BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.	Rulemaking 07-05-025 (Filed May 24, 2007)

MOTION OF COMMERCIAL ENERGY OF CALIFORNIA REQUESTINGANORDERTOSHOWCAUSE

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For Commercial Energy of California

September 27, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.	Rulemaking 07-05-025 (Filed May 24, 2007)

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, Commercial Energy of California ("Commercial Energy")[1] hereby submits this Motion Requesting an Order Requiring Pacific Gas and Electric Company ("PG&E") to Show Cause why it should not be deemed out of compliance with the Commission's Decision ("D".) 10-03-022, regarding implementation of the reopening of Direct Access ("DA"). Specifically, PG&E has not complied with D.10-03-022 by: (1) improperly allowing DA-eligible customers to submit 6-month notices to switch to DA between the effective date of D.10-03-022 and the effective date of the DA Open Enrollment Window ("OEW"); and (2) incorrectly calculating the amount of DA available for 2010. PG&E should therefore be ordered to: (a) disclose the number of customers allowed to enroll between the effective date of D.10-03-022 and the effective date of the OEW and the amount of GWHs associated with each such customer; (b) disallow the 6-month notices to switch received between the effective date of D.10-03-022 and the effective date of the OEW; (c) recalculate the amount of DA available for 2010; (d) restore the DA queue created pursuant to D.10-03-022 and distribute expanded DA capacity to those entities who would have been entitled to enroll during the

[1] Commercial Energy is a privately held Montana corporation marketing energy and energy services to businesses since 1997. Commercial Energy sold electricity to clients in Montana from 1998 through 2004, then opened its Oakland, California office in December, 2004. Today, Commercial Energy supplies natural gas to over 2,000 businesses at over 6,000 locations, primarily in California.

OEW under the reconfigured queue; and reconfigure the queue for 2011 in a manner consistent with the revised OEW for 2010.

I. BACKGROUND

A. SB 695

SB 695 added a new section 365.1 of the Public Utilities Code.[2] In relevant part, section 365.1 provides that:

> (a) Except as expressly authorized by this section, and subject to the limitations in subdivisions (b) and (c), the right of retail end-use customers pursuant to this chapter to acquire service from other providers is suspended until the Legislature, by statute, lifts the suspension or otherwise authorizes direct transactions. . . .
>
> (b) The commission shall allow individual retail nonresidential end-use customers to acquire electric service from other providers in each electrical corporation's distribution service territory, up to a maximum allowable total kilowatthours annual limit.

B. D.10-03-022

The Commission implemented this new statute in D.10-03-022. In that Decision, the Commission noted that "SB 695 *repealed* the prior statutory provisions regarding the suspension of DA which had been in effect since 2001, *and replaced* those provisions with a new statute, Public Utilities Code section 365.1."[3] In Appendix 2 of D.10-03-022, *Adopted Enrollment Procedures for the Phase-In Period*, the Commission stated that "[t]he same switching rules will apply to all customers eligible to switch to DA service under SB 695 ("DA-eligible customers")."[4] The Commission thus defined "DA-eligible customers" as *all* customers eligible to switch to DA *under SB 695*, which would be *all* "individual retail nonresidential end-use customers."[5] Furthermore, the Decision found that "[t]he provisions for new enrollments of DA customers under SB 695 should be based upon a first-come, first-served principle, without special set-asides for DA-eligible customers

[2] All statutory references are to the California Public Utilities Code, unless otherwise stated.
[3] D.10-03-022, p. 22 (emphasis added).
[4] *Id.*, Appendix 2, p. 1.

who have exercised the right to take DA previously."[6] Instead, "an equal opportunity to enroll in DA shall apply to all eligible customers."[7] Finally, D.10-03-022 states that the annual limit for the DA load increase for 2010 is "35% of the current room available under the DA cap."[8]

C. Energy Division Status Report

On August 2, 2010, the Commission's Energy Division issued its *Status Report on the Results of Energy Division's Review of the Utilities' Senate Bill 695 Implementation for 2010 per D.10-03-022* ("Status Report").[9] The Status Report revealed that the utilities had allowed "grandfathered" DA-eligible customers to submit six-month notices to switch to DA service prior to April 11, 2010, the effective date for the OEW. In addition, the Status Report indicated that "30 such customers in PG&E's service territory exercised that option. The load associated with those customers reduced the amount of space available for new load under the 2010 Load Cap by approximately 569 GWH."[10] The Status Report further indicated that "PG&E's April 2010 Baseline DA Load was lower than the Existing Baseline DA Load reported in Appendix A of Decision 10-03-022 [5,574 GWH]. Consequently, PG&E states that it increased the 2010 Annual Limit to fully subscribe the 2010 Load Cap."[11] The Status Report shows that PG&E enrolled only 1,008 GWH of DA load increases. D.10-03-022 had estimated that PG&E could enroll approximately 1,381 GWH of new load under the annual KWH cap set by SB 695 and the phase-in schedule established by the Decision.

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[5] Cal. Pub. Util. Code § 365.1
[6] D.10-03-022, p. 33 (COL 9).
[7] *Id.* at 22.
[8] D. 10-03-022, Appendix 2, p. 1.
[9] The report was issued as required by a June 23, 2010 Assigned Commissioner Ruling directing Energy Division to produce a report on its review of the utilities' compliance with the procedures adopted in D.10-03-022 for the management of the OEW process.
[10] Status Report, p. 3, fn. 3.
[11] *Id.*

D. PG&E Rule 22.1

PG&E filed a Tier 1 Advice Letter pursuant to D.10-03-022 on April 2, 2010 to implement the provisions of the Decision. Consistent with the requirements of the Decision, the Advice Letter became effective upon filing.[12] PG&E's Rule 22.1 states that the enrollment procedures for the phase-in of increased DA capacity adopted in D.10-03-022 do not apply to "eligible non-residential BPS [bundled portfolio service] customers who have submitted a Six Month Notice To Transfer To Direct Access Service form prior to April 11, 2010."[13]

II. PG&E'S RULE 22.1 IS INCONSISTENT WITH D.10-03-022.

The language in Rule 22.1 and PG&E's acceptance of six-month notices to switch to DA between the effective date of the Decision and April 11, 2010 are inconsistent with D.10-03-022. Under SB 695 there is no "grandfathered" right to switch to DA outside of the enrollment procedures established by D.10-03-022. Furthermore, D.10-03-022 explicitly requires that all eligible DA customers have an equal opportunity to enroll in DA. Therefore, PG&E should be ordered to restore the DA queue created pursuant to D.10-03-022 and re-distribute DA capacity to those who would have been able to enroll during the OEW if not for the continued acceptance of 6-month notices in contravention of D.10-03-022.

A. D.10-03-022 Does Not Permit "Grandfathered" Switching Procedures for Previously DA-Eligible Customers.

As stated in D.10-03-022, SB 695 repealed the prior version of section 365.1 and replaced it with a new statute. The new statute provides that the right to acquire DA is *suspended, except as expressly authorized* by section 365.1.[14] Section 365.1 authorizes "individual retail nonresidential end-use customers to acquire electric service from other providers in each electrical corporation's distribution service territory, up to a maximum allowable total kilowatthours annual

[12] D.10-03-022, p. 36 (OP 8).
[13] PG&E, Rule 22.1, section C.1. Southern California Edison's Rule 22.1 contains the same language.

limit." As stated above, D.10-03-022 interpreted section 365.1 as providing DA eligibility for *all* "individual retail nonresidential end-use customers" on an equal basis. There was, therefore, no "grandfathered" eligibility to switch to DA prior to April 11, 2010.

The Commission's determination with regard to residential customers underscores the conclusion that there was no "grandfathered" eligibility for previous DA customers. The Commission found that the new section 365.1 excludes residential customers. Therefore the Decision states that only an "existing DA-eligible residential customer on bundled service that has already given its six-month notice to return to DA *prior to the effective date of this decision* would still retain the right to return."[15] Essentially, the Commission's implementation of the new section 365.1 in D.10-03-022 cut off any pre-existing right to switch to DA service because any right to acquire DA could, at that point, only stem from SB 695. Thus, as of the date of D.10-03-022 (March 15, 2010) previously DA-eligible customers had no right to switch to DA under pre-existing switching rules.

B. D.10-03-022 Provides An Equal Opportunity for All Eligible Customers to Enroll in DA.

In D.10-03-022, the Commission considered and rejected granting preferential treatment to those customers who had previously enrolled in DA. In refusing to grant preferential treatment to previous DA customers, the Commission stated that it would "not grant a special preference or set-aside of load to existing DA-eligible customers. Instead, *an equal opportunity to enroll in DA shall apply to all eligible customers*."[16] The Decision further states that "SB 695 contains no language granting any preference or special rights to DA-eligible customers who have

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[14] Section 365.1
[15] D.10-03-022, p. 23 (emphasis added).
[16] *Id.* at p. 22.

exercised the right to take DA previously, and there is no basis for the Commission to impose special preferential treatment for such DA-eligible customers in implementing SB 695."[17]

Although D.10-03-022 is very clear that "pre-existing" DA-eligible customers should not receive special or preferential treatment or any set-aside of load under the reopening of DA, PG&E effectively granted preferential treatment to such customers by allowing them to submit 6-month notices until the effective date of the OEW. Previous DA customers were allowed to take up available cap space while "new" customers had to wait until the OEW to enroll. Consistent with the Commission's treatment of residential customers, the right of previously DA-eligible customers to switch should have been extinguished as of the effective date of D.10-03-022.

PG&E's Rule 22.1 contains language permitting previously eligible DA customers who submitted 6-month notices prior to April 11, 2010 to switch to DA before the OEW. However, as discussed in detail above, this tariff language is inconsistent with D.10-03-022. In addition, while the Decision states that April 11, 2010 is the effective date of the reopening of DA, that date does not necessarily signify that the *status quo* regarding the switching of previously eligible DA customers should have been maintained until that time. As discussed in detail above, the pre-existing DA regime ended as of the *effective date of D.10-03-022.* Furthermore, the significance of the effective date of the reopening of DA must be viewed in the context of the clear intent of the Decision to provide *all* customers eligible for DA under SB 695 an equal opportunity to enroll. In order to effectuate that purpose and be consistent with SB 695 and D.10-03-022, customers submitting 6-month notices after the effective date of the Decision should have been required to wait until the OEW to enroll.

[17] *Id.* at p. 34 (COL 11).

III. PG&E'S CALCULATION OF THE ANNUAL LIMIT FOR 2010 IS INCONSISTENT WITH D.10-03-022.

D.10-03-022 authorized PG&E to enroll approximately 1,381 GWH of increased DA load for 2010, which was 35% of the remaining space available for DA based on the data at the time of the Decision. According to Energy Division's Status Report, PG&E only accepted approximately 1,008 GWH of new load. This is a significant reduction in the annual limit for 2010 despite the fact that according to the Status Report, "PG&E's April 2010 Baseline DA Load was lower than the Existing Baseline DA Load reported in Appendix A of Decision 10-03-022"[18] so PG&E "increased the 2010 Annual Limit to fully subscribe the 2010 Load Cap."[19] According to the Status Report, the annual limit for 2010 was reduced by approximately 569 GWH, the load of customers submitting 6-month notices through April 11, 2010. These figures indicate that PG&E calculated the load available for 2010 by simply subtracting the 569 GWH of customers submitting 6-month notices from its 2010 annual limit. This approach does not comply with the Decision's requirement that for 2010 the load available would be *35% of the current room available under the cap.* Furthermore, this approach greatly diminished the space available in the OEW. See the table below:

	D.10-03-022	PG&E OEW	Proposed
Overall cap	9,520	9,520	9,520
Baseline	5,574	5,014 (baseline not including 569 GWH from 6-month notice submissions)	5,583 (5,014 plus 569 GWH)
Remaining cap	3,946	4,506 (9,520 minus 5,014)	3,937 (9,520 minus 5,583)
2010 cap	1,381 (35% of remaining cap space)	1,008 (1,577 minus 569 (35% of 4,506))	1,378 (35% of remaining cap space)

[18] Status Report, p. 3, fn. 3.
[19] *Id.*

Ordering Paragraph 1 of the Decision states that "*[a]djustments to each utility's baseline amount of direct access load* as set forth in Appendix 1 shall be based on the same method used by the utilities to calculate direct access load in their Direct Access Implementation Activities Reports."[20] The Decision further provides that information sufficient to inform customers and ESPs with regard to the space available under annual and overall limits of DA should be provided and updated on at least a *monthly basis. This information includes changes in usage to determine the DA load availability*.[21] This language indicates that rather than simply subtracting the GWHs associated with the 6-month notices submitted prior to the OEW, PG&E should have recalculated its base line, including the 569 GWHs associated with 6-month notices received prior to April 11th, and recalculated the available load for 2010 as 35% of the remaining available cap space (as set forth in the table above). This is the only approach that is consistent with the language in the Decision that a utility's base line should be adjusted periodically and that the available space for 2010 should be 35% of the then-current overall remaining load for DA.

While it is true that at the end of the phase-in period there will only be one overall cap and that the issues described in this motion are limited to implementation of the phase-in, the Commission in D.10-03-022 carefully considered the phase-in period and the percentages of cap space available for each year of the phase-in period. PG&E's calculation of available load for 2010 is incompatible with the Commission's consideration of the various factors establishing 35% of the current room available under the cap as the appropriate limit for DA for 2010. Thus, the Commission should recalculate the amount of DA available for PG&E in 2010, restore the DA queue for PG&E customers as required by D.10-03-022, and distribute expanded DA capacity to those entities in the reconstituted PG&E queue that would otherwise have been able to enroll during

[20] D.10-03-022, p. 34, OP 1 (emphasis added).
[21] *Id.* at Appendix 2, pgs. 6-7 (emphasis added).

the OEW if not for PG&E's continued acceptance of 6-month notices in violation of D.10-03-022 and the miscalculation of available DA load for 2010.

IV. CONCLUSION

Based on the foregoing, Commercial Energy respectfully requests that the Commission issue an Order requiring PG&E to Show Cause why it should not be ordered to:

- disclose the number of customers allowed to enroll between the effective date of D.10-03-022 and the effective date of the OEW and the amount of GWHs associated with those customers;
- disallow the 6-month notices to switch received between the effective date of D.10-03-022 and the effective date of the OEW;
- recalculate the amount of DA available for 2010;
- restore the DA queue consistent with the requirements of D.10-03-022 and distribute expanded DA capacity to those who would otherwise have been able to enroll during the OEW if not for PG&E's continued acceptance of 6-month notices in violation of D.10-03-022 and the miscalculation of available DA load for 2010; and
- reconfigure the enrollment queue for 2011 in a manner consistent with the revised OEW for 2010 and the requirements of D.10-03-022.

Respectfully submitted this 27th day of September, 2010 at San Francisco, California.

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DECLARATION OF RON PERRY

IN SUPPORT OF THE MOTION OF COMMERCIAL ENERGY OF CALIFORNIA REQUESTINGANORDERTOSHOWCAUSE

I, Ron Perry, hereby declare:

I am the President and Chief Executive Officer of Commercial Energy of California ("Commercial Energy"). This declaration is submitted in support of Commercial Energy's motion requesting an order requiring Pacific Gas and Electric Company ("PG&E") to show cause why it has not complied with the Commission's Decision (D.) 10-03-022, specifically, by: (i) improperly allowing customers who were previously eligible for Direct Access ("DA") to submit 6-month notices to switch to DA between the effective date of D.10-03-022 and the effective date of the Open Enrollment Window ("OEW"); and (ii) incorrectly calculating the amount of DA available for 2010.

1. In conjunction with my responsibilities at Commercial Energy, I oversee the marketing to and coordination of customers with regard to enrollment in DA with Commercial Energy. Commercial Energy communicated with potential customers regarding possible enrollment in DA under the reopening pursuant to SB 695. Commercial Energy submitted Notices of Intent on behalf of 1,300 customer Service Agreement

Identification Numbers ("SAIDs") as part of the OEW. Commercial Energy was notified that only 27 of these SAIDs were accepted, which was less than 5% of the total submitted usage or SAIDs. Commercial opted not to make offers to any of the accepted customers because of the disproportionate cost of providing service to so few customers. On the other hand, for the 2011 DA enrollment, a much higher percentage of Commercial's potential customers were accepted. Commercial is in the process of extending offers to all of its customers accepted for DA enrollment for 2011.

2. On August 2, 2010 the California Public Utilities Commission's Energy Division issued a Status Report on the Results of Energy Division's Review of the Utilities' Senate Bill 695 Implementation for 2010 per D.10-03-022 ("Status Report"). The Status Report appears to indicate that PG&E followed enrollment procedures that were inconsistent with D.10-03-022.

3. Based on subsequent communication with a representative of PG&E (Calvin Yee), my understanding is that, as stated in the Status Report, PG&E allowed previously DA-eligible customers to submit 6-month notices to switch to DA until April 11, 2010. Furthermore, PG&E did not recalculate the base line amount of DA in calculating the available load for 2010. Instead, my understanding is that PG&E simply subtracted the GWHs associated with the 6-month notices submitted by previously eligible DA customers from the load available for 2010.

4. Based on my understanding, if PG&E had recalculated its base line amount of DA and recalculated the available load for 2010, there would have been more load available for 2010, which would have allowed more customers to enroll in DA during the OEW. Given the timing of Commercial's submissions in the OEW, and assuming the fill rate remained constant, I believe that Commercial Energy would have been granted enough

queue space to justify making offers to Commercial's accepted customers for 2010, and therefore would be serving electricity load in California today.

I declare under penalty of perjury that the foregoing information is true and correct to the best of my personal knowledge and that this declaration was executed on September 27, 2010, at Oakland, California.

Ron Perry

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CERTIFICATE OF SERVICE

I, Melinda LaJaunie, certify that I have on this 27th day of September 2010 caused a copy of the foregoing

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to be served on all known parties to R.07-05-025 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand delivered as follows:

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505 Van Ness Avenue, Room 5218
San Francisco, CA 94102

ALJ. Thomas R. Pulsifer
California Public Utilities Commission
505 Van Ness Avenue, Room 5005
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of September 2010 at San Francisco, California.

/s/ Melinda LaJaunie
Melinda LaJaunie

3418/001/X122491.v1

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