

**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
(Filed September 28, 2018)

**CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S
MOTION FOR STAY OF DECISION 19-10-021**

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October 24, 2019

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Pursuant to Rule 11.1 of the Commission Rules of Practice and Procedure, the California Community Choice Association (CalCCA)¹ respectfully moves for a stay of Decision (D.) 19-10-021 (Decision), addressing Resource Adequacy (RA) import rules, until the Commission issues a decision on the Application for Rehearing, which CalCCA is filing concurrently with this motion (Motion).² A stay is necessary to prevent irreparable harm to the customers served by Community Choice Aggregators (CCAs) and potentially other load-serving entities. CalCCA has separately submitted, concurrent with this Motion, a Motion to Shorten Time to Respond to this Motion for Stay.

I. INTRODUCTION AND BACKGROUND

On October 17, 2019, the Commission issued the Decision, which states that it “affirms” resource adequacy import rules. Among other things, the Decision “clarifies” that “a non-

¹ California Community Choice Association represents the interests of 19 community choice electricity providers in California: Apple Valley Choice Energy, CleanPowerSF, 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.

² CalCCA incorporates the *Application for Rehearing of Decision 19-10-021* by reference to inform this Motion.

resource-specific RA import is required to self-schedule into the CAISO markets consistent with the timeframe reflected in the governing contract.”³ As detailed at length in the Application for Rehearing (Application) filed concurrently with this Motion, the Decision, among other faults, 1) is impermissibly vague, 2) fails to provide findings or evidence to support its central conclusion, 3) violates Public Utilities Code 380, 4) violates state and federal due process requirements, and 5) has a discriminatory impact on out-of-state generators.

As noted in the Application, the language of the Decision lacks sufficient clarity. It appears that in order to comply with the requirement detailed above, the generator supplying import RA will be required to self-schedule energy as a price taker in the CAISO market during some yet-unclear period. Due to the new and vague requirements, the compliance eligibility of many existing import RA contracts held by CalCCA members has been called into question.⁴ If such contracts are to be used to meet compliance deadlines for year-ahead system and flexible RA ahead and multi-year local RA filings (due October 31, 2019) and for the January showing (due November 17, 2019), those contracts will have to be renegotiated on an emergency basis. This wholesale renegotiation of existing contracts or, worse yet, their replacement, is likely to cause substantial market disruption and substantial increases in costs to ratepayers. However, due to the substantial lack of clarity in the Decision, even renegotiating all of the import RA contracts may not be enough to ensure compliance: the Decision is simply too vague to guarantee any particular course of action will make such import RA available for the RA program.

³ D.19-10-021 at 8-9.

⁴ Exhibit A, *Affidavit of Evelyn Kahl on behalf of the California Community Choice Association in Support of Motion for Stay of D.19-10-021*, dated October 24, 2019.

As detailed below, in support of this Motion, CalCCA demonstrates that:

- In the absence of a stay, Community Choice Aggregators (CCAs) and CCA ratepayers will suffer serious and irreparable harm;
- There is a strong likelihood that Rehearing will be granted on the merits of the arguments raised in CalCCA's Application for Rehearing; and,
- The balance of the harms to CCAs and the public interest weighs heavily in favor of a stay.

CalCCA therefore requests an immediate stay of D.19-10-021 for purposes of the October 31 and November 17 compliance showings and any additional showings until the Application has been resolved.

II. CIRCUMSTANCES SUPPORT A STAY OF D.19-10-021 PENDING RESOLUTION OF THE APPLICATION

A. Standard of Review

Under section 1735 of the Public Utilities Code,⁵ it is within the equitable discretion of the Commission to grant a stay.⁶ In deciding whether to issue a stay, the Commission considers a range of factors including:

- (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted;
- (2) whether the moving party is likely to prevail on the merits of the application for rehearing;
- (3) a balance of the harm to the moving party (or to the public interest) if the stay is not granted and the decision is later reversed against the harm to the other parties (or the public interest) if the stay is granted and the

⁵ CAL. PUB. UTIL. CODE § 1735 (“An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs.”).

⁶ *Pac-West Telecomm, Inc. vs. Pacific Centrex Services, Inc., Order Granting Stay of 08-01-031*, Decision (D.)08-04-044, at 1, 7 (2008).

decision is later affirmed; and (4) other factors relevant to the particular case.⁷

The Commission has “broad discretion” in granting a stay⁸ and may grant a stay on a showing of one or many of these factors.⁹

B. Community Choice Aggregators and Their Ratepayers Will Suffer Serious and Irreparable Injury if a Stay is Not Granted

The CCAs, along with other LSEs, face a year-ahead compliance deadline on October 31, 2019, followed by a month-ahead deadline on November 17, 2019. Due to the new and vague requirements, the compliance eligibility of many existing 2020 import RA contracts held by CalCCA members, roughly estimated at \$47 million, has been called into question.¹⁰ If the stay requested herein is not granted, LSEs have two choices. They must immediately and on an emergency basis renegotiate or replace the ineligible import RA contracts to include this requirement, which will, in turn, *increase ratepayer costs for no good reason*. CalCCA estimates that negotiating replacement contracts could result in incremental CCA customer costs as high as \$87 million.¹¹ Alternatively, if replacement contracts are not available in the very short window of time provided by the Commission, CCAs could face noncompliance penalties for deficient system RA showings on October 31 of up to \$34 million.¹² These costs are

⁷ *Id.* at 3.

⁸ *Order Granting Motion for Stay of Decision 10-12-056*, D.11-05-050, at 2 (2011).

⁹ *See, e.g.*, D.08-04-044 at 3-4 (granting motion for stay on consideration of a unique “other factor,” a finding of probable due process violations where the Commission saw no harm to the opposing party of delaying payment); *see also Order Granting Stay of Decision 03-01-077*, D.04-03-044, at 4 (granting stay of decision in light of legal uncertainties and pending litigation).

¹⁰ Exhibit A, *Affidavit of Evelyn Kahl on behalf of the California Community Choice Association in Support of Motion for Stay of D.19-10-021*, dated October 24, 2019.

¹¹ *Id.* ¶ 2.b.

¹² *Id.* ¶ 2.c.

unnecessary and, as discussed in the Application, are unjustified by any showing of urgency for the 2020 compliance year.

C. CalCCA Is Likely to Succeed on the Merits

Due to numerous legal errors in the Decision—its failure to provide findings or evidence to support its central conclusion, its violation of Public Utilities Code 380, its violation of state and federal due process requirements, and its discriminatory impact on out-of-state generators—the AfR is likely to succeed on the merits. All of these legal errors are detailed extensively in the AfR and summarized below.

1. The Decision Fails to Provide Findings or Substantial Evidence to Support its Central Conclusion that the Import RA Requirements it Adopts are Simply “Affirmations” of D.04-10-035 and D.05-10-042

It is legal error that the Decision, for the first time, adopts a distinction in the import RA compliance requirements for resource-specific and non-resource specific contracts and requires, for the first time, that non-resource-specific resources self-schedule (*i.e.*, bid as a price taker) in the CAISO energy market.¹³ Critically, the Decision reaches conclusions that run directly counter to the directives issued in D.05-10-042 and the Commission fails to offer any findings, evidence or even reasoning to connect the dots between the 2004 and 2005 decisions and its adopted import RA requirements.

2. The Decision Violates Public Utilities Code §311(e) and Rule 14 by Materially Changing the Resolution of a Contested Issue Without the Issuance of an Alternate or an Opportunity for Public Comment

The Decision differs materially from the Proposed Decision issued on September 6, 2019. Despite these material changes, the Commission failed to follow the law by issuing an Alternate

¹³ Decision at 8-9.

Proposed Decision (APD or Alternate) and providing for public comment on those changes. The Decision thus is tainted by procedural error.

3. The Decision Abrogates, Without Substantial Evidence and Reasonable Notice, Millions of Dollars of Existing Import RA Contracts by Rendering Them Ineligible for Compliance

The Decision's sudden and swift change in RA compliance rules on October 10, 2019, will devalue and impliedly abrogate contracts previously procured by parties in reliance on the Commission's prior decisions and practices. The material changes in rules will leave these parties at risk of non-compliance for their October 31, 2019, annual RA showing, and subsequent showings for which they intended to rely on these existing RA contracts. The Commission's arbitrary action, unjustified by any showing of public necessity, takes value from these parties without due process.

4. The Decision Violates Public Utilities Code §380 by Exacerbating Potential RA Capacity Shortfalls in 2021

The Decision, by arbitrarily imposing new and onerous requirements on import RA contracts, threatens to shrink the market for import RA and thereby exacerbate any risk of shortfalls. The Decision erects barriers to participation in the RA market by out-of-state generators and suppliers. It is counterproductive and, indeed, violates the Commission's obligations under 380 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.

5. The Decision Violates Due Process by Creating Rules that are too Vague to Provide Sufficient Notice of the Requirements to Parties Expected to Comply by October 31, 2019

The new requirements are unconstitutionally vague and fail to provide adequate notice to LSEs of the standards against which their RA showings will be judged. The Decision is unclear on the definition of “resource specific” contracts and lacks clarity on the required self-scheduling hours.

6. The Decision Discriminates, on its Face, Against Out-of-State Generators, in Violation of the United States Constitution and Public Utilities Code §399.11(e)(2)

The Decision is unconstitutional on its face as it expressly violates the Commerce Clause of the U.S. Constitution. The Decision clearly discriminates against out-of-state generators, on its face, setting different requirements and standards for out-of-state generators which are more costly and burdensome than those requirements set for in-state generators. In doing so it not only violates the U.S. constitution, it also expressly violates a requirement of Senate Bill (SB) 100.

7. The Decision Encroaches on FERC Jurisdiction by “Tethering” the Requirement to and Directly and Substantially Impacting Bidding and Pricing in the CAISO Energy Markets

The Decision directly affects the wholesale energy market thereby opening the doors for the assertion of federal preemption. By restricting the way capacity and energy are sold at wholesale and bid in CAISO markets, the Decision is trespassing into Federal Energy Regulatory Commission (FERC) jurisdiction.

D. The “Balance of Harm” Weighs in Favor of Granting the Stay

If the stay is granted, the “harm” that will ensue is merely the continuation of the status quo. The Commission has failed, as CalCCA explains in the Application, to articulate any

urgency requiring this action for 2020. On the other hand, if the stay is not granted, LSEs will be required to enter into a last-minute scramble to renegotiate existing contracts or purchase from new suppliers, which will negatively impact ratepayers, all in an effort to comply with vague directives from the Commission, or risk non-compliance on November 1.

E. Other Relevant Factors Support the Stay

For the past thirteen years, since the issuance of D.04-10-035 and D.05-10-042, LSEs have routinely contracted for import RA on terms that have become market standard. Until the Decision, all of the instant import RA contracts were considered to meet requirements necessary for the RA purchased thereunder to meet compliance obligations in California.

The Decision, issued less than two weeks before a major compliance deadline, potentially throws out all of the import RA contracts on the unlikely basis that decisions on which those contracts were entered are now “affirmed”—but now apparently require far more than they ever did before. In order for LSEs to maintain a portfolio of compliant import RA contracts, the Decision must be reconsidered and its requirements clarified so that LSEs can actually be assured they are compliant.

III. CONCLUSION

For the reasons outlined above, CalCCA respectfully requests that the Commission stay the Decision until the Application for Rehearing is considered and decided.

October 24, 2019

Respectfully submitted,

Evelyn Kahl

A handwritten signature in blue ink that reads "Evelyn Kahl". The signature is written in a cursive style with a large initial 'E'.

Counsel to
the California Community Choice Association

EXHIBIT A

**DECLARATION OF EVELYN KAHL ON BEHALF OF
THE CALIFORNIA COMMUNITY CHOICE ASSOCIATION
IN SUPPORT OF MOTION FOR STAY OF DECISION 19-10-021**

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**DECLARATION OF EVELYN KAHL ON BEHALF OF THE CALIFORNIA
COMMUNITY CHOICE ASSOCIATION IN SUPPORT OF
MOTION FOR STAY OF DECISION 19-10-021**

1. I, Evelyn Kahl, am a Shareholder of Buchalter, a Professional Corporation, and represent the California Community Choice Association (CalCCA) in this proceeding. My business office is located at:

55 2nd Street, Suite 1700
San Francisco, CA 94105

2. On information and belief, based on confidential and privileged communications with CalCCA and its 19 operational members, which has been aggregated into publicly available information, I believe the following to be true and provide this information to the Commission without any waiver of privilege or confidentiality:
- a. Due to the new and vague requirements imposed on all load-serving entities by D.19-10-021 specified in the Application for Rehearing, the compliance eligibility of many existing import resource adequacy (RA) contracts held by CalCCA members has been called into question.
 - b. The value of contracts whose eligibility has been called into question by D.19-10-021 potentially exceeds \$47 million.
 - c. The cost of replacement contracts, if available by October 31, 2019, would be as high as two times the cost of the existing contracts or more than \$87 million.

- d. If replacement is not possible, these Community Choice Aggregators (CCAs) collectively could face year-ahead penalties of up to \$34 million.
3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on this 24th day of October, 2019, at San Francisco, California



Evelyn Kahl

Counsel to the California Community Choice
Association

PROPOSED ORDER

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ORDER GRANTING STAY

Pursuant to Rule 11.1 of the Commission Rules of Practice and Procedure, I hereby grant a stay of Decision 19-10-021 until the Application for Rehearing filed October 28, 2019 by California Community Choice Association is considered and decided.

This order is effective today.

Dated October 28, 2019, at San Francisco, California.

/s/

Administrative Law Judge