BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill 237 Related to Direct Access.	Rulemaking 19-03-009 (Filed March 14, 2019)

POST-WORKSHOP REPLY COMMENTS OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION

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California Community Choice Association ("CalCCA") appreciates the opportunity the Energy Division has provided to submit these post-workshop reply comments on the Energy Division's January 8, 2020 workshop ("January 8 Workshop").

As discussed below, Energy Service Provider ("ESP") assertions that Senate Bill ("SB") 237 *requires* the Commission to recommend further reopening of direct access ("DA") transactions are incorrect. The Commission's recommendation must satisfy SB 237's statutory criteria requiring no harm to California's environmental, reliability and cost fairness goals. Unless a reopening schedule can satisfy those criteria, the Commission cannot recommend any schedule.

The historic track record and stated plans of ESPs, and the lessons from California's and sister state's electricity markets (highlighted by a recent New York Public Service Commission ("PSC") order)[1] all compel one conclusion: the only reasonable recommendation the Commission can make is to not further reopen DA at this time.

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[1] State of New York Public Service Commission, *Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process*, Case nos. 15-M-0127, 12-M-0476, and 98-M-1343 (December 12, 2019) ("NYPSC Order") at 12 (emphasis added), *available at*: http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-M-

I. SB 237 Does Not Require the Commission to Recommend Any Reopening of Direct Transactions.

In opening comments, the Alliance for Retail Energy Markets ("AReM"), Direct Access Consumer Coalition ("DACC") and the Energy Producers and Users Coalition ("EPUC") asserted that the Commission is bound by SB 237 to recommend a further reopening of DA transactions, beyond the 4,000 gigawatt-hours ("GWh") ordered in Phase 1. This is incorrect. PUC Code §§ 365.1(f)(1) and (2)[2] provide:

> (f) (1) On or before June 1, 2020, the commission shall provide recommendations to the Legislature on implementing a further direct transactions reopening schedule, including, but not limited to, the phase-in period over which the further direct transactions shall occur for all remaining nonresidential customer accounts in each electrical corporation's service territory.
>
> (2) In developing the recommendations pursuant to paragraph (1), the commission shall find all of the following:
>
> (A) The recommendations are consistent with the state's greenhouse gas emission reduction goals.
> (B) The recommendations do not increase emissions of criteria air pollutants and toxic air contaminants.
> (C) The recommendations ensure electrical system reliability.
> (D) The recommendations do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers.

The recommendations the Commission must make are "*on implementing*" a further direct transactions reopening schedule. A recommendation to not implement a further direct transaction reopening schedule is consistent with this language. The Legislature did not, in

0127&submit=Search; *see also* NYPSC "PSC Enacts Significant Reforms to the Retail Energy Market" (December 12, 2019) ("NYPSC Press Release").

[2] (Emphasis added). We note that SB 237 contained a clerical error in which it repeated §365.1(e), rather than labeling this language as §365.1(f). This is corrected in the published version of the Public Utilities Code.

contrast to the explicit directions found in §365.1(e)(1), *require* the Commission to issue an order that increases the maximum total kilowatt-hour annual limit for such transactions.[3]

Several ESPs in opening post-workshop comments note that §365.1(f)(1) requires *among the possible recommendations the Commission could make* that "the phase-in period over which the further direct transactions shall occur for all remaining nonresidential customer accounts in each electrical corporation's service territory." This recommendation is simply among those the Commission would need to make if the Commission recommends reopening in the first place, not evidence that the Legislature was foreclosing that threshold question.

We agree with The Utility Reform Network's ("TURN") discussion of this issue on page 1 of its opening comments on Administrative Law Judge Christine Powell's September 20, 2019 Ruling (the "September 2019 Ruling"):

> The Commission is obligated to make recommendations relating to additional reopening based upon the extent to which any further migration to direct access would be consistent with a series of identified objectives … [that] include consistency with the state's greenhouse gas reduction goals, preventing *any increase* in criteria air pollutants and toxic contaminants, ensuring system reliability, and preventing undue cost shifting. If the reopening of direct access would not be consistent with these objectives, the Commission may not recommend further changes to state law.

In sum, in reply to the opening post-workshop comments of AReM and DACC, the question of *whether or not* to further expand DA in California is squarely before the Commission as it makes its recommendations.

As explained more fully below, the only reasonable recommendation the Commission can make in light of the requirement that the recommendations "do not increase" emissions of

[3] *See also* TURN opening comments on the September 20, 2019 Ruling of Administrative Law Judge Powell ("September 2019 Ruling") (September 30, 2019) at 1; CalCCA reply comments on the September 2019 Ruling (October 7, 2019) at 2-4.

criteria pollutants and toxic air contaminants, that they "ensure" system reliability, and meet the other required statutory criteria, is that there be no reopening of DA unless and until market reforms are in place that assure satisfaction of those criteria.

II. SB 237's Criteria Pollutants and Toxic Air Contaminants Finding Requirement is Binary and is Not Demonstrated by IRP Compliance.

In opening post-workshop comments, AReM contends that SB 237's criterion that "recommendations do not increase emissions of criteria air pollutants and toxic air contaminants"[4] "is directly related to the IRP requirements, which specify that each LSE's IRP must 'minimize localized air pollutants.'"[5] As stated in CalCCA's opening post-workshop comments,[6] SB 237's requirement that the Commission's recommendations "*do not increase*" criteria air pollutants and toxic air contaminants is very different from the Integrated Resource Plan ("IRP") requirement that LSEs "*minimize* localized air pollutants."[7] SB 237's requirement is binary (the recommendations *must not increase* such emissions), and minimizing not the same as not increasing (i.e., minimizing emissions could still result in increases in emissions relative to the baseline levels). SB 237's language on criteria and toxic pollutants is also much more prescriptive than the "consistent with" language SB 237 uses in connection with GHG emissions.

SB 237's strict requirement relating to criteria and toxic air pollution emissions is entirely understandable. What the Legislature is talking about here is environmental justice. Criteria and toxic air pollutants tend to have the greatest impact on disadvantaged communities.[8] The

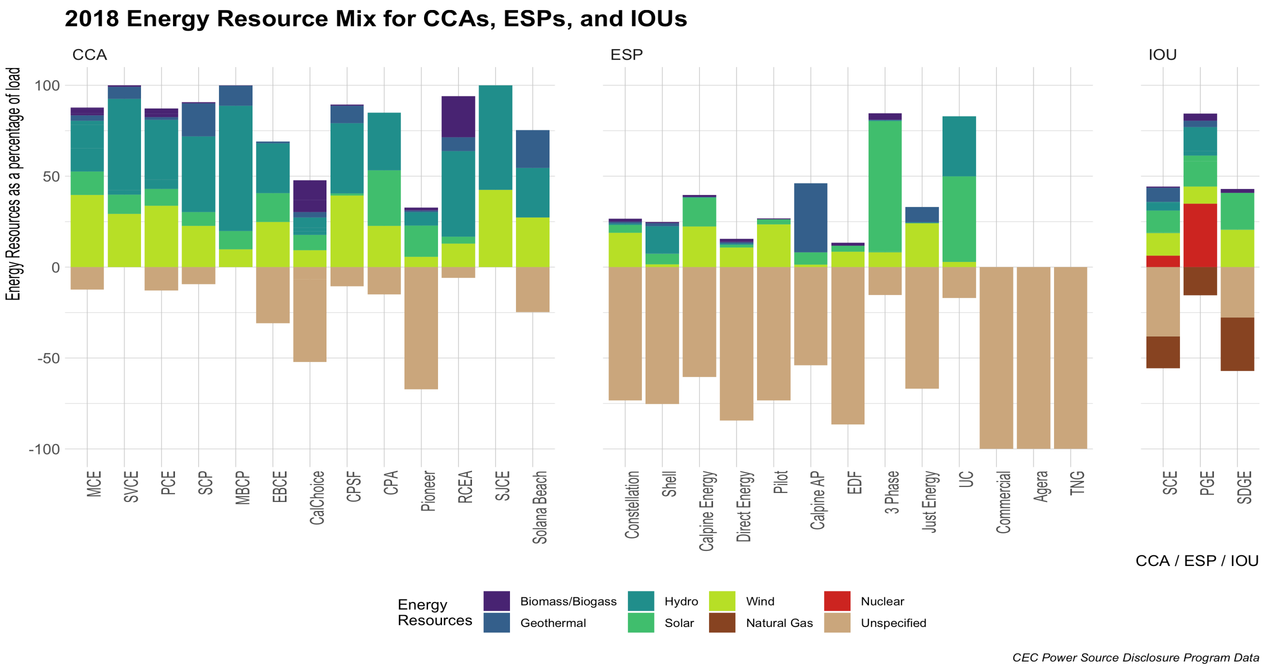
[4] Pub. Util. Code §365(f)(2)(B).
[5] AReM Opening Post-Workshop Comments at 7.
[6] CalCCA Opening Post-Workshop Comments at 14-15.
[7] Compare Pub. Util. Code §365.1(f)(2)(B) (emphasis added) to §454.52(a)(1)(I). There is a similar error in the scoping memo. *See* Amended Scoping Memo and Ruling of Assigned Commissioner Batjer (December 19, 2019) at 5-6.
[8] *See, e.g.*, California Environmental Justice Alliance, *Calenviroscreen: A Critical Tool for Achieving Environmental Justice In California* (2018).

Legislature made clear that the Commission may not make a recommendation with respect to a further DA reopening that could increase emissions in environmentally impacted, generally economically disadvantaged and minority communities. It is hardly surprising that the Legislature requires that a DA reopening not increase impacts at all, rather than just minimize them.

III. ESP Aspirations Regarding Emissions of Greenhouse Gases, Criteria Pollutants and Toxic Air Contaminants Do Not Equate to A Factual Basis for the Commission to Recommend a Further Direct Access Expansion.

A. In Fact, ESPs are Procuring More Brown Power Than Are Other LSE Types, Harming the State's Emissions Reduction Goals.

Several of the DA proponent Parties signing on to the Proposed Direct Access Reopening Schedule ("Joint Proposal") filed opening comments arguing that the environmental values and demand for clean energy among some large corporate customers should convince the Commission that the greenhouse gas ("GHG") and criteria air pollution statutory criteria will be satisfied. DACC reasoned that if ESPs don't provide clean energy, their market share will shrink. Yet, when one reviews data of what ESPs are actually selling to their customers, ESPs collectively sell a greater percentage of brown power than investor-owned utilities ("IOUs") or community choice aggregators ("CCAs"). A review of the ESPs' 2018 energy resource mixes as shown on their Power Content Labels ("PCL") demonstrates that ESPs' current customers are demanding less renewable energy than are customers of the CCAs and less renewable energy than IOUs are procuring for their customers:



In response to CCA representatives raising the implications of ESPs' track record around Renewable Portfolio Standard ("RPS") non-compliance in opening post-workshop comments, DACC characterizes such comments as merely anticompetitive. We disagree. The only way for the Commission to make the findings required by SB 237 is to rely on data, and the data show that ESPs are lagging relative to other LSE types with regards to the RPS. As TURN noted in opening post-workshop comments:

> [c]ompliance for the 2011-2013 period was first evaluated in 2017 with penalties enforced in 2019. The Commission found 6 ESPs to be noncompliant. Compliance for the 2014-2016 period Compliance for the 2014-2016 period was evaluated in 2019. The Commission found 3 ESPs to be noncompliant but has not yet enforced penalties.[9]

In fact, ESPs are the only LSE type found to be noncompliant with the RPS by the Commission based on the most recent RPS Annual Report.[10] While DACC argues that ESPs have been

[9] TURN Opening Post-Workshop Comments at 11-12.

[10] *See* California Public Utilities Commission, *2019 California Renewables Portfolio Standard Annual Report* (Nov. 2019) at 24-26, footnote 77, Table 16 ("2019 RPS Annual Report"), *available at*: https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy_-_Electricity_and_Natural_Gas/2019%20RPS%20Annual%20Report.pdf.

operating since 1998 and therefore know how to comply with these requirements, the ESPs' collective history of noncompliance tells a different story.

In opening post-workshop comments, AReM argued that IRP modeling using a 2020 baseline should be used and compared to projected 2030 emissions to evaluate a downward trend in criteria pollutants if DA were to expand.[11] Relying on forecasted 2020 emissions as a baseline is unreasonable because such emissions are simply aspirational, not actual emissions levels. This is not germane to the current findings the Commission must make, which must be based on existing data sources.

Shell makes two lines of argument relating to DA customers' load profile that must be dismissed. First, it contends that customized energy supply agreements with DA customers are constructed to increase use of energy during periods of high renewable generation (i.e., the "belly of the duck"). ESPs could already enter such agreements today, but ESPs' track record to date does not provide any evidence that such prospective deals would be of sufficient impact to offset the increase in emissions that would inevitably flow from collectively shifting load from overall greener (incumbent) to browner (ESP) suppliers. The *hope* that such transactions might flourish in a way that is material to aggregate pollutant impacts is not a factual basis for the Commission to determine that any further expansion of DA transactions will not increase criteria air pollutants and toxic air contaminants.[12]

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[11] AReM Opening Post-Workshop Comments at 7. This argument was also made by Direct Energy at the January 8 Workshop.

[12] TURN Opening Post-Workshop Comments at 11 (discussing Commission findings of ESP RPS noncompliance); CalCCA opening post-workshop comments at 5 and Figure 1 (noting that "incumbent [LSEs] have been procuring RPS and GHG-free resources beyond minimum requirements. ESPs by and large have not.") (citing 2019 RPS Annual Report Tables 2, 4 and 6); *id*. at 10-11 and Figure 2 (comparing Portfolio Content Category labels of ESPs to CCAs and demonstrating that ESPs are procuring more "brown power" and hence causing more emissions of criteria pollutants and toxic air contaminants as a percentage of load.).

The Commission already has implemented time-of-use ("TOU") rates, flexible capacity requirements, demand response programs and other policies targeted at tailoring load curves to supply curves. One much-discussed phenomenon around TOU rates is the emergence of "structural benefiters" and "structural non-benefiters." The concern Shell's point raises is ESPs will simply chase "structural benefiters" – customers whose use *already* is highest at hours of oversupply. This will not result in any shift in use patterns. TURN speaks to this when it observes that to "customers migrating to Direct Access are likely to be the lowest cost to serve within their rate class, an outcome that will drive up the average cost to serve the customers who remain with IOUs/CCAs."[13]

Next, Shell seems to boldly assert in its comments that CAISO's economic dispatch rules mean that the procurement portfolios of LSEs are actually irrelevant to actual state GHG, criteria pollutant and toxic air contaminant emissions.[14] Taken to its logical extension, this proposition would moot the entire purpose behind California's establishment of the RPS, the California Energy Commission's PCLs, and the IRP. The Commission must see through such attempts at obscuring the impact of ESPs' procurement records on achievement of the state's vital emissions reduction goals.

B. ESPs Are Underinvesting in Long-Term Contracts for New Renewable Supply, Further Harming Both Emissions Reduction and Reliability Goals.

Moreover, TURN's analysis of ESPs' RPS compliance found that ESPs "have a poor track record in using their procurement activities to drive investment in new generation infrastructure."[15] As TURN explained in opening post-workshop comments, DA advocates' assertion that 10 out of 13 ESPs have procured sufficient long-term contracts to meet SB 350's

[13] TURN Opening Post-Workshop Comments at 2.
[14] *See* Shell Opening Post-Workshop Comments at 6, 10-11.
[15] TURN Opening Post-Workshop Comments at 10.

requirements is misleading. ESPs have actually only identified long-term contracts equal to 9% of their retail sales for the 2021-2024 period.[16] To satisfy the requirements of SB 350, ESPs will need to obtain deliveries equal to approximately 26% of retail sales during this compliance period.[17] TURN also noted that ESPs chronically under-forecast load, with the effect of understating their compliance obligations. The additional 4,000 GWh of load eligible for DA authorized by SB 237 will make achievement of SB 350 forward contracting requirements all the more challenging, especially in face of typical short-term commitments from DA customers.[18]

Shell contends that it is speculative to predict that ESPs won't meet SB 350's 65% long-term requirement, because it doesn't begin to go into effect until 2021. CalCCA agrees that this requirement does not go into effect until 2021, and is evaluated over the 2021-2024 compliance period[19] and understands that LSEs are working hard to achieve these ambitious goals. But again, the collective ESP track record is not promising, as demonstrated by the lack of compliance with the RPS requirements in Compliance Period ("CP") 2 (2014-2016) for two of the three ESPs, assumedly related to compliance with the existing "*de minimus*" 0.25% long-term contract requirement.[20]

Shell further argues that "[a]s the DA market expands, ESPs will make longer term investments to meet their larger anticipated requirements."[21] Yet again, all the Commission has to use as the basis for its recommendation is the ESPs' collective track record. As TURN explained, "Direct Access providers typically have very short-term customer commitments

[16] *Id*. at 13.
[17] *Id*.
[18] *Id*. at 13-14.
[19] D.17-06-026 at 9, 38, OP 1.
[20] 2019 RPS Annual Report at 24-26. The long term contracting requirement requires that "a retail seller newly commencing operations in California must sign in the first compliance period of its operation in which any short term contract is signed, long term contracts with expected generation equal to at least 0.25% of its retail sales in the first year of its retail operations in California." D.12-06-038, OP 20.
[21] Shell Opening Post-Workshop Comments at 11.

(often just one year in duration) which frustrates the ability to enter into long-term resource commitments. These long-term commitments are needed to drive investments in new clean generating resources."[22] Other states like New York have not seen much in the way of RPS contributions by DA providers.[23] Most importantly, ESPs already serve a sizeable share of commercial load in IOU territories – and they have not been making the necessary long-term investments. Further, if the DA cap is raised, one would expect new ESP market entrants; which could result in no current ESP gaining any market share and thus facing ongoing challenges in meeting California's long-term renewables contracting requirements.

Finally, we note the argument made by DACC that any noncompliance with the RPS or other law by an ESP should not prevent the Commission from recommending further DA expansion, because noncompliance by a CCA wouldn't justify a moratorium on further CCA expansion. As stated in CalCCA's comments on the September 2019 Ruling, this proceeding is not about CCAs, who operate under an entirely different statutory framework. Regardless, CalCCA does not believe the Commission would or should let any LSE or group of LSEs systematically escape compliance with state mandates.

IV. To Be Consistent with SB 237's Required Statutory Findings, the Commission Should Recommend that Several Foundational Policies Must Be Implemented Prior to Authorizing Additional Direct Transactions.

[22] TURN Opening Post-Workshop Comments at 2.

[23] "[T]the record does not establish that ESCOs have provided significant contributions to the State's progress toward achieving its 2016 clean energy goal of 50% renewables by 2030." NYPSC Order at 76. Note that ESCOs are energy service companies that are akin to energy service providers in California. As a result of this finding, the NYPSC imposed a minimum annual renewables percentage requirement on ESCOs that is 50% higher than the existing Tier 1 LSE obligation (but in no case greater than 100%) and "[o]nce the Tier 1 LSE obligation reaches 50%, the products will be required to be 100% renewable, and that requirement will remain fixed as the Tier 1 LSE obligation increases above that level." *Id*. at 77. The NYPSC went on to explain "it makes little sense to permit ESCOs to offer renewably sourced commodity if the percentage of renewable energy is equal to or less than what is obtainable from the NYISO spot market or what is offered currently by the utilities. This requirement strikes the proper balance between the recognized value of incremental additions of renewably sourced energy against the need for a floor that protects customers against misleading claims regarding 'green' ESCO products." *Id*. at 78.

CalCCA agrees with opening post-workshop comments filed by Pacific Gas & Electric Company ("PG&E"), Southern California Edison Company ("SCE") and TURN that several significant market structure policies must be in place before DA can be expanded further.[24] Common to these commenters was a call for:

- Resolution and implementation of the central procurement entity structure;
- An established Provider of Last Resort ("POLR"), particularly in light of recent expressions by IOUs that they do not wish to take on this role; and
- Clarity around policies to prevent undue cost-shifting, such as further implementation of open issues relating to the Power Charge Indifference Adjustment ("PCIA").

SCE and TURN also noted that the IRP process is still very new and untested.[25] CalCCA agrees, noting that time is needed to see how the IRP program moves from theory to implementation. SCE further notes that the Commission's planned integration of IRP and RPS reporting should be implemented prior to making these changes.[26] TURN further urges that additional policies be "in place (and validated through real-world experience) before any additional expansion of direct access can be considered" including:

- Updated emissions accounting protocols that can accurately calculate and assign criteria pollutant and Greenhouse Gas emissions to unspecified (system) power purchased by LSEs.
- Revised rules governing confidentiality that provide more real-time transparency into the retail and wholesale activities of ESPs.[27]

CalCCA agrees with these parties that resolution and implementation of such rules are necessary before DA can be expanded to enable the Commission to make the findings specified in SB 237.

Several ESPs and DA advocates acknowledge the current policy uncertainty. For example, Commercial Energy discusses how Local Resource Adequacy capacity constraints

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[24] PG&E Opening Post-Workshop Comments; SCE Opening Post-Workshop Comments at 1-3; TURN Opening Post-Workshop Comments at 3-4.
[25] SCE Opening Post-Workshop Comments at 2; TURN Opening Post-Workshop Comments at 5-6.
[26] SCE Opening Post-Workshop Comments at 7-8.
[27] TURN Opening Post-Workshop Comments at 3-4.

could be mitigated if IOUs could sell and optimize their portfolio, but that the Commission hasn't acted on this yet in PCIA Working Group 3.[28] CCAs certainly agree with this proposition, yet assert that it further supports a recommendation to hit the pause button on a further DA reopening in order to make the required findings. Both Commercial Energy and EPUC acknowledge in their opening comments that whether there will be a central buyer, and how this framework will be structured, is still uncertain.[29] Per EPUC:

> [T]he problem is not a function of adding LSEs to the mix; instead, the problem arises from a system that may provide an economic incentive not to comply. A backstop procurement framework to address noncompliance, potentially through a central buyer, may be required to address any potential erosion of carbon reductions.[30]

While CalCCA agrees with EPUC that these significant structuring issues must be resolved, we reach a different conclusion about the impact of the current uncertainty on the Commission's task in Phase 2. In light of the required findings and the structure of SB 237 as explained above, the only recommendation the Commission can make in light of these moving targets is to not recommend a further DA expansion at this point in time.

Several ESP parties argue that load migration to CCAs is happening despite policy issues being unresolved so that should not prevent a further DA reopening. This is a false equivalence. The Legislature made clear from the moment it created them that CCAs are not a subset of ESPs.[31] CCAs differ significantly from ESPs in their governance structures, commitment to GHG emissions reductions, and in that they serve *all* customers in their territory by default, and will continue to serve all customers on a tariffed basis – not simply the most profitable customers under one-off arrangements. Transparency is another big difference between ESPs and CCAs.

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[28] Commercial Energy of California Opening Post-Workshop Comments at 3-4.
[29] *Id*. at 4; EPUC Opening Post-Workshop Comments at 5, footnote 8; *id*. at 7.
[30] EPUC Opening Post-Workshop Comments at 7.
[31] Pub. Util. Code §218.3(a).

While Shell's opening comments defended the ESP's aggressive confidentiality assertions as being inherent to their business of negotiating bilateral contracts with large corporate customers,[32] TURN explained how such opacity hinders the Commission (and other stakeholders) from evaluating and ensuring compliance with California's environmental and reliability goals.[33] Moreover, as TURN pointed out at the January 8 Workshop, CCA customers tend not to opt-out, whereas DA customers have little commitment to their retail providers and thus ESPs experience far more churn in customers that they serve at any one time. The uncertainty of ESPs' customer base makes it irrational for ESPs to invest in long-term contracts and new generation, as Commercial Energy's representative expressed at the January 8 Workshop. As CCA representatives expressed at the workshop, the primary driver for communities establishing CCAs is to exceed the incumbent utility's RPS procurement and other environmental impacts and to fight the deleterious effects of climate change on their communities.[34] Simply put, as mission-driven government agencies, CCA expansion does not raise the same concerns that direct access expansion does.

V. Current Consumer Protections for DA Customers Are Untested in an Uncapped Retail Market, and the Commission Should Carefully Evaluate Lessons from Other States.

AReM, DACC, Commercial Energy and the California Large Energy Consumers Association argue that existing statute and Commission precedent is sufficient to protect customers under further DA expansion. Yet (to state the obvious), ESPs currently cannot market to all nonresidential customers. As DACC explained, all of their customers must have the

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[32] Shell Opening Post-Workshop Comments at 12-13.

[33] TURN Opening Post-Workshop Comments at 2 ("Direct Access providers routinely assert greater claims to confidentiality than other LSEs and do not provide transparency on terms of their contracts with customers or energy supplies. Shielding greater volumes of information from disclosure will undermine the ability of the public and policymakers to assess progress and meaningfully participate in the oversight process."). *Id*. at 6-7.

[34] *See* https://cal-cca.org/cca-impact/ (quantifying the collective long-term renewables and energy storage procurement of CCAs, RPS percentages of CCAs, including low percentages of unbundled RECs).

resources to enter the queue, negotiate bilateral contracts with ESPs and ensure that proper filings are made with the Commission.[35] In an expanded or fully reopened nonresidential retail market, many customers will not be so "sophisticated."[36] If the DA cap is lifted for nonresidential customers, there will be no queue and we can envision far more form contracts and fewer arms'-length negotiations as ESPs seek economies of scale and existing or new ESPs market to a broader range of nonresidential customers. Thus, existing law is untested in an expanded DA setting in California. But, what we see in other states like New York, Illinois and Texas does give rise to consumer protection concerns.[37]

As DACC notes, sections 394.5 and 366.5 do provide special additional requirements for service to small commercial in recognition that they are likely to be preyed upon. As noted by DACC, §394.5 focuses on requirements for disclosure of pricing and terms & conditions of service while §366.5 puts in place procedures designed to make "slamming" a customer more difficult. These requirements do not, however, address the full range of concerning activities.

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[35] DACC Opening Post-Workshop Comments at 5.

[36] *Id*.

[37] *See*, *e.g.*, https://www.dallasnews.com/news/watchdog/2019/08/23/texans-pay-more-for-electricity-now-than-other-major-markets-a-wholesale-price-record-is-to-blame/ (spiking rates for ESP customers in Texas); *Competing to Overcharge Consumers: The Competitive Electric Supplier Market in Massachusetts*, Jennifer Bosco, National Consumer Law Center (April 2018), *available at*: https://www.nclc.org/images/pdf/pr-reports/competitive-energy-supply-report.pdf; NYPSC Order (noting that adoption of new marketing standards "are the result of a gradual iterative process of increasing the specificity and restrictiveness of the applicable standards to ESCO marketing practices resulting from persistent, unacceptably high numbers of customer complaints alleging ESCO deceptive marketing."); NYPSC Press Release at 2-3 ("The complaint rate for ESCOs remains unacceptably high. Between 2014 and 2016, the Commission received more than 11,000 initial complaints about ESCOs. … Throughout these proceedings, non-ESCO parties raised many concerns about the current operation of the retail energy market. The Commission shares those concerns, particularly regarding the lack of easily accessible and comprehensible product and pricing information and the number of complaints alleging that bad-acting ESCOs were exploiting customers. Thus, the Commission concludes that significant changes to provisions governing retail access are needed to provide adequate protections for New York customers. If market participants are unwilling or unable to provide material benefits to customers — beyond those provided by utilities — at reasonable prices, the market serves no proper public interest purpose and should be ended.").

The Energy Division's Gap Analysis[38] lays out a series of consumer protection concerns, summarized at pp. 73-75. Other states' experiences surface further concerns regarding consumer protection, notwithstanding extensive webs of consumer protection laws and regulations.[39] The New York PSC has devoted decades to consumer protection problems. Yet as of December 2019, the PSC found:

> Based upon the number of customer complaints that continue to be made against ESCOs, and the likely need for increased enforcement activities, the large number of ESCO customers that pay significant premiums for products with little or no apparent added benefit, and the market's dearth of innovation and value-added services, it appears that a material level of misleading marketing practices continues to plague the retail access market. Whether or not ESCOs are purposefully deceiving or preying on unsuspecting customers, many ESCO marketing practices nevertheless could be perceived by massmarket customers as misleading. Moreover, these problems persist despite the Commission's actions over the years to improve the function of the market, through efforts aimed at both limiting undesirable behavior of ESCOs and their representatives and by eliminating barriers and otherwise supporting ESCOs' business activities.[40]

Will the Commission allow the type of predatory marketing to increase customer sign ups - such as offering sports tickets, gift cards or teaser rates - to small commercial customers as seen in New York?[41] In Texas, customers are being offered energy pricing that decreases the cost of energy as the energy consumer consumes more energy.[42] Will the Commission prohibit this type of pricing behavior as inconsistent with state policy goals concerning conservation? What will the Commission do to ensure energy customers understand that their ESP may be serving them with 100% brown power during the term of their contract? In light of the decisive action taken by the New York PSC just last year, the Commission must examine predatory behavior and other

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[38] *California Customer Choice Project - Choice Action Plan and Gap Analysis*, issued December 2018 (the "Gap Analysis").

[39] *See* CalCCA Opening Post-Workshop Comments at 21-22.

[40] NYPSC Order at 88-89.

[41] NYPSC Press Release at 3.

[42] *See*, *e.g.*, https://www.comparepower.com; *see also* https://www.texaspowerguide.com/2017/reliant-high-use-plan/

issues and ensure its consumer complaint process and enforcement tools will be sufficient. Based on the concerns raised in the Gap Analysis, and the problems seen in other markets, ensuring the Commission has the appropriate consumer protection rules and oversight mechanisms in place is a valid area of focus.

VI. ESP Parties Have Not Demonstrated that the Commission Can Recommend a Further DA Expansion in a Manner that Does Not Cause Undue Cost Shifting.

As TURN discussed in the January 8 Workshop and in opening comments, ESPs tend to cherry-pick the customers that are least expensive to serve.[43] This may be economically rational behavior for a private company without an obligation to serve all customers within a certain territory, but one that is highly likely to result in cost-shifts to bundled customers who would become more costly to serve as a result. It's telling that ESP comments focus exclusively on their service to the largest commercial and industrial ("C&I") customers – that is a warning to the Commission on which market segments they intend to serve and is directly demonstrative of the cost shifts that will ensue.

In opening post-workshop comments, AReM cavalierly argues that "[i]f an ESP fails and returns any small commercial customers *en mass*e, they return to bundled utility service."[44] This is cause for significant concern and scrutiny in light of current market uncertainty, the bankruptcy of the Country's largest utility and signals reminiscent of the last energy crisis. Pursuant to SB 237, both the cost-shifting and reliability implications must be carefully considered.

Moreover, while §365.1(f)(2)(D) focuses on cost-shifts to bundled service and DA customers, the fact is that more than one quarter of California customers in IOU territories are currently CCA customers, and this number is growing. These customers represent the full range

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[43] TURN Opening Post-Workshop Comments at 18, 19.
[44] AReM Opening Post-Workshop Comments at 12, footnote 28.

of electric customers in California – residential, CARE, medical baseline, small non-residential to the largest C&I customers. While SB 237 focuses on bundled customers, the Commission has an obligation to protect all customers from cost-shifts. Moreover, the Legislature has expressed a clear intent for the Commission to support the formation of CCAs in SB 790 (Leno 2011).[45] Due to the cherry picking by DA providers, there will be a cost-shift to CCA customers if DA is further expanded. CCAs have procured electricity on behalf of nonresidential customers, and have been working hard to comply with SB 350's long-term contract requirements.[46] While ESPs argue to the contrary, the Commission needs to take this customer impact into account when it makes its recommendation.

AReM, DACC and Shell argued in opening comments that CCAs could impose exit fees on their customers if load migration to ESPs caused undue cost-shifting to existing CCA customers. While CCAs, as local government agencies, would certainly never want to be in a position to have to impose such fees on their customers, CalCCA agrees that CCAs have the authority to do so and that Electric Rule 23 requires the distribution utility to collect such fees from customers who have departed CCA service. PG&E Rule 23 states "PG&E shall include CCA charges on the [ratepayer's] bill" and PG&E "shall process customer payments and transfer amounts paid toward CCA charges to the CCA when the payments are received..." This obligation is neither qualified nor conditioned on whether the ratepayer is currently a CCA customer. Rather, the implication within PG&E's tariffs, as well as the Public Utilities Code and Commission decisions, is that all CCA charges shall be included on the bill provided by the

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[45] *See, e.g.*, Pub. Util. Code § (PUC 366.2(c)(9)("All electrical corporations shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs. ….The commission shall exercise its authority pursuant to Chapter 11 (commencing with Section 2100) to enforce the requirements of this paragraph when it finds that the requirements of this paragraph have been violated.")

[46] As noted in CalCCA's opening comments, CalCCA members have collectively entered into contracts for new-build projects totaling over 3,400 MW of renewable generation, capacity and energy storage. CalCCA Opening Post-Workshop Comments at 1.

distribution utility so long as the charges are applicable to the ratepayer. MCE recently sent a letter to PG&E seeking to confirm this understanding, but PG&E has not yet responded. Hence, in our opening post-workshop comments, CalCCA asked the Commission to consider this matter as part of its study pursuant to SB 237. In its decision on Phase 2, we ask the Commission to confirm that this is indeed the case, particularly in light of the risk to so many California customers of a cost-shift as a result of potentially significant load migration to ESPs.

VII. CalCCA Response to the Joint Proposal & Conclusion

For the many reasons set forth herein and in CalCCA's opening post-workshop comments, as well as the concerns raised at the January 8 Workshop and opening comments filed by TURN, the Public Advocates Office, PG&E and SCE, any recommendation by the Commission for the Legislature to further reopen DA transactions at this point in time cannot be reconciled with the four statutory findings the Commission is required to make. The Joint Proposal is therefore unreasonable and would lead the Commission down a path that doesn't comply with SB 237.

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Respectfully submitted,

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