.³⁷ While DRA agrees with PG&E that a schedule for full implementation of PDR, including dual participation, by the summer of 2010 is too compressed, AReM is skeptical of the claim that full-scale PDR cannot be implemented by the summer of 2010 and asserts that direct access customers who are not enrolled in IOU DR programs can participate in PDR during the summer of 2010.³⁸ AReM is opposed to PG&E's proposal that the Commission develop conditions for participation by retail customers.

Various parties suggest enacting a pilot or partial program as an initial step toward PDR rather than the full PDR program. For example, SCE states that it could modify its existing Participating Load Pilot (PLP) program to allow some PDR participants in 2010.³⁹ After having completed the initial work on its PLP, SCE states that the PDR product is better suited to small and medium

³⁶ CAISO Comments at 1-2.

³⁷ PG&E Comments at 16.

³⁸ AReM Comments at 7.

aggregated DR resources. SCE further asserts that modifying its PLP to fit into the new PDR product framework would allow it to work with the CAISO on operation of the new PDR wholesale market product, while allowing additional development of rules and requirements for full implementation in 2011. Toward this end, SCE recommends that the Commission direct it to file an advice letter seeking authorization to modify its PLP for a PDR pilot in the summer of 2010, and that additional processes be ordered to resolve the outstanding issues in time for full implementation of PDR by the summer of 2011.

Various parties appear to embrace this approach. In Reply Comments PG&E states that it is prepared to implement the CAISO's PDR program on a limited basis. DRA also voices its agreement that PDR should be implemented in 2010 only as a pilot.⁴⁰ SDG&E also supports the use of pilot programs and proposes to leverage the existing PLP to implement PDR for the summer of 2010. SDG&E suggests that IOUs should solicit and incorporate third-party DRPs into their 2010 PDR pilots as a way to gain experience through real-time DRP/LSE interaction.⁴¹ Similarly, EDF asserts that allowing DR providers to have access to the CAISO market in the same timeframe as IOUs will ensure that customers have access to both LSE programs and third party DRP programs, and will avoid giving the LSEs a competitive advantage.⁴²

³⁹ SCE's PLP has a three-year pilot program cycle (2009-2011), funded in D.08-12-038 and D.09-08-027.

⁴⁰ DRA Reply Comments at 3.

⁴¹ SDG&E Reply Comments at 2.

⁴² EDF Reply Comments at 3.

Taking the record of the proceeding as a whole, we conclude that the Commission should not allow DRPs to participate directly in CAISO markets on behalf of IOU retail customers until the CPUC develops adequate customer protections. Since the complexities identified by the parties in this proceeding cannot be resolved at this time, we will defer the development of the necessary customer protections until a subsequent phase of this proceeding.

As an initial step toward direct participation, DRPs can bid on behalf of ESP customers (provided the ESP customer is not in an IOU DR program), and we do not prohibit an ESP customer from bidding on its own behalf or for other ESP customers. However, those load-serving entities that choose to engage in the initial phases of participation may be subject to CPUC oversight related to the short and long-term reliability of directly bid resources for long-term procurement analysis, counting conventions of directly bid resources for RA credit, and consumer protection issues. We will also require PG&E, SCE, and SDG&E to file advice letters amending their PLP pilots and preparing them for direct participation as soon as FERC approves a PDR tariff that the CPUC deems appropriate. These party's PLP programs are in different states of development and have varying levels of funding remaining. Where there are insufficient funds to support a new pilot program, it may be necessary to engage in fund shifting as provided for in D.09-08-027. Some IOUs are proposing additional pilot programs outside of this proceeding.⁴³ We will not address the merits of those proposals here but will consider them separately.⁴⁴

⁴³ SDG&E advice letter 2152-E proposes to modify a portion of its day-ahead Capacity Bidding Program by 2010. PG&E advice letter 3635-E proposes to modify its PeakChoice program by summer/fall 2010. SCE filed a Petition for Modification of

Footnote continued on next page

Until the issues discussed in this decision are resolved, direct participation by DRPs is limited to the scenarios identified in this section. However, given the value of effectively regulated direct participation of PDR in the CAISO markets and our desire to secure these benefits for ratepayers, we intend to resolve the outstanding issues identified in this decision as expeditiously as possible.

On April 16, 2010, FERC issued a notice of deficiency regarding the CAISO's PDR tariff proposal, including three discrete areas of concern.⁴⁵ Neither the CPUC nor the parties have had the opportunity to review any final PDR provisions. We cannot at this time determine if or how the proposed PDR pilot programs might need to be modified. At this time the Commission remains hopeful that FERC will issue an order on the CAISO's PDR tariff filing in time for the pilot programs to be integrated into the CAISO's wholesale markets for the latter part of the summer of 2010.⁴⁶ We will leave Phase Four of this proceeding open for the limited purpose of addressing PDR implementation issues, such as whether and to what extent the Commission will approve the IOU pilot programs based upon the version of PDR eventually approved by the FERC. We

D.09-08-027 on March 18, 2010 requesting to pilot an agricultural pumping interruptible program for ancillary services to bid into PDR, in addition to converting its existing PLP pilot to a PDR pilot.

⁴⁴ In its comments on the Proposed Decision, SCE states that as part of its advice letter filing in compliance with this decision, it will include an agricultural pumping interruptible pilot for ancillary services to bid into PDR. As the other utilities have additional proposals before the Commission in other venues, SCE may propose the agricultural pumping pilot but should do so in a separate advice letter filing.

⁴⁵ Letter from the FERC Office of Energy Market Regulation to the CAISO, filed in Docket No. ER10-765.

⁴⁶ The Commission may have in an expedited proceeding to determine if the tariff language is appropriate.

clarify that while we defer action on approving IOU bidding of PDR products into the CAISO markets (depending on the outcome of the FERC's proceeding), the IOUs should continue to develop pilot programs as directed herein. Parties should closely monitor FERC Docket No. ER10-765 and be prepared to expeditiously evaluate the FERC's decisions on the proposed PDR product and comment on whether the CPUC should order the IOUs to participate in the CAISO's PDR bidding process after such tariff language is finally approved by the FERC.

We recognize that there may necessarily be an interval between a FERC decision on the CAISO's PDR tariff and the date for IOU participation in PDR bidding in order for the IOUs to modify their PDR programs to reflect FERC and/or CPUC orders approving use of a PDR product design. We will not assume the outcome of the FERC's process and, in effect, begin implementing a program that is still in development. In the event it is not possible to conclude the process by summer 2010, the PDR implementation issues will be addressed in future DR proceedings so that PDR may be implemented as expeditiously as possible.

4. Comments on Proposed Decision

The proposed decision in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on April 12, 2010 by AreM, DACC, EDF, Edison, EnerNOC, PG&E, and SDG&E. AReM, CAISO, DACC, DRA, EnerNOC, PG&E, and SDG&E filed reply comments on April 19, 2010. All comments and replies were filed timely.

5. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner in this proceeding and Darwin E. Farrar is the assigned Administrative Law Judge in Phase Four of this proceeding.

Findings of Fact

1. There are substantial complexities associated with dual participation in the context of direct participation of retail DR in the CAISO markets.
2. The Commission should consider issues related to dual participation after sufficient experience is gained with PDR.
3. IOUs may solicit and incorporate third-party DRPs into their 2010 PDR pilots as a way to gain experience with real-time DRP/LSE interaction.
4. The CAISO only tracks PDR performance at an aggregate level and does not see usage of the retail customer.
5. The Commission will consider what customer protection policies should be developed for DRPs in a subsequent phase of this proceeding.
6. The Commission shall revisit the question of whether it will allow more than one DRP per customer account in a subsequent proceeding.
7. The Commission shall revisit the question of whether dual participation should be restricted at the retail level in a subsequent proceeding.
8. The details related to settlement, information sharing, and communication shall be resolved in a subsequent proceeding.
9. The IOU PLP programs should be leveraged to design PDR pilot programs that may be ready to be implemented during the summer of 2010.
10. IOU proposals for additional participation in PDR will be considered separately.

Conclusions of Law

1. Consistent with FERC Orders 719 and 719-A, direct bidding by retail consumers of DR resources in wholesale markets cannot go forward in California except as allowed by the Commission and consistent with the terms and conditions established by the Commission.

2. The Commission has jurisdictional authority to restrict IOU customers from directly participating in the CAISO energy markets.

3. Energy Service Providers (ESPs) may engage in direct participation of retail DR on behalf of their own customers and other ESP customers, and an ESP customer can bid on behalf of itself.

4. Load-serving entities that choose to engage in the initial phases of participation may be subject to Commission oversight related to the short and long-term reliability of directly bid resources for Long-term Procurement analysis, counting conventions of directly bid resources for RA credit, environmentally-related procurement statutes and policies, and consumer protection issues.

5. The Commission has a role in consumer protection and may, among other things, resolve customer complaints related to DRPs, establish financial responsibility standards for DRPs, and require DRPs to inform potential customers that enrolling with the DRP will mean that they will be unenrolled from DR programs offered by another carrier.

6. To the extent that existing funds for the PLP programs are insufficient for Proxy Demand Response pilot programs, PG&E, SCE, and SDG&E may seek to shift funds pursuant to D.09-08-027.

O R D E R

IT IS ORDERED that:

1. There shall be only one Demand Response Provider per retail customer account.
2. There shall be no dual or multi-party direct bidding of Demand Response at the retail level.
3. The demand response of utility bundled customers shall not be bid directly into the California Independent System Operator's wholesale electric and ancillary services markets by Demand Response Providers until the Commission establishes consumer protection policies.
4. Any Direct Access customers enrolled in an Investor-Owned Utility demand response program must withdraw from the Investor-Owned Utility demand response program before engaging in direct bidding through a third-party. It is the third-party's responsibility to communicate this requirement to effected Direct Access customers.

5. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company shall each file a Tier 2 advice letter within 10 days of the effective date of this decision to modify its Participating Load Pilot program to Proxy Demand Resource pilot programs for summer 2010.

This order is effective today.

Dated June 3, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners