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

CALIFORNIA COMMUNITY CHOICE ASSOCIATION’S
COMMENTS ON ADMINISTRATIVE LAW JUDGE’S RULING
INVITING COMMENTS ON THE STAFF REPORT PROVIDING
RECOMMENDATIONS ON THE SCHEDULE TO REOPEN DIRECT ACCESS

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October 16, 2020
Table of Contents

SUMMARY OF COMMENTS .................................................................................................................. ii

I. INTRODUCTION .......................................................................................................................... 1

II. THE COMMISSION SHOULD MODIFY THE STAFF REPORT TO STRENGTHEN THE PROPOSED CONDITIONS ON FURTHER DA EXPANSION AND PROCESS FOR ASSESSING COMPLIANCE ........................................... 6

A. The Final Report Should Add a Condition for Reopening Requiring Market Conditions and Rules that Will Facilitate Achievement of State Goals and Ensure Competitive Neutrality ................................................................. 6

B. The Staff Report Should Further Define the Process for Making a Final Determination on DA Reopening ......................................................................................... 6

C. Procedures for Recovery of Stranded Costs Incurred by CCAs as a Result of DA Reopening Should be Developed Prior to Implementation ........................................................................................................ 8

D. Market Rules, including Switching Rules, Should Be Examined to Ensure Competitive Neutrality and Should be a Precondition to DA Reopening ........................................................................................................ 9

E. Standards for Compliance with IRP, RA and RPS Requirements Warrant Further Definition ......................................................................................................................... 10

F. Procurement Transparency, along with IRP Compliance and Enforcement Measures, Require Further Definition ........................................................................................................ 11

III. THE FINAL REPORT’S RECOMMENDATIONS SHOULD ADHERE MORE CLOSELY TO THE SCOPE OF SB 237 ........................................................................................................ 13

A. Recommendations Regarding General Enforcement for Other LSEs Should Be Removed from the Report and Addressed in Other More Relevant Proceedings following a Holistic Review of Existing Authority ........................................................................................................ 13

B. Recommendations Regarding Central Procurement Should Be Removed from the Report ................................................................................................................................. 14

IV. OTHER COMMENTS .................................................................................................................. 15

V. CONCLUSION ............................................................................................................................. 15
SUMMARY OF COMMENTS

1. Adopt the Staff’s proposed conditions and requirements for Direct Access (DA) reopening, limiting their scope to DA and Electric Service Provider (ESP) oversight, as Senate Bill (SB) 237 contemplates, and further developing these conditions and requirements as described in these comments.

2. Add a condition for reopening requiring market conditions that will foster attainment of state goals and ensure competitive neutrality for all LSEs in the application of all Public Utilities Commission of the State of California (Commission) rules.

3. Establish a Phase 3, Track 1 process for further development of DA reopening conditions and requirements, including at a minimum adoption of the following measures:
   - **Competitively neutral switching rules.** Today, rules surrounding an ESP customer’s election to switch to CCA service create barriers to such switches. Switching rules should not uniquely disadvantage CCAs in competing for commercial and industrial customers.
   - **Rules governing CCA stranded cost recovery.** CCAs should be provided the same opportunity afforded IOUs to recover costs stranded by migration of their load to an expanded DA program.
   - **Clear compliance metrics.** For example, a precondition that precludes reopening for *all* ESPs if *one* ESP meets only 99 percent of its RA requirements for a single year could be unreasonable, depending upon market conditions at the time.
   - **ESP transparency measures.** Staff notes the lack of transparency into ESP procurement plans and contracts relative to CCAs and IOUs¹ but does not detail the measures it would take to make these plans more transparent.

4. Establish a Phase 3, Track 2 to be implemented following the issuance of 2021-2024 Renewable Portfolio Standard (RPS) compliance reports to assess readiness for DA reopening considering statutory requirements and the detailed conditions and requirements adopted in Track 1.

5. Limit recommendations on compliance and enforcement authority to ESPs and defer broader consideration of these issues to more relevant proceedings where a record can be developed.

6. Exclude the vague recommendation to consider central procurement as a measure to address load migration, recognizing that such a proposal is not contemplated by SB 237 and that many other considerations must be addressed before suggesting such a direction to the Legislature.

7. Acknowledge CalCCA’s submission of comments on the January 8, 2020, workshop.

¹ *Id.* at 23.
The California Community Choice Association (CalCCA)\(^2\) submits these comments in response to the *Ruling Inviting Comments on The Staff Report Providing Recommendations on The Schedule to Reopen Direct Access* (Staff Report) dated September 28, 2020 (Ruling).

I. INTRODUCTION

CalCCA commends the Commission Staff for a well-reasoned, pragmatic draft study examining the implications of reopening or expanding the Direct Access (DA) program. The Staff Report proposes overarching conditions and requirements that must be met by Electric Service Providers (ESPs) before expanding the program scope to all commercial and industrial customers. Staff grounds its proposals and underlying reasoning soundly on facts illuminating the shortcomings of ESP performance under the existing DA program. The Staff Report reasonably concludes that DA reopening presents a risk to electric reliability, California’s

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climate goals, and cost-shifts among customers if ESPs do not comply with key statutory and regulatory requirements. Absent such compliance, DA reopening would also jeopardize affordability and the competitive landscape for all load serving entities (LSEs). Indeed, these risks are only amplified by the uncertainty introduced by the COVID-19 health and economic crisis, the August 2020 rolling blackouts, the anticipated provider of last resort (POLR) proceeding pursuant to SB 520, and a decision addressing the PCIA Working Group 3 Final Report.

Recognizing these risks and uncertainties, the Staff Report takes a measured approach to timing. Staff reasonably propose to defer a determination on DA reopening until after the 2021-2024 RPS compliance period, with other compliance requirements in the interim for the IRP, RPS and RA programs. Similarly, Staff proposes to roll-out any reopening incrementally to allow consideration of changing conditions.

Together, Staff’s thoughtful recommendations frame a general process that will ensure DA reopening, if any, will meet the statutory requirements of Public Utilities Code §365.1(f)(2). The Legislature mandated in §365.1(f)(2) that any recommendations to reopen DA:

(A) “are consistent with the State’s greenhouse gas emission reduction goals”
(B) “do not increase criteria air pollutants and toxic air contaminants”
(C) “ensure electric system reliability” and
(D) “do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers.”

While the Commission cannot make the required findings today that reopening is consistent with these requirements, Staff proposes broad conditions that should precede any further DA

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3 See Staff Report at 22.
4 Discussed in greater detail in Section 2.
expansion to address the first three of these mandates. Further reopening will be permitted only if:  
- ESPs submit robust, transparent Integrated Resource Planning (IRP) filings and meet all procurement requirements pursuant to Decision (D.) 19-11-016.
- ESPs meet their RPS obligations for the 2021-2024 compliance period.
- ESPs comply with all RA requirements including multi-year local, year ahead flexible and system, and month ahead system and flexible obligations.

As noted in CalCCA’s Post Workshop Comments, even if these requirements are met, CalCCA remains concerned that the progress made by many CCAs in exceeding RPS targets will will be setback as customers move from greener CCAs to ESP providers broadly, resulting in a GHG emissions “backslide”.

These requirements will also indirectly address the fourth statutory condition, mitigating the risk of cost-shifts by ensuring that “all LSEs meet their own procurement obligations.”

In addition, the Staff Report addresses potential cost-shifts to existing community choice aggregators (CCAs) who, unlike the investor-owned utilities (IOUs), do not impose departing load charges to recover the costs of stranded investment. It thus recommends Legislative action to “ensure that there is no cost shifting” as the result of customer movement between different LSEs and that this is applied equitably to all customers. A CCA exit fee mechanism must be a precondition to reopening DA. Only by placing these conditions on ESPs and adopting

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5 Id. at 5, 27.
6 See Exhibit A, CalCCA Post-Workshop Comments, January 21, 2020 at 5. CalCCA notes that post-workshop comments and replies, which included substantial analysis, were not included in the record. CalCCA thus incorporates by reference its post workshop opening and reply comments as Exhibit A and Exhibit B, respectively.
7 Id. at 25.
8 Id. at 26.
9 Id. at 29.
mechanisms to mitigate cost-shifts can the Commission be confident that expanding DA will not undermine affordability or other LSEs’ long-term contracting, nor lead to an LSE death spiral.10

CalCCA recommends two further high-level DA reopening preconditions which are implicit in the Staff Report. First, market rules that ensure competitive neutrality must be in place prior to any reopening of DA. For example, the current switching rules put CCAs at a disadvantage by creating a barrier for customers to leave DA service for CCA service. Second, market conditions at the time of reopening should also be assessed in-order-to ensure that they are conducive to meeting the statutory goals. Even if ESPs meet the stated goals, there could be market conditions that favor further deferral. For example, reopening DA in the midst of a supply shortfall could further destabilize the market and waiting until conditions are more conducive to a successful expansion may be the most prudent action.

These overarching preconditions to further reopening create a solid base for a process to determine whether DA reopening can meet the Legislature’s mandate, but more objective and granular requirements and metrics are required for implementation. CalCCA recommends further development of these requirements and metrics in a new Phase 3, Track 1 of this proceeding. The Commission should take action on key issues, including the adoption of the following:

- **Competitively neutral switching rules.** Today, rules surrounding an ESP customer’s election to switch to CCA service create barriers to such switches. Switching rules should not uniquely disadvantage CCAs in competing for commercial and industrial customers.

- **Rules governing CCA stranded cost recovery.** CCAs should be provided the same opportunity afforded IOUs to recover costs stranded by migration of their load to an expanded DA program.

- **Clear compliance metrics.** For example, a precondition that precludes reopening for all ESPs if one ESP meets only 99 percent of its RA requirements for a single year could be unreasonable, depending upon market conditions at the time.

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10 See Exhibit A, CalCCA Post-Workshop Comments, January 21, 2020 at 6-7.
• **ESP transparency measures.** Staff notes the lack of transparency into ESP procurement plans and contracts relative to CCAs and IOUs\(^{11}\) but does not detail the measures it would take to make these plans more transparent.

These requirements and metrics would then be applied in a second Track of Phase 3 instituted following the issuance of 2021-2024 RPS compliance reports. In Track 2, the Commission would assess whether ESPs have met the adopted compliance requirements and, more generally, whether DA reopening would meet the requirements of §365.1(f)(2).

While the Staff Report’s approach is generally sound, it wanders beyond the clear boundaries of SB 237 and the scope of this proceeding in two respects. First, it proposes significant modifications to the compliance and enforcement process for IRP, RA, and RPS for all LSEs, rather than limiting its recommendations to ESPs as SB 237 contemplates.\(^ {12}\) While these issues may warrant further consideration, their broad scope goes far beyond the issues raised directly by SB 237. The Commission’s recommendations should focus squarely on DA and ESPs providing DA service. Second, the Staff Report strays in vaguely contemplating the potential broadening of central procurement. The need for and effectiveness of central procurement involves many other considerations that go beyond the question of whether the Legislature should authorize DA reopening. Indeed, while SB 237 considers how to deal with cost responsibility *if* the Commission adopts some form of central procurement pursuant to §380, the SB 237 assessment is not the right forum for consideration of the merits or design of central procurement mechanisms. The Final Report thus should remove the suggestion that central procurement should be considered as a possible solution to load migration.

Finally, an error in Section 1.2.2 of the Staff Report requires correction. CalCCA was inadvertently left off the list of parties who provided informal comments in response to the

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\(^{11}\) *Id.* at 23.

\(^{12}\) *Id.* at 29.
January 8, 2020, workshop. CalCCA did, in fact, submit informal opening and reply comments, which are attached hereto as Exhibits A and B, respectively. CalCCA requests that the list of commenting parties be revised accordingly.

II. THE COMMISSION SHOULD MODIFY THE STAFF REPORT TO STRENGTHEN THE PROPOSED CONDITIONS ON FURTHER DA EXPANSION AND PROCESS FOR ASSESSING COMPLIANCE

A. The Final Report Should Add a Condition for Reopening Requiring Market Conditions and Rules that Will Facilitate Achievement of State Goals and Ensure Competitive Neutrality

The Staff Report’s reopening conditions focus exclusively on ESPs’ compliance with regulatory requirements under the IRP, RA, and RPS programs. Even if ESPs meet these requirements, market conditions may dictate the timing of reopening. For example, reopening DA in the midst of an acute supply shortfall may exacerbate those conditions. Likewise, waiting may be wise if the Commission has not completed efforts to level the playing field for all LSEs or addressed the critical issue of Provider of Last Resort.

B. The Staff Report Should Further Define the Process for Making a Final Determination on DA Reopening

SB 237 framed reopening considerations from a high-level policy perspective, focusing on four key areas: GHG goals, criteria and toxic pollutants, reliability, and cost shifting. The Staff Report responds by providing another layer of definition to these considerations, which is described in the table below.

<table>
<thead>
<tr>
<th>Statutory Requirements</th>
<th>Staff Report’s Response</th>
</tr>
</thead>
</table>
| (A) The recommendations are consistent with the state’s greenhouse gas emission reduction goals | • ESPs must meet all IRP and RPS obligations in the intervening years  
Legislature should clarify the CPUC’s IRP enforcement authority |
| (B) The recommendations do not increase criteria air pollutants and toxic air contaminants | • CPUC has limited authority over criteria and toxic pollutants  
Meeting RPS and IRP requirements minimizes criteria pollutants  
Limiting reliance on unspecified power may reduce pollutants |
### Statutory Requirements vs. Staff Report’s Response

<table>
<thead>
<tr>
<th>Statutory Requirements</th>
<th>Staff Report’s Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>(C) The recommendations ensure electric system reliability</td>
<td>![Bullet points for C]</td>
</tr>
<tr>
<td>(D) The recommendations do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers</td>
<td>![Bullet points for D]</td>
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While the Staff Report takes these requirements a step further in Section 3, further clarification is required to effectively implement SB 237.

CalCCA recommends that the final Staff Report frame a process to add further detail to the adopted preconditions and requirements. A two-track Phase 3 process could facilitate these efforts. In Track 1 of Phase 3, which would be initiated before the end of the 2021-2024 RPS compliance period, the Commission and stakeholders would develop metrics for evaluating ESP compliance with the DA reopening conditions that can be objectively applied in making its final “go/no go” recommendation. An initial list of issues requiring examination in Track 1 or other proceedings is discussed in the following sections. Following LSE submission of their 2021-2024 RPS compliance reports, the Commission would initiate Track 2, assessing ESP performance against the adopted conditions and requirements and developing a final determination regarding readiness for DA expansion. Making the final determination at this time ensures that DA will be reopened only if ESP performance and market conditions support achievement of the state’s climate and reliability goals.
C. Procedures for Recovery of Stranded Costs Incurred by CCAs as a Result of DA Reopening Should be Developed Prior to Implementation

CalCCA appreciates the Staff Report’s acknowledgement that, unlike IOUs, CCAs have no mechanism to recover stranded costs arising from load migration to DA.\textsuperscript{13} The Staff Report observes:

> With the long-term procurement obligations established in IRP and RPS, a rapid or unforeseeable departure of load departure from CCAs could leave them with significant stranded costs that they cannot fully recover through market transactions.\textsuperscript{14}

At an extreme, mounting stranded costs could cause CCA failure, to the detriment of CCA customers. Consequently, the Staff Report urges the Legislature to “consider the CPUC’s authority in allowing CCAs to recover the costs of investments” stranded by load migration.\textsuperscript{15}

CCA stranded cost-risk must be addressed before reopening DA. SB 350 created an obligation for all LSEs to procure at least 65 percent of their RPS supply through contracts of 10 years or longer by January 1, 2021.\textsuperscript{16} A substantial load loss could leave a CCA with long-term commitments in excess of their total need. Even if the load loss itself did not drive that result, declining market prices could also strand above-market costs. Indeed, these are the conditions that drove the Legislature and this Commission to adopt the Power Charge Indifference Adjustment (PCIA) to secure recovery of these types of costs by the IOUs.

The Staff Report correctly observes that the Commission could play a role in allowing CCAs to implement an effective departing load charge that could be easily administered. If a customer migrates from an IOU to a CCA, the IOU retains a billing relationship with that customer, and thus can attach departing load charges to delivery charges for stranded cost

\textsuperscript{13} Staff Report at 26.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
recovery. Because a CCA does not provide delivery service, if it a customer migrates to DA, it no longer has a billing relationship with the customer, making it administratively difficult to effectuate a departing load charge. Enabling CCA recovery of departing load charges through a customer’s delivery bill could address this disparity.

CalCCA supports the Staff Report’s recommendation to the Legislature to consider enabling CCA stranded cost recovery prior to any DA reopening. CalCCA also recommends that the Commission examine if it can implement this change under its existing statutory authority.

D. Market Rules, including Switching Rules, Should Be Examined to Ensure Competitive Neutrality and Should be a Precondition to DA Reopening

CalCCA raised concerns in its comments throughout this rulemaking that the switching rules applied in previous DA reopening periods placed CCAs at a disadvantage relative to ESP competitors. The Commission dismissed this concern but found that “if and when the cap on DA service is lifted, this issue and the waitlist process should be revisited and, therefore, this issue may be considered during Phase 2 of this proceeding.” The switching rule influence on customer choices remain a concern that must be addressed before any further DA reopening.

Today, if a DA customer wants to migrate service from one ESP to another ESP, that customer may do so freely and retain its allocated right to participate in the DA program. Likewise, a CCA customer who wishes to take service from an ESP may leave the CCA without sacrificing its right to later return to CCA service. However, if a DA customer wishes to take

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17 See Opening Comments of California Community Choice Association on the Order Instituting Rulemaking, April 5, 2019, at 10-14; see also Reply Comments of California Community Choice Association on the Order Instituting Rulemaking, April 10, 2019, at 8-9. CalCCA will not repeat the arguments here.
18 D.19-05-043 at 29.
19 Ibid.
service from a CCA, the customer must give up its allocated DA right and cannot return without going to the back of the existing waitlist. As a result, a customer may be willing to switch periodically among ESPs, but must make a harder choice in choosing service from a CCA since it will be required to give up its DA program rights.

The Commission rejected CalCCA’s proposal to address this inequity in D.19-05-043 on grounds that it would be unfair to other DA customers in a limited DA program to reserve space for a customer who may not use it. It stated: “Available load under the DA cap is in high demand, as demonstrated by the waitlist; therefore, such load must be allocated in an equitable manner to those customers who are interested.” In any DA reopening process, this issue must be re-examined to consider the potential influence of existing switching rules on the reopening phase-in. In particular, the Commission should examine whether DA remains “in high demand” considering the results of the two other SB 237 expansions. There also may be intermediate solutions, such as placing migrating customers first in line for the next reopening tranche.

E. Standards for Compliance with IRP, RA and RPS Requirements Warrant Further Definition

The Staff Report proposes preconditions that require verification that ESPs have complied with the Commission’s IRP, RA, and RPS requirements. While it gives additional definition to these preconditions in Section 3, further clarification is required to provide adequate notice to all LSEs and to ensure any expansion is consistent with §365.1(f)(2).

Key among these issues is whether “absolute compliance” is required or whether “substantial compliance” is sufficient. If the standard is “substantial compliance”, metrics will

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21 Id. at 29.
22 Staff Report at 4.
23 Id. at 27-28.
need to be developed to determine in Track 2 whether ESPs compliance is substantial. For example:

- Must all ESPs meet the compliance metrics to justify DA reopening, or will reopening be applied on ESP-by-ESP basis?
- Must ESPs comply with each requirement 100 percent and comply in 100 percent of the compliance periods or should exceptions be made?

Planning for all LSEs will benefit from greater clarity on these and other questions raised by the proposed preconditions and requirements.

F. **Procurement Transparency, along with IRP Compliance and Enforcement Measures, Require Further Definition**

The Staff Report tackles the challenging issue of IRP compliance and enforcement, which necessarily raises the question of compliance transparency. As an initial matter, it observes that “ESPs’ procurement processes lack transparency when compared to IOUs’ and CCAs’ procurement processes.”\(^{24}\) This lack of transparency leaves the CPUC unable to check on ESPs’ progress toward compliance targets and to propose remedies to address any shortfalls. It appears, however, that rather than imposing additional transparency requirements, the Staff Report creates a big stick to assure compliance: revoking the licenses of ESPs that repeatedly fail to comply with procurement requirements. Further consideration should be given to measures to increase the transparency of ESP data to minimize the need for extreme measures.

The Staff Report also discusses criteria for determining ESP compliance with IRP requirements.\(^{25}\) ESPs must submit “robust, transparent IRPs” that can be “meaningfully aggregated with plans from other LSEs” without causing reliability or renewable integration issues. Once again, the standard is not clear. How can an LSE demonstrate a “robust,  

\(^{24}\) Staff Report at 23.
\(^{25}\) *Id.* at 27.
transparent IRP” and what represents “meaningful aggregation of IRPs?” How would a determination be made that an ESP has caused reliability or renewable integration issues? CalCCA raised similar questions in its comments on draft Resolution E-5080 adopting an IRP citation program, and they remain unanswered.26

Perhaps the most concerning IRP requirement proposed by the Staff Report is ESPs’ responsibility to “demonstrate a track record of procuring new resources in line with their submitted IRP portfolios.”27 The notion of demonstrating procurement “in line with” with IRP portfolios leaves ambiguity and hints at making IRP portfolios somehow binding on ESPs. Given the constantly changing resource landscape, binding IRPs seem less effective than other alternatives. A better approach would be to require that ESPs must comply with any procurement directives issued by the Commission. As in the recent procurement track, this requirement gives clarity by specifying the amount of procurement required for each LSE and the characteristics of the needed procurement (e.g., system RA).

If the IRP requirements specified in the Staff Report ultimately become preconditions to DA reopening, a more detailed examination should be undertaken of existing IRP authority over ESP IRPs and the need for additional authority. As discussed above, the Commission should establish clear metrics by which to evaluate ESP performance through 2024 in a Phase 3, Track 1, to resolve ambiguities.

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27 Staff Report at 27.
III. THE FINAL REPORT’S RECOMMENDATIONS SHOULD ADHERE MORE CLOSELY TO THE SCOPE OF SB 237

A. Recommendations Regarding General Enforcement for Other LSEs Should Be Removed from the Report and Addressed in Other More Relevant Proceedings following a Holistic Review of Existing Authority

While SB 237 and the mandated report require the Commission to address only DA reopening, the Staff Report wanders beyond these boundaries in considering enforcement authority. Indeed, the first three recommendations for Legislative action address enforcement for IRP GHG goals for all LSEs, enforcement of RA goals for all LSEs, and the revocation of CCA registration for repeated noncompliance with these requirements.28

While the Commission may be interested in reviewing enforcement authority in these areas, it should not make these significant proposals in the context of the SB 237 DA reopening assessment. The Commission has existing enforcement authority to ensure LSE compliance. For example, it has adopted citation programs for IRP,29 RPS,30 and RA31 noncompliance. Moreover, there was no examination in this rulemaking regarding whether these citation programs or any other enforcement authority has been effectively used or is adequate to address ESP noncompliance or, particularly, noncompliance by other LSEs. Before seeking authority to use the blunt instrument of license or registration revocation to deter noncompliance, further consideration of existing measures should be explored in the relevant IRP, RPS and RA proceedings. Further thought should also be given to the circumstances in which this tool could be applied to ensure that the penalty corresponds to the level of noncompliance. Seeking this

28 Staff Report at 29.
30 See, e.g., Resolutions E-4257, E-4720, E-4017, D.14-12-023, and D.18-05-026.
31 See, e.g., Resolution E-4195, D.11-06-022.
broad authority in the narrow context of DA reopening would be tantamount to the tail wagging the dog.

B. Recommendations Regarding Central Procurement Should Be Removed from the Report

The Staff Report vaguely contemplates the potential broadening of central procurement to address the complexities of load migration.\(^{32}\) It provides no information on the products that might be addressed through this mechanism, nor does it discuss the type of central procurement – full or residual – that would be considered. It would be heedless to present this unstudied conclusion to the Legislature to consider in developing any framework for DA reopening.

Broadening central procurement would be a draconian response to these complexities of load migration. In addition, central procurement implicates myriad other considerations, including the effect on progress toward climate and reliability goals and interaction with key statutory requirements. In particular, §380(b)(5) requires the Commission to “[m]aximize the ability of community choice aggregators to determine the generation resources used to serve their customers.” Likewise, §454.51(d) requires the Commission to “[p]ermit community choice aggregators to submit proposals for satisfying their portion of the renewable integration need.” Even if additional central procurement were desirable in the context of DA reopening, anything but a residual model would create conflict with Legislative mandates for the Commission’s oversight of CCA procurement.

Without a broader examination in an appropriately scoped forum, the Commission should avoid loosely suggesting the broadening of central procurement as a tool to support DA reopening.

\(^{32}\) Staff Report at 24.
IV. OTHER COMMENTS

In Section 1.2.2 of the Staff Report, CalCCA was inadvertently left off of the list of stakeholders and parties who provided informal comments and reply comments in response to the DA workshop on January 8, 2020. CalCCA did, in fact, submit informal opening and reply comments, which are attached hereto as Exhibits A and B, respectively and requests that the language be revised accordingly.

V. CONCLUSION

For all the foregoing reasons, CalCCA respectfully requests consideration of the proposals specified herein and looks forward to an ongoing dialogue with the Commission and stakeholders.

Respectfully submitted,

Evelyn Kahl
General Counsel to the California Community Choice Association

October 16, 2020

33 Staff Report at 11.
EXHIBIT A

CalCCA Post-Workshop Comments, January 21, 2020
SB 237’s Requirements

- SB 237 requires that the recommendations to the Legislature the Commission must make by June 1, 2020, concerning whether to further expand direct access are consistent with the following Commission findings:
  1. the recommendations are consistent with the state’s GHG emissions reduction goals;
  2. the recommendations do not increase criteria air pollutants;
  3. the recommendations “ensure” electric system reliability; and
  4. the recommendations do not cause any undue cost shifting between bundled and direct access customers.

- The question of whether or not to further expand DA should be the result of conscious, thorough decision-making, not a rushed 6-month process without a study or formal record.
- ESPs’ track record on new, long-term renewable procurement and consumer protection raises many red flags at a time of tremendous electricity policy uncertainty in California.
- There is no reasonable basis for the Commission to find that a further DA expansion is consistent with California’s environmental, reliability and cost-shifting policies, and thus it should not recommend any further reopening schedule at this time.

Lessons From Retail Competition in Other States

- The New York PSC just enacted “significant reforms to the retail energy market” after a three-year investigation revealed many troubling ESP consumer practices.¹
- The mismatch between the duration developers need in a contract for a new project, and the length of time an LSE can be confident of having a given load at a given price is a structural impediment to new project development in any market with retail competition.
- While other states with retail competition have market features that California does not (e.g., centralized capacity markets and a central buyer for RECs in New York; an uncapped energy-only market in Texas), these states are still having big problems with retail choice.

A Further DA Expansion Is Inconsistent with California’s GHG Reduction Goals.

- ESPs procure less RPS-eligible energy as a percentage of retail sales than CCAs and IOUs.² As a result, any load shifting from IOUs and CCAs to ESPs, all else equal, increases aggregate GHG and criteria pollutant emissions.
- Portfolio Content Labels demonstrate that ESPs (collectively) are supplied by more brown power, especially the largest ESPs.³
- ESPs as a whole have consistently failed to achieve minimum RPS compliance levels in any compliance period to date.

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² See Exhibit A.
³ See Exhibit B.
Six ESPs were deemed noncompliant in compliance period (“CP”) 1 (2011-2013).  
Three ESPs were deemed noncompliant in CP 2 (2014-2016), two of which did not meet the 0.25% long-term contracting requirements.

- D.19-12-042 found that ESPs rely on short-term contracts to meet RPS requirements.
  - The 2019 California Renewables Portfolio Standard Annual Report shows virtually no plans by ESPs to procure from newly constructed projects.
  - In CP 2 (2014-2016), half of ESPs met existing (0.25%) long-term contracting requirements entirely through long-term agreements for unbundled RECs, not for new construction.
  - At the January 8 Workshop, Commercial Energy’s representative explained that it would be illogical for ESPs to enter into long-term contracts to serve short-term commitments from customers.

- Because ESPs are procuring more brown power than other LSEs, it would not be reasonable for the Commission to make the finding that a further DA expansion will be consistent with the state’s GHG emission reduction goals.

### Load Migration to DA Will Increase Emissions of Criteria Air Pollutants and Toxic Air Contaminants.

- The required finding in PUC Code 365.1(f)(2)(B) is binary: the Commission’s recommendation regarding whether to expand DA must not increase criteria air pollutants or toxic air contaminants. There is no qualifier in the statutory language.
- IRP compliance is insufficient to demonstrate that such emissions will not increase.
- ESPs are procuring more brown power than other LSEs. Because brown power causes more emissions of pollutants, it is highly likely that expanded DA will lead to more emissions of criteria pollutants and toxic air contaminants.
- Emissions of criteria air pollutants and toxic air contaminants tend to have a greater impact on disadvantaged communities.
- CalCCA recommends that the Commission use the data it has on each resource relied upon by each LSE based on such LSE’s IRP filing and tie data on criteria air pollutant and toxic air contaminant emissions of each such research using the ARB’s Facility Search Tool.
- Based on the collective record of ESPs, the Commission cannot recommend any further expansion of DA at this time consistent with the required statutory findings that DA expansion will not increase criteria air pollutants or toxic air contaminants.

### In Light of Recent Decisions and Significant Policy Uncertainty, the Commission Cannot Reasonably Find that Any Further DA Expansion of DA Would “Ensure” Reliability.

- California’s RA market is undergoing significant change, transitioning from a fluid RA market to one characterized by tightening supplies and possible market power issues.

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5 Id. at 25.
7 From 2018 RPS Compliance Reports, Unique Inputs Tab. See CalCCA’s post-workshop comments for detail.
• Whether California will shift to a central procurement model and the details of any such shift are still uncertain and there’s no data on implementation of any such policy shift.

• Increased market complexity appears to be the reason for the top-down, prescriptive approach applied in setting the Preferred System Portfolio in the IRP Proceeding.

• The Commission's urgent concern in D.19-11-016 – which required an additional 3.3 GW of new System RA outside of the normal RA planning cycles – was to address a potential reliability shortfall by 2021 and is implemented over the 2021-2023 cycle.

Any Expansion of Direct Access Would Cause Undue Shifting of Costs.
• Reliance on PCIA alone will not prevent indifference broadly, but only to the rapidly shrinking population of bundled customers.

• Although SB 237 expressly refers to bundled customers and DA customers, PUC Code Section 365.1(c) and other statutes make clear that Commission policies must ensure indifference more broadly.9 This is critical to ensuring that no customer is harmed by further DA expansion, including CCA customers.

• Exit fees and switching rules need to be considered.

• ESPs tend to target their recruitment toward customers that are less expensive to serve.

The Commission Should Not Recommend a Further DA Expansion at this Time Due to Significant Consumer Protection Concerns.
• In restructured markets, small non-residential customers (“mom and pop” businesses) face the same consumer protection issues as residential customers.
  o New York PSC: reformed retail competition in December 2019 citing “lack of easily accessible and comprehensible product and pricing information and, the number of complaints alleging that bad-acting [retail providers] were misleading and exploiting customers.”10
  o Texas: small business customers signed up for retail rates under promises of a low rate; wholesale prices spiked to $6000-9000/MWh; bills skyrocketed.11
  o ESPs giving incorrect information regarding variable rates, offering teaser rates that reset to much higher rates, high cancellation fees, and automatic renewal.
  o “Slamming & Cramming”, “Baiting and Switching” (per Gap Analysis).

• Inconsistency with energy conservation policies, time of use, etc.

• The Commission should ensure that rules are in place to prevent such practices before the Commission can recommend a further DA expansion.

In sum, the Commission should recommend to the Legislature that Direct Access transactions should not be further reopened at this point in time because the Commission cannot reasonably recommend any further DA expansion consistent with the findings it must make under SB 237.

9 See, e.g., PUC Code §§365.2, 366.2(a), 366.3, 380(b), and 454.51(d).

10 See footnote 1.

Exhibit A: Average Actual LSE RPS Percentages (2014-2018)

Exhibit B: 2018 Energy Resource Mix for California CCAs and ESPs

Source: California Energy Commission’s 2018 Power Source Disclosure Program public data.
EXHIBIT B

CalCCA Post-Workshop Reply Comments, January 27, 2020
POST-WORKSHOP REPLY COMMENTS OF
CALIFORNIA COMMUNITY CHOICE ASSOCIATION

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January 27, 2020
# TABLE OF CONTENTS

I. SB 237 Does Not Require the Commission to Recommend Any Reopening of Direct Transactions ....................................................................................................................... 2

II. SB 237’s Criteria Pollutants and Toxic Air Contaminants Finding Requirement is Binary and is Not Demonstrated by IRP Compliance ....................................................... 4

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 ............................................................... 5
   A. In Fact, ESPs are Procuring More Brown Power Than Are Other LSE Types, Harming the State’s Emissions Reduction Goals .................................................. 5
   B. ESPs Are Underinvesting in Long-Term Contracts for New Renewable Supply, Further Harming Both Emissions Reduction and Reliability Goals ...................... 8

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 ....................................................... 10

V. Current Consumer Protections for DA Customers Are Untested in an Uncapped Retail Market, and the Commission Should Carefully Evaluate Lessons from Other States. .... 13

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 .......... 16

VII. CalCCA Response to the Joint Proposal & Conclusion ............................................................... 18
POST-WORKSHOP REPLY COMMENTS OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION

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.

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

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

\(^5\) 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.
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:

[ compliance 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.
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.\textsuperscript{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.\textsuperscript{12}

\textsuperscript{11} AReM Opening Post-Workshop Comments at 7. This argument was also made by Direct Energy at the January 8 Workshop.
\textsuperscript{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); \textit{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.”

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. 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.” 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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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, supposedly related to compliance with the existing “\textit{de minimus}” 0.25% long-term contract requirement.\textsuperscript{20}

Shell further argues that “[a]s the DA market expands, ESPs will make longer term investments to meet their larger anticipated requirements.”\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item Id. at 13.
\item Id.
\item Id. at 13-14.
\item D.17-06-026 at 9, 38, OP 1.
\item 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.
\item Shell Opening Post-Workshop Comments at 11.
\end{enumerate}
\end{footnotesize}
(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.” Other states like New York have not seen much in the way of RPS contributions by DA providers. 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]he 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. 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. 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. 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{31} CCAs differ significantly from ESPs in their governance structures, commitment to GHG emissions reductions, and in that they serve \textit{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.

\textsuperscript{28} Commercial Energy of California Opening Post-Workshop Comments at 3-4.
\textsuperscript{29} \textit{Id.} at 4; EPUC Opening Post-Workshop Comments at 5, footnote 8; \textit{id.} at 7.
\textsuperscript{30} EPUC Opening Post-Workshop Comments at 7.
\textsuperscript{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,\textsuperscript{32} TURN explained how such opacity hinders the Commission (and other stakeholders) from evaluating and ensuring compliance with California’s environmental and reliability goals.\textsuperscript{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.\textsuperscript{34} Simply put, as mission-driven government agencies, CCA expansion does not raise the same concerns that direct access expansion does.

\textbf{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

\textsuperscript{32} Shell Opening Post-Workshop Comments at 12-13.

\textsuperscript{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."). \textit{Id.} at 6-7.

\textsuperscript{34} See \url{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. In an expanded or fully reopened nonresidential retail market, many customers will not be so “sophisticated.” 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.

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.

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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?\textsuperscript{41} In Texas, customers are being offered energy pricing that decreases the cost of energy as the energy consumer consumes more energy.\textsuperscript{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

\textsuperscript{38} California Customer Choice Project - Choice Action Plan and Gap Analysis, issued December 2018 (the “Gap Analysis”).

\textsuperscript{39} See CalCCA Opening Post-Workshop Comments at 21-22.

\textsuperscript{40} NYPSC Order at 88-89.

\textsuperscript{41} NYPSC Press Release at 3.

\textsuperscript{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.\footnote{TURN Opening Post-Workshop Comments at 18, 19.} 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 masse, they return to bundled utility service.”\footnote{AReM Opening Post-Workshop Comments at 12, footnote 28.} 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...
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

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.

January 27, 2020

Respectfully submitted,

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