

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Enhance the Role of
Demand Response in Meeting the State's Resource
Planning Needs and Operational Requirements.

Rulemaking 13-09-011
(Filed September 19, 2013)

**SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND OPENING COMMENTS
ON PROPOSED DECISION ADOPTING GUIDANCE FOR FUTURE DEMAND
RESPONSE PORTFOLIOS AND MODIFYING DECISION 14-12-024**

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Dated September 19, 2016

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Sierra Club and Environmental Defense Fund (“EDF”) respectfully submit the following comments on the August 30, 2016 Proposed Decision (“PD”) of Administrative Law Judge Hymes Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024. These comments are timely submitted pursuant to Rule 14.3(a) of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure.

I. INTRODUCTION

Over the past twelve years, the Commission has stated repeatedly that “the use of fossil-fueled [back-up generation, or] BUGs does not constitute Demand Response.”¹ With this PD, the Commission extends this policy to its unassailable, logical conclusion: if fossil fuel back-up generation does not constitute demand response (“DR”), then fossil-fueled resources must not be used to respond to demand response events. Sierra Club and EDF strongly support the PD in explicitly prohibiting fossil-fueled resources (“prohibited resources”) from participating in demand response programs. If approved with the needed refinements we suggest in these comments, the PD will result in a more accountable and legitimate demand response regime that

¹ A. 14-11-012, *Alternate Proposed Decision of Commissioner Florio* (Oct. 6, 2015), p. 15. The Commission has defined demand response as excluding fossil resources since 2003. *See, e.g.* D.03-06-032, *Interim Opinion in Phase 1 Addressing Demand Response Goals and Adopting Tariffs and Programs for Large Customers* (June 5, 2003), Attachment A at p. 2 (holding that “the Agencies’ definition of demand response does not include or encourage switching to the use of fossil fueled emergency backup generation.”); D.06-11-049, *Order Adopting Changes to Utility Demand Response Programs* (Dec. 1, 2006), p. 58; D.09-08-027, *Decision Adopting Demand Response Activities and Budgets for 2009 through 2011* (Aug. 24, 2009), pp. 164-166; D.11-10-003, *Decision Further Refining the Resource Adequacy Program Regarding Demand Response Resources* (October 10, 2011) p. 26; D.14-12-024, *Decision Resolving Several Phase Two Issues and Addressing the Motion for Adoption of Settlement Agreement on Phase Three Issues* (Dec, 9, 2014) p. 53-55, Table 5.

appropriately uses ratepayer dollars, improves human health, and helps California meet its increasingly ambitious greenhouse goals.

In order for these benefits to become a reality, the PD's ban on prohibited resources must be enforceable. Yet, the PD mischaracterizes and fails to address issues raised by the Energy Division Staff Report and by other parties regarding the necessity and feasibility of recording the use of prohibited resources during demand response events through use of metering. Instead, the PD relies on mere attestation and calls for an "audit verification plan" to be designed by a consultant retained by the investor-owned utilities ("IOUs"), entities that have consistently argued against robust compliance procedures to prevent use of prohibited resources as demand response. Indeed, it is entirely unclear how a legitimate audit can be conducted where the only available record is attestation, with no actual tracking of usage of the prohibited resource. The Commission should not content itself with half-measures. The PD must be revised to require metering for non-residential customers rather than mere attestation to enable meaningful enforcement of the prohibition on use of fossil-fueled generation as a demand response resource.

Despite the comments of numerous parties regarding the need to change the role of utilities in the demand response market,² the PD continues with the status quo of the utility as administrator and still adheres to a system that may favor the utility over third party providers. Sierra Club and EDF propose that the PD be modified to reflect that 1) the utility should not be the ultimate administrator of demand response auction mechanism ("DRAM"), because such a system is counter to a transparent and competitive market; and 2) instead, the utilities should bid in demand response with other third parties in a transparent market hosted by an independent administrator.

² See, e.g., *Comments of Environmental Defense Fund on Administrative Law Judge's Ruling Requesting Responses to Additional Questions in Regard to 2018 and Beyond Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State's Resource Planning Needs and Operational Requirements, R. 13-09-011 at 6 (filed Jul. 01, 2016); *Response of OhmConnect, Inc. to Administrative Law Judge's Ruling Requesting Responses to Additional Questions in Regard to 2018 and Beyond Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State's Resource Planning Needs and Operational Requirements, R. 13-09-011 at 2 (filed Jul. 01, 2016).

II. DISCUSSION

A. The PD Appropriately Bans Fossil-Fueled Engines from Providing Demand Response but Must Be Revised to Include a Meaningful Enforcement Mechanism.

1. The PD Reasonably Finds that Fossil-Fueled Resources Cannot Provide Demand Response.

Sierra Club and EDF strongly support the PD in instituting a date of January 1, 2018 to begin the prohibition of certain fossil-fueled engines in demand response, and in rescinding the requirement in D.14-12-024 that the utilities collect data on fossil-fueled back-up generation use. As the PD correctly finds, the Commission has followed proper notice and comment procedure to amend D.14-12-024, as dictated by Section 1708 of the Commission's Rules of Practice and Procedure. Parties were given the opportunity to comment on the Energy Division's October 2015 Staff Proposal, and to ask questions about it at the January 2016 workshop. This process is adequate under the statute and similar to the process the Commission has followed for revising other decisions.³

The PD also appropriately recognizes that numerous clean energy laws and policies, including the state's Energy Action Plan, the Loading Order, Assembly Bill 57, and Senate Bill 1414 make it abundantly clear that demand response is intended to reduce greenhouse gas emissions. As the PD succinctly states: "the Loading Order indicates that demand response is a reduction in demand that is not supported by fossil-fueled resources."⁴ Just as we do not need to know how many children's toys contain lead before deciding to ban the use of lead in children's toys, it is clear that it is not necessary to know how many fossil-fueled resources participate in demand response before deciding that any contribution from these resources is counter to the program's aims and should not be accepted. Therefore, the PD reasonably cancels the unnecessary data collection effort. As noted in prior comments, the proposed data collection plan would result in delay and unknown costs that may amount to millions of ratepayer dollars,

³ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State's Resource Planning Needs and Operational Requirements, R. 13-09-011 at 15-17 (Aug. 30, 2016) (Proposed Decision), *citing* R. 11-03-012, September 29, 2015 Ruling, Appendix A at 3-4.

³ *Id.* at 20.

⁴ *Id.*

all in the service of a voluntary survey that is unlikely to yield accurate or helpful results.⁵ In addition, the PD correctly observes that after first ordering similar data collection in 2011, a decision “to abandon the data collection is anything but hasty.”⁶ In transmuting the Commission’s long-held policy statement into an enforceable rule, the Commission takes a much-needed step that is reasonable, thoughtful, and critically necessary to restore the reputation of demand response as a true preferred resource.

Sierra Club and EDF are concerned, however, that the PD’s unequivocal conclusions are not explicitly reflected in its Findings of Fact or Conclusions of Law. Instead, the Conclusions of Law contain passively worded statements that sound like recommendations for future action of the Commission, rather than a clear prohibition set forth in the body of the PD. In addition, the Conclusions of Law do not contain the list of prohibited resources. To remove any ambiguity, Conclusion of Law #4 should be revised to state the new rule clearly:

4. The Commission ~~should adopt a clearly identified prohibition on the use of certain resources in order to enforce its policy statement regarding these resources.~~ **finds that the following resources may not be used to respond to a demand response event: distributed generation technologies using diesel, natural gas, gasoline, propane, or liquefied petroleum gas, in Combined Heat and Power (CHP) or non-CHP configuration.**

2. **The PD Must Include Monitoring and Enforcement to Ensure Compliance with the Prohibition of Fossil-Fueled Resources in Demand Response Programs.**

The PD falls needlessly short of ensuring prohibited resources are not utilized during demand response events by declining to institute an effective monitoring and compliance process. The PD misstates the verification recommendations of the Staff Report and fails to address or evaluate the comments on metering and monitoring raised by parties to this proceeding. It also inappropriately shifts the responsibility for designing a verification program

⁵ See, e.g., *Sierra Club Comments on Staff Proposal Regarding the Use of Fossil-Fuel Back-Up Generation in Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 2 (Oct. 15, 2015).

⁶ PD, p. 23.

premised on attestation to an outside consultant hired by the utilities.⁷ The PD must be revised to requiring metering rather than attestation to ensure compliance with the Commission’s ban on prohibited resources.

a. *Attestation Alone is an Insufficient Enforcement Program Where Metering or Data Loggings is Nonexistent.*

The PD compels tariff language changes in demand response programs that require non-residential customers to indicate whether or not they own a prohibited resource at the time they enroll in a demand response program and, if so, to attest that they will not use the resources during a demand response event or will agree to accept a default adjustment. However, as many parties pointed out in comments throughout the proceeding, attestation is an insufficient compliance mechanism.⁸ As Sierra Club has noted, many older fossil generators only have odometer-style meters. These older generators are often the most polluting, making it imperative that California ratepayers can be confident they are not paying a large premium to subsidize dirty diesel fuel. However, without a data logging device that collects data on the date and time of the generator’s use, there is no way to verify after a demand response event has occurred whether or not a prohibited resource was used during the event. No number of site visits after a demand response event has concluded will be able to prove or disprove if a generator was on. Demand response events are, by their nature, unpredictable, making it unfeasible to schedule surprise site visits to correspond with a demand response event.

The PD itself points out that, “the Commission’s adopted policy statement regarding

⁷ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 26 (Aug. 30, 2016) (Proposed Decision).

⁸ *See, e.g., Sierra Club Comments on Staff Proposal Regarding the Use of Fossil-Fuel Back-Up Generation in Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 5 (Oct. 15, 2015); *Joint Opening Comments of Natural Resources Defense Council (NRDC), Environmental Defense Fund (EDF) and The Utility Reform Network (TURN) on Staff Proposal Regarding the Use of Fossil-Fueled Back-up Generation in Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 2 (Oct. 15, 2015); *The Office of Ratepayer Advocates’ Comments on Staff Proposal Regarding Use of Fossil-Fueled Back-Up Generation in Demand Response Programs*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 9 (Oct. 15, 2015).

fossil-fueled back-up generation essentially has no effect without any associated conditions or requirements.”⁹ Similarly, the ban on prohibited resources proposed in the PD will be of questionable effectiveness if there is no ability to track compliance. Yet, despite the importance of monitoring and verification, the PD fails to address the feasibility of requiring all prohibited resources to have the ability to track their usage. What’s more, it mischaracterizes Energy Division Staff’s monitoring proposal, claiming that “the Staff Proposal recommended a verification process that encompassed either bi-annual site visits or a cross examination of data” from air districts.¹⁰ This statement is in error: the Staff Proposal recommended a bifurcated verification process, where non-residential customers must either install a meter to track the usage of the prohibited resource or accept a default adjustment.¹¹ Although this verification proposal was addressed extensively by parties in responsive comments, the PD ignores both Staff’s recommendation and the comments parties made in response.

In a recent ex parte meeting the Joint Demand Response parties observed that when “there is no objective means for parties to know whether those rumors are true or not, in the absence of greater transparency, such rumors of irregularities can persist and undermine confidence in the process.”¹² This statement refers to rumors of irregularities in the selection process for DRAM resources, but the logic fits the back-up generation issue perfectly: With no way to verify compliance, transparency is nonexistent, ratepayer confidence is undermined, and enforcement is not possible. Monitoring is the foundation of any robust and transparent regulatory regime, and the Commission’s demand response programs should be no different. To properly serve the public and protect ratepayers, the Commission must determine an appropriate compliance and monitoring regime now, rather than leaving the implementation process in the ambit of utilities that have strongly argued against any restrictions.

Accordingly, the PD should be revised to require non-residential customers that operate a prohibited resource that does not currently have data logging capability to install such a device as

⁹ PD, p. 20.

¹⁰ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 36 (Aug. 30, 2016) (Proposed Decision).

¹¹ *Demand Response and Back Up Generation – Energy Division Staff Proposal* at 9-10 (Sep. 21, 2015).

¹² *Notice of Ex Parte Communication of the Joint DR Parties*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 2-3 (July 28, 2016).

a condition of continuing in the program and require periodic auditing to ensure prohibited resources are not used during demand response events. These devices are not expensive, especially in light of the high payments participants receive.¹³ An audit verification plan should center on review of actual records of prohibited resource usage, not quixotic efforts to “audit” attestation. To the extent additional discussion is needed to identify permissible metering devices and resolve related compliance issues, Sierra Club and EDF recommend a workshop within thirty days of issuance of a final decision, followed by approval through an advice letter to allow for public comment and final review and approval by the Commission.

b. *The Commission Should Consider New Strategies to Reduce the Use of Prohibited Resources.*

In addition to providing effective monitoring and enforcement on the use of prohibited resources in demand response programs, the Commission should consider prioritizing incentives to enable owners of prohibited resources that had historically participated in demand response programs to replace the fossil-fuel technology with non-emissive components and make use of existing infrastructure investments. Because prohibited resources currently installed have a connection to the grid, and associated wires infrastructure; both of these assets can be reused as part of a retrofit to clean distributed energy resources, such as batteries co-located with solar photovoltaic generation. Incentives may take the form of the Self-Generation Incentive Program, or, for example, rebates for batteries that are available only for replacing a prohibited resource. We believe it is timely for the Commission to explore these alternatives in a workshop or other form of public discourse that allows for innovative solutions designed to give prohibited resource owners strong financial reasons to replace these resources.

B. In Order to Ensure a Transparent, Competitive Procurement Process for Demand Response, the PD Should Shift Administrative Responsibilities to an Independent Third Party.

The PD sets forth the laudable goal that “demand response shall be market-driven leading to a competitive, technology-neutral, open-market in California with a preference for services

¹³ *Sierra Club Response to Administrative Law Judge’s Ruling Requesting Responses to Additional Questions in Regard to 2018 and Beyond Demand Response Programs, Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 5 (Jul. 1, 2016).

provided by third-parties through performance-based contracts.”¹⁴ However, the PD does not provide for the achievement of that goal. Sierra Club and EDF are concerned that the PD preserves the role of the utility as administrator, stating it is “reasonable to continue both roles of the Utilities as demand response program providers (implementers) and administrators” due to regulatory and technological uncertainty.¹⁵ As stated by EDF in previous comments, preserving the utility role as administrator preserves a number of barriers to the advent of a market that is ripe with innovation and cost-effective solutions. Procurement bid and selection processes remain opaque – and, as evidenced by recent DRAM results, it is not clear that utility procurement abides by either budget or registration caps.¹⁶ Disallowing utilities from bidding into the DRAM¹⁷ does not necessarily obviate these concerns – absence of utility bids does not preclude the establishment of a market that does not fully allow for or properly value third party DR solutions.

In addition, while it is true that utilities have amassed some amount of experience in this arena,¹⁸ that does not mean that other entities do not have equally valuable insight to bring. As stated previously by EDF, entities like the California Independent System Operator (“CAISO”) “would establish an objective perspective on the utilization of DR to address system needs, given their constant factoring on customer behavior, real-time load, and weather conditions.”¹⁹ To that

¹⁴ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 42 (Aug. 30, 2016) (Proposed Decision).

¹⁵ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 51-52 (Aug. 30, 2016) (Proposed Decision).

¹⁶ *Comments of Environmental Defense Fund, the Sierra Club, and the Natural Resources Defense Council on Utility Advice Letters Concerning Demand Response Auction Mechanism (DRAM) Pilot Results* (Aug. 11, 2016).

¹⁷ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 65 (Aug. 30, 2016) (Proposed Decision).

¹⁸ *Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024*, Order Instituting Rulemaking to Enhance the Role of Demand Response in Meeting the State’s Resource Planning Needs and Operational Requirements, R. 13-09-011 at 52 (Aug. 30, 2016) (Proposed Decision).

¹⁹ *Comments of Environmental Defense Fund on Administrative Law Judge’s Ruling Requesting Responses to Additional Questions in Regard to 2018 and Beyond Demand Response Programs*, Order

end, EDF believes that the Commission should alter the PD to reflect something other than the status quo power imbalanced structure that is already in place, and should use this as an opportunity to transition to an open marketplace that relies on appropriate pricing and incentives to inspire participation and that allows utilities and third party DR providers to compete on an even-playing field.

III. CONCLUSION

With California moving to aggressively decarbonize its energy system and expanding its commitment to preferred resources, the Commission must ensure that the future of demand response is in line with the overall values and goals of accountability and transparency. Proposed changes to the PD's Findings of Fact and Conclusions of Law are provided below as Appendix A to these Opening Comments.

Dated September 19, 2016

Respectfully submitted,

/s/

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APPENDIX A
SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND'S
PROPOSED CHANGES TO ALTERNATE PROPOSED DECISION

Revised Findings of Fact

.....
4. The Energy Action Plan and the Loading Order indicate a preference for carbon-free cleaner technologies.

.....
18. The data collection will may not provide an adequate answer to our question.

.....
35. ~~Prudence requires some measure of verification of~~ Customer compliance with the prohibition provision cannot be known without some measure of verification.

36. If a prohibited resource does not have a data logger capable of recording the time and date the resource is used, it is not possible to ascertain whether the resource was used during a demand response event after the event is over.

37. As an alternative to derating, it is reasonable to require a data logger to ensure non-residential participants in demand response programs do not use prohibited resources during a demand response event.

Revised Conclusions of Law

4. ~~The Commission should adopt a clearly identified prohibition on the use of certain resources in order to enforce its policy statement regarding these resources.~~ The following resources may not be used to respond to a demand response event: distributed generation technologies using diesel, natural gas, gasoline, propane, or liquefied petroleum gas, in Combined Heat and Power (CHP) or non-CHP configuration.

5. ~~The Commission should modify~~ D.14-12-024 is modified to abandon the data collection effort and to establish a date to begin the prohibition of the use of certain resources during demand response program events.

.....
12. The Commission should require non-residential customers to electronically attest to whether they own a prohibited resource and a) agree not to use the prohibited resource to reduce load during a demand response event in return for an incentive and install a logging device to record the date and time of use of the prohibited resource or b) if the prohibited resource is required to be used for safety reasons, agree to a default adjustment.