FILED
08/13/21
02:34 PM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill 237 Related to Direct Access.	R.19-03-009

RESPONSE OF
CALIFORNIA COMMUNITY CHOICE ASSOCIATION
TO THE APPLICATION OF THE ALLIANCE FOR RETAIL ENERGY MARKETS, CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION, DIRECT ACCESS CUSTOMER COALITION, ENERGY PRODUCERS AND USERS COALITION, SHELL ENERGY NORTH AMERICA (US), L.P. AND WESTERN POWER TRADING FORUM FOR REHEARING OF DECISION 21-06-033

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August 13, 2021

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Pursuant to California Public Utilities Commission's (Commission) Rule of Practice and Procedure (Rule) 16.1(d), the California Community Choice Association (CalCCA)[1] submits this Response to the *Application of The Alliance for Retail Energy Markets, California Large Energy Consumers Association, Direct Access Customer Coalition, Energy Producers and Users Coalition, Shell Energy North America (US), L.P. and Western Power Trading Forum (Applicants) for Rehearing of Decision 21-06-033*, filed July 29, 2021 (Application). The Decision Recommending Against Further Direct Access Expansion, D.21-06-033 (Decision), was voted out by the Commission on July 24, 2021, and issued on July 29, 2021.

[1] California Community Choice Association represents the interests of 22 community choice electricity providers in California: Apple Valley Choice Energy, Baldwin Park Resident Owned Utility District, Central Coast Community Energy, Clean Energy Alliance, Clean Power Alliance, CleanPowerSF, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, Marin Clean Energy, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Pomona Choice Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Diego Community Power, San Jacinto Power, San José Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power, and Valley Clean Energy.

I. INTRODUCTION

Applicants seek rehearing of the Decision recommending against future expansion of Direct Access based on the Commission's inability to make the findings required by California Public Utilities Code section 365.1(f)(2), enacted by Senate Bill (SB) 237 (2018). The Decision thoroughly considered the implications of reopening Direct Access consistent with the Legislature's requirements set forth in SB 237. The Commission clearly explained that the Decision was issued "against the backdrop of two recent grid reliability events" in the summer of 2020, and the forecasts from the Commission's Integrated Resource Planning (IRP) proceeding demonstrating the significant capacity deficits that California faces.[2] The Commission is currently scrambling to ensure electric system reliability in the near- and long-term. The Decision therefore came at a time in which the Commission's priorities – maintaining grid reliability, ensuring adequate capacity, and complying with the State's ambitious greenhouse gas emission reduction goals – resulted in its findings recommending against reopening Direct Access.

Applicants contend: (1) that the Commission misinterpreted its statutory duties under SB 237, thus abusing its discretion; (2) that the Commission's findings are not based on substantial evidence; and (3) that Applicants are unfairly discriminated against in violation of the dormant Commerce Clause and the Equal Protection Clause of the Federal and State Constitutions.

The Commission's determinations and legal conclusions set forth in the Decision are correct, and the Application for Rehearing should be denied for the following reasons:

- ✓ The Commission's interpretation of section 365.1(f)(2) is consistent with the plain language of the entire statute, as well as the legislative history of SB 237, and therefore the Commission proceeded in the manner required by law and did not abuse its discretion.

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[2] Decision at 2-4.

- ✓ The Decision is supported by the findings required by California Public Utilities Code section 365.1(f)(2) and is also adequately supported by findings based on the entire administrative record of the proceeding. Specifically, the Commission determined based on the record that it could not make the required findings under section 365.1(f)(2), and therefore could not recommend the reopening of Direct Access.

- ✓ Applicants' dormant Commerce Clause argument fails because the Decision applies equally to both in-state and out-of-state Electric Service Providers (ESPs) and therefore does not unfairly discriminate against out-of-state interests.

- ✓ Applicants' argument that the Decision discriminates against both ESPs and their customers and therefore violates their Equal Protection rights fails the "rational basis" test in that the Decision is based on the findings regarding electric grid reliability and environmental concerns.

II. DISCUSSION

A. Legal Standard

Under Rule 16.1, "the purpose of an application for rehearing is to alert the Commission to a <u>legal error</u>, so that the Commission may correct it expeditiously."[3] An application for rehearing "shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law."[4] While a party may not agree with the outcome in a highly contested proceeding, "[a]n application for rehearing should raise legal error, and should not be used as a vehicle for relitigation of policy positions or to reweigh evidence."[5]

Under California Public Utilities Code section 1757.1, the Commission commits legal error when: (1) the decision was an abuse of discretion; (2) the Commission has not proceeded in the manner required by law; (3) the Commission acted without, or in excess of, its powers or

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[3] Rules of Practice and Procedure, Rule 16.1(c) (emphasis added).

[4] *Id.*

[5] *Order Denying Application for Rehearing of Decision 19-10-056,* Rulemaking (R.) 19-07-017, Mar. 2, 2020 at 4 ("the application for rehearing essentially repeats verbatim the arguments raised in [Applicant's] comments to the Proposed Decision," and "[t]he fact that we did not weigh the evidence in [Applicants'] favor does not constitute legal error").

jurisdiction; (4) the decision is not supported by the Commission's findings; (5) the decision was procured by fraud; or (6) the decision violates any right of the petitioner under the Constitution of the United States or the California Constitution.[6]

Upon review, courts defer generously to the Commission's judgment in carrying out the legal powers and responsibilities delegated to the Commission by the State Constitution and applicable statutes.[7] "There is a strong presumption of validity of the Commission's decisions, . . . and the Commission's interpretation of the California Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language . . . ."[8] Courts give "presumptive value to a public agency's interpretation of a statute within its administrative jurisdiction because the agency may have 'special familiarity with satellite legal and regulatory issues,' leading to expertise expressed in its interpretation of the statute."[9] In addition, when conflicting inferences can reasonably be drawn from the facts, the weighing of factors by the Commission is a matter within the exclusive jurisdiction of the Commission.[10]

B. The Commission's Interpretation of SB 237 Does Not Constitute Legal Error or an Abuse of Discretion

Applicants contend that the Commission disregarded the "express duties imposed on it by SB 237" and abused its discretion by failing to provide a recommendation to reopen Direct Access.[11] Applicants' argument, however, fails on many levels. As a threshold matter, as described above, the Commission's interpretation of the California Public Utilities Code is given

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[6] Cal. Pub. Util. Code §1757.1(a).

[7] California Constitution, Art. XII, §§1-6; Cal. Pub. Util. Code §§701, 1701(a).

[8] *Greyhound Lines, Inc. v. Public Utilities Comm'n* (1968) 68 Cal.2d 410, 410-11 (citations omitted).

[9] *Pacific Gas and Electric Co. v. Public Utilities Comm'n* (2015) 237 Cal.App.4th 812, 839 (citing *Pacific Bell Wireless, LLC v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 718, 729).

[10] *Pacific Gas and Electric Co.,* 237 Cal. App.4th at 838-839 (citations omitted).

[11] Application at 3.

great deference.[12] Furthermore, Applicants improperly interpret and apply one part of SB 237 in isolation from the rest of the statute. Finally, even if the language of SB 237 permits more than one reasonable interpretation, legislative history associated with SB 237 firmly supports the Commission's interpretation.

1. The Commission's Interpretation of SB 237 is Lawful and Within its Expertise and Discretion

Applicants cite to only one part of SB 237 in concluding that the Commission "disregarded" the "express directives" of SB 237:

> 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.[13]

By citing the above section in isolation, without the statutory language surrounding it, Applicants claim that the Commission "unlawfully elected to issue a Decision that failed to comply with the duties imposed on it by the precise and explicit wording of SB 237."[14] However, a closer examination of the requirements imposed on the Commission establish that the Commission's obligation in SB 237 extends beyond Applicants' characterization of that obligation.

Through SB 237, the Legislature directs the Commission to act on Direct Access in two phases: (1) to reopen Direct Access on a limited basis by June 1, 2019, and (2) with regard to further reopening (at issue in the current Application), to provide recommendations to the Legislature.[15] With respect to the first phase, SB 237 provides:

> (e) On or before June 1, 2019, the commission shall issue an order regarding direct transactions that provides as follows:

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12 *See Greyhound,* 68 Cal.2d at 410-11.
13 Cal. Pub. Util. Code §365.1(f)(1).
14 Application at 5.
15 Cal. Pub. Util. Code §§365.1(e), (f).

> (1) Increase the maximum allowable total kilowatthours annual limit by 4,000 gigawatthours and apportion that increase among the service territories of the electrical corporations,
> (2) All residential and nonresidential customer accounts that are on direct access as of January 1, 2019, remain authorized to participate in direct transactions.[16]

With respect to the second phase, SB 237 requires:

> (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.[17]

The Commission interpreted the first phase required by SB 237 as a "mandate," and issued D.19-05-043, implementing the 4,000 gigawatt hour increase for Direct Access transactions.[18] With respect to the second phase, the Commission found that because it could not make the required statutory findings, it could not recommend to the Legislature to further reopen Direct Access.[19]

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[16] *Id.*, §365.1(e).
[17] *Id.,* §365.1(f).
[18] *Decision Regarding Increased Limits for Direct Access Transactions,* D.19-05-043 (May 30, 2019).
[19] Decision at 19.

As stated above, Applicants interpret SB 237 as mandating that the Commission recommend how further reopening of Direct Access will occur.[20] Applicants further contend that "the Commission assumed it had the discretion and right to overturn the will of the Legislature when it elected to ignore the statutory duties imposed on it by SB 237, based only on a questionable and highly discriminatory list of reasons why Direct Access should not be expanded."[21] However, the plain and commonsense language of SB 237 supports the Commission's determination.

The "rules" of statutory interpretation are well established – courts "begin by examining the statutory language, giving it a plain and commonsense meaning."[22] When interpreting a statute, "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and the provisions relating to the same subject matter must be harmonized to the extent possible."[23] Here, Applicants only cite subsection (f)(1) as the full obligation of the Commission, while failing to cite the following subsection (f)(2) which requires that the Commission make specific findings in its development of any recommendations regarding Direct Access reopening. Applicants therefore fail to interpret subsection (f)(1) in the context of the full directives of the Legislature in SB 237.

Applicants' interpretation of SB 237 also fails when examined in light of the full statutory scheme of SB 237. "An interpretation that renders related provisions nugatory must be

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[20] Application at 4 ("[d]espite [the] clear directive [of SB 237], the Decision does not provide recommendations on implementing a further direct access reopening schedule. Nor does the Decision include a proposed phase-in period").

[21] Application at 4.

[22] *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190 (quoting *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856-57); *see also New Cingular Wireless PCS, LLC v. Public Utilities Comm'n* (2016) 146 Cal.App.4th 784, 795.

[23] *Save Lafayette Trees v. East Bay Regional Park District* (2021) 280 Cal.Rptr.3d 679, 700 (emphasis supplied) (quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735); *see also Smith,* 11 Cal.5th at 190.

avoided, each sentence must be read not in isolation but in the light of the statutory scheme, and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed."[24] As set forth above, SB 237 *mandates* as phase 1 that the Commission reopen Direct Access by 4,000 gigawatt hours by January 1, 2019,[25] which the Commission directed in D.19-05-043. SB 237 then carves out phase 2, at issue here, which requires Commission analysis on implementing further reopening. The Legislature could have mandated a further reopening in phase 2 as it did in phase 1, but it did not. Instead, the Legislature requested the analysis of the Commission, provided in recommendations regarding reopening. With the full provisions of SB 237 read in context, the Commission's phase 2 recommendation against reopening was not only reasonable and within the Commission's discretion, but it was also in accordance with SB 237.

2. Even if the Statutory Language in SB 237 Permits More Than One Reasonable Interpretation, the Legislative History Supports the Commission's Interpretation of SB 237

As noted above, statutory interpretation is based on "effectuat[ing] the law's purpose," and courts first look to the statutory language, giving it "plain and commonsense meaning."[26] If, however, "the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy."[27] While the plain meaning of SB 237 is clear, as set forth above, the legislative history provides further clarification as to the intent of the Legislature to require the Commission to make the necessary findings in connection with its recommendation on whether to reopen Direct Access.

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24 *Id.* at 701 (citations omitted).

25 Cal. Pub. Utils. Code §365.1(e).

26 *Smith,* 11 Cal.5th at 190 (quoting *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856-57).

27 *Id.*

The original bill, as introduced by Senator Hertzberg on February 6, 2017, and amended as of June 13, 2018, would have required the Commission to completely eliminate the cap on Direct Access over three years, commencing on July 1, 2019.[28] In a bill analysis from the Assembly Committee on Utilities and Energy, the statutory capping of enrollment in Direct Access as a result of the energy crisis was discussed, along with the past reopening and expansion of Direct Access in 2010 to 13 percent of retail electric load.[29] "Comments" on the analysis include reservations on the reopening of Direct Access:

- "Given the shaky status of [Resource Adequacy], is this the right time to contribute to the destabilization of the market by removing the cap on [Direct Access]?"[30]

- "The CPUC reports that it is seeing some of the same trends in the electricity marketplace that preceded the last energy crisis in California. Specifically, in a forward to what is called "The Green Book," released in May [2018], CPUC President Michael Picker made the following statement. "In light of this concern that procurement is already unstable in the state, should the Legislature compound the instability by removing the cap on [Direct Access] at this time?""[31]

In a bill analysis from the Assembly Committee on Appropriations regarding Senator Hertzberg's bill as written, the analysis cites the status of the electricity market at that time as having "undergone significant changes since the energy crisis," of which "[m]any of those changes continue."[32] The analysis further states that the Commission, while noting the "potential

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28 *See* Text of Senate Bill No. 237, Amended in Assembly June 13, 2018, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB237; *see also* Assembly Committee on Utilities and Energy, June 26, 2018, at 1, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237 (summarizing Senate Bill No. 237 as requiring the Commission "to eliminate the cap over three years, commencing on July 1, 2019, on the "direct access" (DA) program . . . .").

29 *See* Assembly Committee on Utilities and Energy, June 26, 2018, at 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237.

30 *Id.* at 4.

31 *Id.*

32 *See* Assembly Committee on Appropriations, August 9, 2018, at 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237.

for benefits to result from these changes" has also "expressed concerns" regarding the lack of a "coherent and comprehensive plan" to further deregulate the electric markets. The analysis recommends that "the author [of SB 237] may wish to consider a more limited expansion."[33]

As of August 21, 2018, the bill was amended to remove the requirement to completely eliminate the cap on DA. Instead, the amended bill required the Commission to provide recommendations to the Legislature regarding a second reopening of Direct Access.[34]

As of August 24, 2018, the bill was again amended to require two distinct actions by the Commission: (1) expand the DA program to 16 percent, or 4,000 gigawatt hours, apportioned across the service territories of the IOUs (with all DA customers already enrolled as of January 1, 2019 remaining eligible to participate in DA); and (2) report to the Legislature by June 1, 2020 on further expansion of the program, and with the recommendations "conditioned on specified findings."[35] As to the requirement that the Commission provide recommendations on reopening, the Comment portion in the August 24, 2018 Summary of the Senate Third Reading discusses the analysis being conducted at the Commission on customer choice and its effect on the "rapidly changing electricity market . . . to ensure continued reliable, clean, and affordable electricity for customers and equitable treatment for all market participants."[36] The Comment goes on to state that:

> [t]he recommendations on expansion of DA required by this bill are consistent with the CPUC's work on customer choice. The expansion of the DA program called for in this bill may be premature given the CPUC's warning that they observe [sic] similar

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[33] *Id.*

[34] Proposed amendment to California Public Utilities Code section 365.1(e), text of Senate Bill No. 237, as amended in Assembly, August 21, 2018, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB237

[35] Senate Third Reading, SB 237 (Hertzberg), as amended, at 1 (emphasis added), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237

[36] *Id.* at 3.

> circumstances in the electricity market as they observed before the energy crisis of 2001.[37]

On August 30, 2018, the Assembly passed the bill, and the Senate Committee on Energy, Utilities and Communications held a hearing to consider the bill. The Senate Committee analysis of the bill, which was ultimately passed in the Senate on August 31, 2018, summarizes the bill, discussing the requirement that the Commission reopen the DA program by 4,000 GWh, and the requirement that the Commission subsequently report to the Legislature regarding further reopening.[38] The analysis states that the bill" [r]equires that the [Commission] recommendations be <u>conditioned on</u> specified findings"[39] (that reopening would be consistent with GHG emission goals, would not increase criteria air pollutants and toxic air contaminants, would ensure electric system reliability, and would not cause undue cost shifting). The analysis includes a discussion of the complexities of reopening Direct Access, and notes that the Commission:

> [H]as stated that California must consider how to shape [the California energy market] in a way that continues to ensure reliable, clean, and affordable electricity for customers and equitable treatment for all market participants. The CPUC warns that the state does not currently have a plan to address these issues.

On the same day of this hearing, the bill was passed with no amendments.

Consistent with the Committee Analysis, the Legislative Counsel's Digest for SB 237 states that:

> This bill would require the commission to provide to the Legislature recommendations on the adoption and implementation of a 2nd direct transactions reopening schedule. <u>The bill would require the commission, in developing the recommendations, to make certain findings</u>.[40]

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[37] *Id.*

[38] Senate Committee on Energy, Utilities and Communications, 8/31/18 Hearing, Analysis of SB 237 (Version 8/24/28, As Amended), at 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB237

[39] *Id.* (emphasis added).

[40] SB 237, Legislative Counsel's Digest, paragraph 3.

As a whole, the legislative history of SB 237 contemplates a discussion of the most prudent course to reopen Direct Access in light of the history of California electricity deregulation and the potential concerns regarding the impacts of reopening Direct Access. Importantly, the legislative history specifically requires any recommendation regarding Direct Access to be <u>conditioned on</u> the Commission making all of the findings listed in section 365.1(f)(2).

Consistent with both the statutory language and the legislative history, the Commission carefully considered the required findings, and in determining that it could not make all of those findings, developed its recommendation against reopening Direct Access. In doing so, the Commission acted within the law, and did not abuse its discretion.

C. The Decision is Adequately Supported by the Commission's Findings and Meets the Requirements of California Public Utilities Code Sections 365.2(f)(1) and 1757.1

Applicants contend that the Decision's findings "are flawed, without merit, and are highly discriminatory,"[41] and do not meet the "substantial evidence" standard required by California Public Utilities Code section 1757.[42] Contrary to Applicants' positions, however, the Decision is in fact adequately supported by the Commission's findings based on the entire administrative record.[43]

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[41] Applicants cite section 1757, which is the standard of review for complaint, enforcement, ratemaking, or licensing proceedings, as the applicable statute. However, in this quasi-legislative proceeding, section 1757.1 provides the applicable standard of review. The only difference between sections 1757 and 1757.1 is that section 1757.1 does not include review of whether "the findings in the decision of the commission are . . . supported by substantial evidence in light of the whole record." Instead, section 1757.1 focuses on whether the Decision is adequately supported by the findings.

[42] Application at 17.

[43] *See City of Vernon v. Public Utilities Comm'n* (2001) 88 Cal.App.4th 672, 677 (review limited to a determination based on the "entire administrative record" of factors set forth in California Public Utilities Code section 1757.1).

As set forth above, Commission decisions are given great deference by courts, and there is a "strong presumption of validity of the commission's decisions."[44] Courts apply a "strong presumption of the correctness of the findings . . . of the commission, which may choose its own criteria or method or arriving at its decision.[45] In addition, when conflicting inferences can reasonably be drawn from the facts, the weighing of factors by the Commission is a matter within the exclusive jurisdiction of the Commission.[46] Even if the Section 1757 "substantial evidence" standard applied,[47] "[t]o accomplish the overturning of a Commission finding for lacking the support of substantial evidence, the challenging party must demonstrate that based on the evidence before the Commission, a reasonable person could not reach the same conclusion."[48]

Applicants contend that the Commission erred in its analysis regarding ESP past procurement performance, given the ESPs' 23-year track record of meeting their procurement obligations. Applicants also point out that all LSEs are subject to identical obligations for Resource Adequacy (RA), Renewable Portfolio Standard (RPS), Integrated Resource Planning (IRP) and GHG requirements.[49] In addition, Applicants argue that the Commission erred in finding that unpredictable load migration could destabilize the state's energy system.[50]

In making its determination for phase 2 of this proceeding, the Commission relied on a Draft Staff Report, 54 sets of Comments filed, and party participation at a Commission workshop. Based on the record, the Commission made findings in support of its Decision to

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44 *Greyhound,* 68 Cal.2d at 410-11.

45 *Pacific Gas and Electric Co.,* 237 Cal.App.4th at 838 (quoting *Pacific Tel. & Tel. Co. v. Public Utilities Comm'n* (1965) 62 Cal.2d 634, 647).

46 *Pacific Gas and Electric Co.,* 237 Cal.App.4th at 838-839 (citations omitted).

47 *See supra* n. 41.

48 *Pacific Gas and Electric Co.,* 237 Cal.App.4th at 839 (citations omitted).

49 Application at 16-19.

50 *Id.* at 19-20.

recommend against reopening of Direct Access, in accordance with California Public Utilities Code sections 365.1(f)(2) and 1757.1.

The Commission found that it could not make the first two out of the four required findings in California Public Utilities Code Section 365.1(f)(2), and therefore, concluded it could not recommend to the Legislature that Direct Access should be reopened. First, the Commission could not find that expansion of Direct Access will ensure system electric reliability, "given the concerns raised in the Staff Report and the urgent reliability challenges that the state faces."[51] In support of this finding, the Commission found that given the rotating outages that California experienced in Summer 2020 due to capacity and reliability challenges, near-, mid-, and long-term actions are needed to ensure summer reliability.[52] The Commission further found that while considerable new generation has been ordered by the Commission, construction of new generation requires financing, and financing is typically obtained by showing long-term load commitments.[53] Without long-term load certainty, LSEs cannot demonstrate the long-term customer commitment to support or enter into the long-term power purchase agreements necessary to finance construction of new generation.[54] The Commission also found that Direct Access customers generally enter into short term agreements with ESPs, and that ESPs primarily fill their obligations through short-term contracts, or unspecified power purchased on the CAISO energy market.[55] The Commission further found that expanding Direct Access will allow load migration between LSEs, causing fragmentation of the electricity market, which will result in

[51] Decision at 19.
[52] *Id.* at 27, Findings of Fact 1-2.
[53] *Id.,* Findings of Fact 3-4.
[54] *Id.,* Finding of Fact 5.
[55] *Id.* at 28, Finding of Fact 6.

CCAs and ESPs having difficulty financing new generation needed for system reliability and for GHG emissions reduction goals).[56]

Second, the Commission could not find that reopening Direct Access would be consistent with the state's GHG emission reduction goals. The Commission found that ESPs' power purchases consist largely of unspecified power, which the California Air Resources Board has determined has higher GHG emissions and particulate pollutants than the power mix used by IOUs and CCAs.[57] The findings included that as of 2019 the power mix for each type of LSE is: IOUs – 64.4 percent GHG-free; CCAs – 79.1 percent GHG-free; and ESPs – 30.6 percent GHG-free.[58] Furthermore, the Commission found that if ESPs continue to rely on unspecified power, load migration due to Direct Access expansion will result in increased GHG emissions.[59]

Given the Commission's extensive support of its Decision, Applicants' contentions regarding the Decision being unsupported by findings or lacking the support of substantial evidence must be dismissed. While Applicants' may not agree with the Commission's Decision, the Decision is adequately supported by the findings as required by California Public Utilities Code section 1757.1.

D. The Decision Does Not Violate the Dormant Commerce Clause Because It Treats In-State and Out-of-State Businesses Equally

Other than a general description of the dormant Commerce Clause, a statement that "a nondiscriminatory alternative does exist" without any further explanation, and a general statement that "[t]he practical effect of the Decision is to favor California-based IOUs and CCAs, to the detriment of the state's ESPs, the overwhelming majority of which are out-of-state

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[56] *Id.*, Finding of Fact 7-8.
[57] *Id.,* Finding of Fact 9.
[58] *Id.,* Finding of Fact 10.
[59] *Id.,* Finding of Fact 12.

corporations," Applicants fail to articulate exactly how the Decision violates the dormant Commerce Clause. This inability to demonstrate any discriminatory treatment is likely because the Decision equally affects both in-state ESPs (such as Applicant Alliance for Retail Energy Markets' (AReMs') member Calpine Energy Solutions, headquartered in San Diego, California, and Pilot Power Group, also headquartered in San Diego, California) as well as out-of-state ESPs (such as AReMs' member Constellation New Energy, headquartered in Baltimore, Maryland).

Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause), provides Congress with the power "to regulate commerce . . . among the several states, ..."[60] From this authorization of Congressional power, courts have inferred a restriction on state power known as the "dormant Commerce Clause," which limits the States' authority to enact or enforce laws that discriminate against or unduly burden interstate commerce.[61] Courts will strike down a state law if it expressly mandates differential treatment of in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter.[62] A law that is not facially discriminatory can still be struck down if the effect or purpose of the law is to burden interstate commerce.[63]

The Court has specifically held that state laws, such as the Decision at issue here, that treat in-state and out-of-state businesses equally cannot violate the dormant Commerce Clause. In *Minnesota v. Clover Leaf Creamery Co.,*[64] the Supreme Court upheld a state law banning the

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60 U.S. Constitution, Art. 1, §8, Clause 3.

61 *See Granholm v. Heald,* 544 U.S. 460, 492-93 (2005) (state law allowing in-state wineries, but not out-of-state wineries, to ship their products to consumers violated dormant Commerce Clause by discriminating against out-of-state wineries).

62 *Id.*

63 *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142-43 (1970) (citing *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440-443 (1960) (applying a balancing test that evaluates whether the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits").

64 *Minnesota v. Clover Leaf Creamery Co., et al.,* 449 U.S. 456, 470-74 (1981).

retail sale of milk products in plastic, nonreturnable containers but permitted sales in other nonreturnable, nonrefillable containers, such as paper cartons. The Court found no discrimination against interstate commerce, because <u>both in-state and out-of-state interests</u> could not use the plastic containers and therefore they were treated in the same manner.[65] Similarly, in *North American Meat Institute v. Becerra,*[66] the Federal District Court upheld a California law that banned selling veal or pork in the state where the animal was confined in a "cruel manner," rejecting the argument of out-of-state meat sellers that the law discriminated against interstate commerce in violation of the dormant Commerce Clause by effectively excluding them from California's market. The court found that the law applied equally to California meat producers and out-of-state meat producers and thus was not discriminatory in effect, stating that an "equal opportunity" burden on all targeted goods is not invalid under the dormant Commerce Clause.[67]

Applicants' argument here, that the dormant Commerce Clause is violated because some out-of-state businesses will be impacted, is identical to the arguments that have been previously rejected by the Supreme Court and other courts. The Commission's recommendation to not reopen Direct Access applies equally to both in-state and out-of-state companies, and therefore the dormant Commerce Clause argument does not apply.

Moreover, courts considering regulations imposing an only "incidental" burden on interstate commerce have upheld those regulations. In explaining these decisions, courts cite the state's power to make laws governing matters of local concern even if a law in some measure

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[65] *Id.; see also Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, at 125-26 (1978) (finding no violation of the dormant Commerce Clause by a Maryland statute that prohibited producers or refiners of petroleum products from operating retail service stations in the state, because the fact that the burden incidentally fell on out-of-state companies (no in-state producers or refiners actually existed) "does not lead . . . to a conclusion that the state is discriminating against interstate commerce" as the statute does not "distinguish between in-state and out-of-state companies in the retail market.").

[66] *North American Meat Institute v. Becerra,* 420 F.Supp.3d 1014, 1025-27 (C.D. Cal. 2019).

[67] *Id.*

affects interstate commerce or even, to some extent, regulates it.[68] The Supreme Court has long recognized public health, the environment, and natural resources as legitimate matters of local concern, and state laws intended to protect them justify the burden on interstate commerce so long as the law is not motivated by an economic protectionist purpose.[69] Therefore, even if the dormant Commerce Clause somehow applied in this situation, the Commission's findings regarding reliability of the electric system and the environmental concerns that support its decision to recommend against reopening Direct Access would likely justify any burden on interstate commerce.

E. The Decision Does Not Violate Applicants' Equal Protection Rights

Applicants broadly argue that the Decision unlawfully discriminates against both non-residential customers and the ESPs that wish to serve them and therefore violates their right to equal protection under the Fourteenth Amendment of the United States Constitution, and the California State Constitution.[70] Applicants state that the Decision "constitutes a state-imposed barrier to two groups," and cite the "disparate treatment" of ESPs as compared to CCAs and IOUs which are able to serve all non-residential customers within their service areas.

However, Applicants provide no legal support for this argument other than a cite to a Supreme Court case from 1880 generally stating that a state's legislative or administrative action can violate the equal protection of the laws, and a 1993 case discussing standing to bring an equal protection claim. Any analysis of a state law and whether it implicates equal protection rights must apply the "rational basis" test and whether the law is rationally related to any

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68 *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 349-50 (1977) (citations omitted).

69 *See Maine v. Taylor,* 477 U.S. 131, 151-52 (1986) ("As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation [citation omitted], it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.").

70 Application at 21.

legitimate government purpose.[71] On "rational-basis review," a classification in a statute or regulation bears a "strong presumption of validity."[72] In this case, as set forth above regarding the Commission's findings supporting its recommendation against reopening Direct Access, significant public policy justifications exist which implicate electric system reliability and the environment. Therefore, under the "rational basis test," Applicants' equal protection argument should be rejected.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Rehearing.

Respectfully submitted,

Evelyn Kahl
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August 13, 2021

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[71] *See Federal Communications Comm'n v. Beach Communications, Inc., et al.,* 508 U.S. 307, 313 (1993) ("[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); *see also Minnesota,* 449 U.S. at 461-62 (considering whether a state classification between milk containers is "rationally related" to the legitimate state purpose of promoting resource conservation, easing solid waste disposal problems, and conserving energy).

[72] *Id.* at 314.