BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Annual Local and Flexible Procurement Obligations for the 2019 and 2020 Compliance Years.	R.17-09-020

COMMENTS OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION ON PROPOSED DECISION CLARIFYING RESOURCE ADEQUACY IMPORT RULES

Irene K. Moosen
Director, Regulatory Affairs
California Community Choice Association
One Concord Center
2300 Clayton Road, Suite 1150
Concord, CA 94521
415.587.7343
Regulatory@cal-cca.org

Evelyn Kahl
Ann Springgate
Buchalter, A Professional Corporation
55 Second Street
Suite 1700
San Francisco, CA 94105
415.227.0900
ekahl@buchalter.com

Counsel to the
California Community Choice Association

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CalCCA requests the Commission reject the PD as written and affirm the previous usage of "firm" energy in the context of import RA, and as set out in its prior decisions.

1. The requirement that energy "flows" under an import RA contract for that capacity to be counted toward a compliance obligation is a new requirement, not a clarification of existing rules, that, if adopted, would eviscerate the value in load-serving entities' import RA contracts and cause massive disruption in the RA market.

2. The rule would take effect on the eve of a compliance deadline, leaving many LSEs out of compliance with no time to address the shortfall.

3. The rule would require bidding behavior by out-of-state generators that is not required of in-state generators, and would therefore violate the Commerce Clause of the U.S. Constitution, and SB 100.

4. If the constitutional impacts were mitigated by imposing identical requirements on in-state generators as well as out-of-state generators, FERC would likely assert jurisdiction over RA contracts and, potentially, the RA program itself.

5. The PD's likely result is an oversupply on the CAISO grid.

6. Oversupply caused by the PD may result in curtailment of other, preferred, resources, resulting in a decrease in the State's ability to meet its climate goals.

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the California Community Choice Association (CalCCA)[1] submits the following comments on the *Proposed Decision Clarifying Resource Adequacy Import Rules*, issued on September 6, 2019 (Proposed Decision or PD).

I. INTRODUCTION

The Commission's concern regarding a potential crisis in reliability is legitimate, and all load-serving entities should own the responsibility to help develop a solution to address well-founded reliability concerns. The Proposed Decision's assessment and solution, however, are not based on a well-founded assessment of the Resource Adequacy (RA) market or imports and thus are misguided. The PD is not, as it claims, a clarification of existing rules meant to ensure that import RA resources are available when needed. What is clear is the PD's new requirements will effect a sea change in the way import RA is transacted and bid in the California Independent System Operator (CAISO) market, and in turn, cause a major disruption in the market on the eve of a compliance deadline.

[1] California Community Choice Association represents the interests of 19 community choice electricity providers in California: Apple Valley Choice Energy, Clean Power SF, Clean Power Alliance, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, Marin Clean Energy, Monterey Bay Community Power, Peninsula Clean Energy, Pioneer Community Energy, Pico Rivera Innovative Municipal Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Jacinto Power, San Jose Clean Energy, Silicon Valley Clean Energy, Solana Energy Alliance, Sonoma Clean Power, and Valley Clean Energy.

The new requirements also face significant and insurmountable legal challenges. The new requirements discriminate, on their face, against out-of-state generators, in violation of the United States Constitution, and of California's own Senate Bill (SB) 100.[2] Further, since the PD implicates energy markets by entangling import RA contracts with energy sales, it invites Federal Energy Regulatory Commission (FERC) intervention in California's RA program. Indeed, avoiding the discrimination in interstate commerce by extending the requirements to in-state generators would only heighten the invitation for FERC intervention.

For the following reasons CalCCA requests the PD be rejected:

7. The requirement that energy "flows" under an import RA contract for that capacity to be counted toward a compliance obligation is a new requirement, not a clarification of existing rules, that, if adopted, would eviscerate the value in load-serving entities' (LSEs) import RA contracts and cause massive disruption in the RA market.

8. The rule would take effect on the eve of a compliance deadline, leaving many LSEs out of compliance with no time to address the shortfall.

9. The rule would require bidding behavior by out-of-state generators that is not required of in-state generators, and would therefore violate the Commerce Clause of the U.S. Constitution, and SB 100.

10. If the constitutional impacts were mitigated by imposing identical requirements on in-state generators as well as out-of-state generators, FERC would likely assert jurisdiction over RA contracts and, potentially, the RA program itself.

11. The PD's likely result is an oversupply on the CAISO grid.

12. Oversupply caused by the PD may result in curtailment of other, preferred, resources, resulting in a decrease in the State's ability to meet its climate goals.

For these reasons, CalCCA requests the Commission reject the PD as written and affirm the previous usage of "firm" energy in the context of import RA, and as set out in its prior decisions. Proposed findings of fact, conclusions of law and ordering paragraphs are provided in Appendix A.

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[2] Senate Bill 100 (Stats. 2018, ch. 312) (hereafter, SB 100)..

II. THE PD IS NOT A CLARIFICATION OF PRIOR DECISIONS; RATHER IT IS A SEA CHANGE IN THE RULES AND WILL CAUSE A MAJOR DISRUPTION IN THE MARKET

The PD states an intent "to clarify the RA import requirements as set forth in D.04-10-035 and D.05-10-042."[3] Yet the requirements the PD imposes are not mere clarifications. The proposed definition of "firm energy" – energy that must "flow" during the Availability Assessment Hour (AAH) -- is new and differs substantially from the way in which import RA is transacted today. It changes the product sold in the market from a capacity product to some other, as yet untried, type of hybrid energy and capacity product. These changes will retroactively eviscerate the value of LSEs' existing import RA contracts and change the way the import RA market operates in California, all on the cusp of a compliance deadline.

A. The Definition of "Firm Energy" Is Not a Clarification But a New Definition

The PD references Decision (D.) 04-10-035 and D.05-10-042 as the bases for its conclusion regarding qualifying capacity requirements associated with import RA. The PD's interpretation of these decisions as supportive of its direction strains credulity. Nothing in either decision or underlying reports suggests that to qualify import RA must "flow" in the AAH.

Decision 04-10-035 does not include the actual qualifying capacity criteria, stating only: "The qualifying capacity formulas set forth in Section 5 of the Workshop Report are accepted except where specifically addressed herein."[4] The Workshop Report [5] (2004 Workshop Report), provides as follows:

QC= Contract Amount provided the contract:
1. Is an Import Energy Product with operating reserves
2. Cannot be curtailed for economic reasons
3a. Is delivered on transmission that cannot be curtailed in operating hours for economic reasons or bumped by higher priority transmission OR
3b. Specifies firm delivery point (not seller's choice).

Notably, "Import Energy Product," while a capitalized term, is not defined in the Workshop Report nor in D.04-10-035.

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3 Proposed Decision at 6.
4 D.04-10-035, Conclusion of Law 13, at 54.
5 R.04-04-003, *Workshop Report on Resource Adequacy Issues*, June 15, 2004.

The only other substantive discussion regarding imports in the 2004 Workshop Report is Appendix D, a CAISO analysis regarding *deliverability* of out-of-state resources.[6] This analysis, however, focuses on physical deliverability:

> While the existing system may be able to satisfy the procurement plans of any one LSE, it likely will not be able to transmit the sum of LSEs' needs. Each LSE may well be utilizing the same potentially constrained transmission paths to deliver their out-of-state resources. Therefore, the transmission system should be checked to make sure that simultaneous imports can be accommodated.[7]

This issue is one that has been addressed by the FERC-approved Maximum Import Capability (MIC) rule.[8] Under this Rule, CAISO has the authority to calculate an entity's MIC, that is, "the quantity in megawatts [] determined by CAISO for each [physical] intertie into its Balancing Area Authority (BAA) to be deliverable to the BAA based on CAISO study criteria."[9]

The PD also refers to D.05-10-042, which sheds limited light on the 2004 Workshop Report. Notably, this decision took up the question of firm transmission rights for imports[10] and ultimately found that liquidated damages (LD) import contracts would be permitted without firm transmission rights, "as import transmission capability will be allocated to LSEs."[11] There is nothing in this decision suggesting that to be considered "firm energy" or even an "Import Energy Product with operating reserves" the energy must "flow" during AAHs.

The suggestion that the PD's "firm energy" definition is based on prior Commission decisions is pure fiction and lacking any legal basis. Indeed, a more accurate read of the prior decisions is a concern that import RA be physically deliverable and that there be consequences for failing to deliver when needed.

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6 2004 Workshop Report, Appendix D at 3.

7 *Id.* at 3.

8 *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities* (Order No. 888-A), 78 F.E.R.C. 61220 (Mar. 4, 1997) ("The purpose of the Rule is to promote competition in the wholesale bulk power markets by remedying undue discrimination in access.").

9 *Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp.*, 2016 U.S. Dist. LEXIS 101258, *5 (S.D. Cal. 2016).

10 D.05-10-042 at 67.

11 *Id.* at 68.

B. The PD Will Eviscerate the Value of Most Import RA Contracts and Require A Change to How Out-of-State Generators Participate in the CAISO Market

In the current RA market, California contracts and rules for import RA generally require that sellers make their energy available to the market, but do not control the pricing of energy sales. Sellers must bid into the CAISO Day Ahead Market (DAM), but make their own economic decision as to what price to bid based on their particular circumstances and prices on the given day. In order for contracts structured this way to "count" for RA compliance obligations, the seller must be obligated to deliver energy if its bid is accepted, and the LSE must be able to attest that its contracts for import RA include this obligation. This structure appears to be what the Commission's prior decisions had in mind.

The PD would dramatically change this structure. Import RA contracts cannot be used for compliance obligations unless the RA product is associated with firm energy that must "flow" during the AAH. In practice, in order to guarantee that energy "flows," each seller will be required not only to bid, but to bid such that its offer is *necessarily* accepted. In other words, the generator will be required to self-schedule energy as a price taker in the CAISO market in order to satisfy this requirement. In fact, this requirement appears to reflect a desire to control energy *prices,* not availability to the market – which should not be the function of the RA program.

The vast majority of contracts for import RA in California do not include this bidding requirement. Thus, if the PD becomes final all LSEs who have contracted on this standard basis will be unable to provide the required attestation. The import RA contracts on which they relied for compliance will no longer suffice for that purpose, and these LSEs will fall out of compliance with their RA obligation. Given that import RA contracts will no longer be able to serve their stated purpose, the immediate result of the PD is the evisceration of the majority of import RA contracts' value to LSEs. Not only will the value of the contract decrease, but if the contracts are terminated as a result of this change in law, millions of dollars of transmission investments by California entities may be stranded due to a large decline of import RA transactions.

In addition, because import RA contracts may also provide the buyer with damages if sellers are not capable of supplying RA-program compliant capacity, the value of import RA contracts to sellers is also potentially eviscerated. This regulatory disruption will raise costs for market participants and customers. And, ironically, although the PD is characterized as a "clarification" only, complying with the directive may trigger a change of law under existing contracts.

Further, to maintain the contracted RA's compliance value to buyers, out-of-state generators will be required to self-schedule as a price taker into the CAISO markets – likely the PD's true aim. As noted below, this heightens the economic impact of discrimination against these generators in interstate commerce.

The rules imposed by the PD thus strip value from existing import RA contracts without providing a mechanism by which buyers and sellers can be certain the import RA purchased can fulfill its purpose. The Commission has attempted in the past to avoid abrogation of existing contracts in its regulatory changes; it should heed its own counsel in addressing the PD.[12]

C. The PD Will Cause Massive Disruption in the Market Immediately Prior to a Compliance Deadline, at a Time When RA Imports Are Most Needed

In addition to the change in market behavior outlined above, the PD will require reconfiguration of a majority of import RA contracts in order to maintain their value to both buyers and sellers. The PD was, however, issued a month in advance of a major compliance deadline. At this time most LSEs have finalized their purchases in advance of mandated showings. Thus, most buyers face the probability that a majority of their import RA contracts could be terminated; those that are not, must be renegotiated, and re-priced, on an emergency basis. Moreover, many of the sellers of import RA have indicated that they will not be able to comply with the proposed requirements outlined in the PD. Thus, LSEs still making procurement decisions will be put in an impossible position. They will have to choose between investing time and resources into negotiating the purchase of products that will likely be deemed

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[12] *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development*, Cal. P.U.C. D.19-03-012, *2 (Mar. 28, 2019) ("For a party that is not a party to the contract, nor to the original proceeding, the [abrogation of a contract] bar is even higher."); *see also Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electronic Service Industry and Reforming Regulation*, Cal. P.U.C. D.95-05-045, *56 (May 24, 1995) ("This proposal reiterates the Commission's commitment against abrogating [] contracts…."); *In the Matter of the Investigation on the Commission's own Motion into Pacific Gas and Electric Company's Gas Gathering Operations, Including the Reasonableness of its Charges and how it shall Structure and Offer the Service in the Future*, Cal. P.U.C. D.89-12-016, *40 (Dec. 6, 1989) ("we do not wish to…abrogate contracts which were negotiated in good faith and under a different regulatory framework.").

non-compliant by the CPUC, and electing not to purchase, knowing this may result in non-compliance with System RA procurement obligations.

It also seems highly likely that the last-minute contract negotiating, restructuring, and re-pricing necessitated by the PD will result in ratepayers bearing the brunt of significantly higher prices paid for import RA. The Commission should consider that the need for many LSEs to restructure a large portion of their RA contract portfolios on the eve of the compliance deadline will erode confidence in the California market and thereby raise prices even further.

Because LSEs have been procuring multi-year RA, as directed by the Commission, some of the existing RA contracts for import RA may run for multiple years. As noted, CalCCA disagrees with language in the PD that "the requirements at issue date back to Commission decisions from 2004, and thus are not new requirements."[13] The PD uses this fact to determine that it is "unnecessary" to grandfather existing contracts.[14] However, these are entirely new requirements, with potentially devastating effects on LSEs' ability to maintain and achieve compliance with their RA obligations. At a minimum, the Commission should consider a "grandfather" provision to allow LSEs to remain in compliance by "counting" their import RA based on the previous rules for any import RA procurement up to the date of the Commission's approval of this PD. Doing so will avoid the need for emergency contracting and the associated costs to ratepayers.

Even if existing contracts are grandfathered, longer-term issues remain. Given the uncertainty surrounding their contracts with California buyers and the change in bidding behaviors required, the likely end result of the PD is not, as the Commission hopes, more import RA contracts associated with "firm" energy. In fact, the more likely end result is that fewer out-of-state resources will be willing to participate in the California market at all.

After the PD was published several suppliers of import RA either revoked their offers or decreased the amount of capacity they are willing to offer to LSEs. Some suppliers have shifted by only offering import capacity in the summer months. This reduces their risk of selling energy during months with lower demand and lower prices, which decreases the value the supplier can estimate for that energy. For example, months where the market estimates a surplus of hydro available from the Pacific Northwest may not be an opportunistic time for an import supplier to

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13 PD at 11.

14 *Id*.

offer energy to California, and they may choose to not participate in the import RA market in these months. As a result, import RA and the CAISO's reliance on imports may vastly diminish at a time when California needs out of state resources the most.

It is counterproductive and, indeed, imprudent to adopt a policy likely to reduce the amount of RA capacity made available to California at a time other Commission proceedings have raised significant concerns about a looming potential shortage of RA capacity. CalCCA agrees that import RA must be reliable, but even the CAISO has not proposed that to ensure the reliability of import RA requires that it actually "flow." Certainly, other options are available to ensure the reliability of import RA without disrupting the market to this extent. For example, the CAISO is only proposing in its RA Enhancements Stakeholder Process that import RA contracts specify the Balancing Area (BA) from which the power will be delivered[15] and be able to demonstrate that they are "firm" energy, with the BA carrying reserves to ensure that the energy is firm.[16]

CalCCA requests the import RA rules not be revised in this PD. Instead, the Commission should table this PD and work closely with the CAISO to determine what, if any, rule changes are needed to address the Commission's import RA concerns.

III. THE PD, ON ITS FACE, IMPERMISSIBLY DISCRIMINATES IN INTERSTATE COMMERCE BY APPLYING THE REQUIREMENT FOR "ENERGY TO FLOW DURING PEAK PERIODS" ONLY TO RA IMPORTS, IN VIOLATION OF THE U.S. CONSTITUTION AND SB 100

A. The PD Imposes Different Requirements with an Unjustified Economic Burden on Out-of-State Generators Than In-State Generators

As noted above, the PD expressly treats out-of-state generators differently than in-state generators. An import generator must guarantee that energy "flows" under its RA contract during all AAHs whether or not the energy is actually needed; an in-state generator has no such requirement. To guarantee that the energy will "flow," the import generator has no choice but to self-schedule as a price-taker in the CAISO markets; an in-state generator, however, may bid its marginal cost into the market and is not obligated to "flow" if the generator's bid is not selected.

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15 California Independent System Operator, *Resource Adequacy Enhancements Revised Straw Proposal*, July 2, 2019, p.44.

16 *Id*. at 45.

These differences are without a sound factual and legal foundation. In fact, they appear to be an attempt to control prices bid by import RA into the CAISO markets during times of need. Under existing rules, without the PD's "clarification," import RA would "flow" when needed *at the right price.* It thus appears that price, not reliability, is the PD's main concern. Consequently, the proposed rule appears to be more in the nature of economic regulation in the energy market than a reliability assurance.

B. The Law Prohibits This Type of "Facial" Discrimination in Interstate Commerce

The PD imposes unique burdens on out-of-state generators with contracts that are intended to be used to satisfy California LSEs' RA compliance obligations, unlike their in-state counterparts. This difference in treatment constitutes facial discrimination against out-of-state generators, and as such, violates the Commerce Clause of the United States Constitution.[17]

The Commerce Clause provides that "the Congress shall have Power…to regulate Commerce…among the several States…."[18] It is long established that, "while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce."[19] No State, consistent with the Commerce Clause, may take action which discriminates against interstate commerce by providing a direct commercial advantage to local business.[20] "This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution."[21]

Here, as in *GMC v. Tracy*, "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'"[22] The fact that out-of-state sellers of capacity must participate in the CAISO market on different terms than their in-state counterparts has the effect of an import duty, which the Supreme Court

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17 United States Constitution, Art. I, § 8, cl. 3.

18 *Id*.

19 *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988)).

20 *See Maryland v. Louisiana*, 451 U.S. 725, 754 (1981).

21 *Id*. (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

22 *GMC v. Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)).

has described as the "paradigmatic" violation of the Commerce Clause.[23] "A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."'[24] The Supreme Court has made clear that this type of facial discrimination is "at the very core of activities forbidden by the dormant commerce clause."[25]

Where, as here, the state's action discriminates against out of state interests in favor of in state interests on its face, any justification for the action faces the highest level of scrutiny. The Supreme Court noted in *Camps Newfound/Owatonna v. Town of Harrison*, state laws discriminating against interstate commerce on their face are "virtually per se invalid."[26] "When a statute directly regulates or discriminates against interstate commerce, or when its effect is in favor of in-state economic *interests* over out-of-state *interests*, [the U.S. Supreme Court] ha[s] generally struck down the statute without further inquiry."[27] "In determining whether a state statute is facially discriminatory, the following matters are irrelevant: the justification that the state offers for the discrimination, the legitimacy of the state interests that the statute is designed to protect, the degree and scope of the discrimination, and the volume of commerce affected."[28] In fact, the State's burden of justification is so heavy that '"facial discrimination by itself may be a fatal defect."'[29]

When a state action is found to be facially discriminatory, the state may be able to overcome the *per se* rule by demonstrating it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[30] With respect to the import RA rules at issue here, it is true that the Commission enjoys a level of autonomy with respect to

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23 *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 193 (1994).

24 *Id*. at 203 (citing *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 112 S.Ct., at 2014 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984))); *see also Healy*, 512 U.S. at 193 (tariffs forbidden by the dormant Commerce Clause).

25 *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581 (1997).

26 *Id.* at 575 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)).

27 *Tenn. Wine & Spirits Ass'n v. Thomas*, 139 S. Ct. 2449, 2471 (2019); see also *Boston Stock Exchange*, 429 U.S. at 332 (noting that a State "may not discriminate between transactions on the basis of some interstate element").

28 *Pacific Merchant Ass'n v. Voss*, (1995) 12 Cal. 4th 503, 517.

29 *Tenn. Wine & Spirits Ass'n*, 139 S. Ct. at 2473 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337).

30 *Camps Newfound/Owatonna*, 581 (quoting *Oregon Waste v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 101 (1994).

reliability concerns, based on its police power authority.[31] However, "it does not at all follow that every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion of the police powers of the State."[32]

The burden of overcoming the "strictest scrutiny" applicable here falls on the State. Even a legitimate reliability concern is not enough to support the Commission's facially discriminatory rule when, as here, the Commission's concerns with respect to reliability could be achieved through nondiscriminatory means.[33] Moreover, as noted above, the requirement appears more in the nature of a price regulation than a reliability assurance.

The discriminatory impact of the PD also blatantly violates a requirement of SB 100. Senate Bill 100 amended Section 399.11(e)(2) of the California Public Utilities Code to "require[] generating resources located outside of California that are able to supply that electricity to California end-use customers to be treated identically to generating resources located within the state, without discrimination."[34] Clearly, requiring specific action by generators (*e.g.*, ensuring that energy "flow" during the AAH) of out-of-state resources when the requirement does not apply to in-state generators constitutes the type of disparate treatment SB 100 prohibits.

IV. IF THE PD'S REQUIREMENTS WERE, INSTEAD, APPLIED TO ALL RA TO ELIMINATE THE DISCRIMINATION, OTHER INSURMOUNTABLE PROBLEMS REMAIN

A. FERC Jurisdiction Is Likely to Be Asserted

As written, the PD would restrict the way capacity and energy are sold at wholesale and bid into CAISO markets for all but municipal utilities. FERC has generally been willing to allow the CPUC to establish RA requirements for its LSEs, but by directly implicating wholesale energy markets in these import contracts the PD raises the possibility of FERC asserting jurisdiction over these contracts and potentially the entire RA program. If the Commission were to rectify the constitutional issue described above by simply applying the same requirement to all

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31 *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017) (where the State regulates a "traditional state function," e.g., resource adequacy programs adopted to ensure *local* reliability, FERC is less likely to intervene).

32 *Tenn. Wine & Spirits Ass'n*, 129 S.Ct. at 2473 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

33 *See Oregon Waste*, 511 U.S. at 102.

34 Cal. Pub. Util. Code §399.11(e)(2).

generators, both in- and out-of-state, the effects on the wholesale markets for both capacity and energy are even more pronounced. As a result, the likelihood of FERC asserting jurisdiction is even higher.

FERC's jurisdiction arises from the Federal Power Act, which was originally enacted in 1920 and has been amended numerous times.[35] The FPA grants FERC exclusive jurisdiction over the rates, terms and conditions of wholesale sales, requiring "just and reasonable" rates,[36] prohibiting "undue preference or advantage,"[37] and conferring authority to rectify any action that violates these statutory directives.[38] Consequently, CPUC decisions that affect wholesale sales are likely to trigger FERC jurisdictional oversight.

FERC, on occasion, has permitted state laws and programs in several contexts where state and federal jurisdiction overlap. In fact, the Commission may be relying on the overlap between its jurisdiction over reliability concerns, and FERC's jurisdiction over wholesale sales. For example, in Order 719, FERC required regional transmission organizations and independent system operators to permit "a qualified aggregator of retail customers to bid demand response on behalf of retail customers" directly into organized, FERC regulated markets.[39] Recognizing the interface of the program with retail jurisdiction, FERC allowed states to opt out. FERC noted that its intent "was not to interfere with the operation of successful demand response programs, place an undue burden on state and local retail regulatory entities, or to raise new concerns regarding federal and state jurisdiction…."[40]

However, where a state law or program is so "tethered" to or directly impacts participation in the wholesale market, FERC is likely to assert jurisdiction. FERC authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce.[41] In *FERC v. Elec. Power Supply Ass'n*,[42] the Supreme Court observed that the FPA obligates FERC to oversee "[a]ll rates and

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35 16 U.S.C. §§791, *et seq.* (FERC was preceded by the Federal Power Commission).
36 16 U.S.C. §824d(a).
37 16 U.S.C. §824d(b).
38 16 U.S.C. §824e(a).
39 *Order 719*, 125 F.E.R.C. 61071 at *459-60 (Oct. 17, 2008) (amending 18 C.F.R § 35.28).
40 *Id*. at *128.
41 *Cal. Pub. Util. Comm.*, 132 F.E.R.C. 61047, 61335 (July 15, 2010); 16 U.S.C. §824(d) (Under the FPA, the term "sale of electric energy at wholesale" means "a sale of electric energy to any person for resale.").
42 136 S.Ct. 760 (2015).

charges made, demanded, or received by any public utility for or in connection with" interstate transmissions or wholesale sales —as well as "all rules and regulations *affecting* or pertaining to such rates or charges."[43] The Court also approved a "common-sense" construction of the FPA's language which "limit[s] FERC's 'affecting' jurisdiction to rules or practices that '*directly* affect the [wholesale] rate.'"[44]

Caselaw establishes rough guidelines for what constitutes a "direct" impact on the wholesale market. In *Hughes v. Talen Energy Mktg., LLC.,*[45] the Supreme Court ruled that a program designed by the State of Maryland to provide subsidized price support to encourage development of new resources was preempted by federal law.[46] The program provided "subsidies, through state-mandated contracts, to a new generator, but condition[ed] receipt of those subsidies on the new generator selling capacity into a FERC-regulated wholesale auction."[47] FERC sought to preempt the program due to its effect on wholesale markets, noting the tension with state policy:

> Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives. We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity.[48]

The Fourth Circuit affirmed FERC's conclusion, reasoning that the program "functionally sets the rate that [generator] receives for its sales in the PJM auction," which is a FERC-approved organized market.[49] The Supreme Court agreed: "[b]y adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf."[50]

Just as FERC successfully asserted its jurisdiction in Maryland because of the state's direct interference in the wholesale market, it is highly likely that a similar conclusion will be

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43 *Id.* at 773 (2015) (quoting 16 U.S.C. §824d(a)) (emphasis added).
44 *Id.* at 774 (quoting *Cal. Indep. Sys. Operator Corp. v. FERC,* 372 F.3d 395, 403 (D.C. Cir. 2004)).
45 136 S.Ct. 1288 (2016).
46 *Id*. at 1290.
47 *Id*. at 1293.
48 *Id.* at 1296 (citing *PJM Interconnection,* 137 F.E.R.C. 61145, 61747 (Nov. 17, 2011)).
49 *Id*. (quoting *PPL EnergyPlus, LLC v. Nazrian*, 753 F.3d 467, 476-77 (4th Cir. 2014)).
50 *Id*. at 1297.

reached should the CPUC finalize the instant decision. It seems apparent that the PD would have the "effect of disrupting the competitive price signals" the CAISO market is designed to produce, as the Court found in *Hughes v. Talen*, and as a result would, it seems, lead directly to FERC jurisdiction.

B. The CAISO Will Be Oversupplied

Other issues would also arise. If every generator selling import RA into the market were required to self-schedule as a price taker so the contract can be used to support an RA compliance obligation, the CAISO would be required to schedule all of these energy deliveries to the maximum extent possible. This will potentially create an oversupply of energy, creating issues for the proper operation of the market. If the requirement to "flow" energy were extended to all RA resources, the amount of energy would equal the total amount of RA, which will often exceed even the monthly peak need, since it is based on a 1-in-2 peak forecast. The natural consequence of this would be an uneconomic and inefficient grid oversupply, without the ability to reduce the supply through market mechanisms.

The requirement for import RA to "flow" energy will exacerbate problems that the CAISO is currently facing. The CAISO must manage operating conditions on a real-time basis to ensure grid reliability. Unfortunately, it is exactly during the AAH that the CAISO must deal with the extreme ramps indicated in the Duck Curve. Imports are one of the methods CAISO uses to accommodate the large ramps. If import RA is required to "flow" during this period, instead of being flexible to help meet these ramps, these resources will be adding to the problems. The CAISO is already dealing with substantial amounts of inflexible resources; imposing requirements that make for more inflexibility is not helpful. CalCCA questions whether the PD adequately considered the CAISO's operating conditions.

C. California State Climate Goals May be Impacted

Even more troubling, however, is that the CAISO would be required to schedule all of these deliveries *in preference to all other sources of generation*. In other words, the CAISO would be required to curtail other resources, including in-state renewables. Thus, the PD would effectively negate other Commission directives, including greenhouse gas reduction targets, and impact energy-only contracts across the State.

V. CONCLUSION

As established LSEs with vested interests in serving their customers throughout the State, CalCCA members are committed to assisting the Commission in making the best decisions possible regarding the use and limitations of import RA. While CalCCA applauds the Commission's attempt to ensure continued grid reliability, the PD's approach to import RA is fatally flawed. As written, the PD violates federal and state law, would destroy the value in current import RA contracts, and create havoc in the RA market in the immediate run up to a compliance deadline.

Respectfully submitted,

Evelyn Kahl
Counsel to the
California Community Choice Association

September 26, 2019

APPENDIX A

Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs

Findings of Fact:

~~2. It is reasonable that RA import contracts should be structured to require energy to flow during peak periods.~~

Conclusions of Law:

2. "Firm" energy for the purposes of this rule is defined as that meeting the requirements for "qualifying capacity" as set out in D.04-10-035. ~~encompass energy delivery that flows, at a minimum, during the Availability Assessment Hour window.~~

Ordering Paragraphs:

2. ~~Firm energy requires that energy flow, at a minimum, during the Availability Assessment Hour window.~~ .

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