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)

COMMENTS OF THE DIRECT ACCESS CUSTOMER COALITION ON COMMERCIAL ENERGY OF CALIFORNIA MOTION

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October 12, 2010

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In accordance with the provisions of Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the Direct Access Customer Coalition ("DACC")[1] respectfully submits the following comments pertaining to the *Motion of Commercial Energy of California Requesting an Order to Show Cause* ("Motion") filed on September 27, 2010, by Commercial Energy of California ("Commercial Energy").

I. INTRODUCTION AND SUMMARY

The Motion states that Pacific Gas and Electric Company ("PG&E") should:

> …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 OEW under the reconfigured queue; and reconfigure the queue for 2011 in a manner consistent with the revised OEW for 2010.[2]

[1] DACC is a regulatory alliance of commercial, industrial and governmental customers who have opted for direct access for some or all of their loads.

[2] Motion, at pp. 1-2.

In support of this allegation, Commercial Energy cites the August 2 Energy Division Status Report that 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 open enrollment window ("OEW"). In addition, the Status Report indicated that "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."[3]

Furthermore, the Motion notes that PG&E increased the 2010 Annual Limit to fully subscribe the 2010 Load Cap. However, the Status Report shows that PG&E enrolled only 1,008 GWH of DA load increases despite the fact that D.10-03-022 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. Commercial Energy contends that PG&E's behavior is inconsistent with both the decision and its own Rule 22.1. The Motion therefore 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.[4]

[3] Id at p. 3.

[4] Id at p. 9.

II. COMMENTS ON THE MOTION

DACC is of course sympathetic to the idea that PG&E should be held to following both the Commission's directives and the utility's own tariff own rules. Furthermore, DACC concurs that PG&E should be required to allocate the full amount that D.10-03-022 estimated that PG&E could enroll under the annual KWH cap set by SB 695 and the phase-in schedule established by that decision or to explain why such action is not possible. Nevertheless, we believe that a portion of the remedy proposed by the Motion (the disallowance of the six-month notices) is inappropriate and should be rejected. DACC believes that the grandfathered DA customers were acting in good faith in accordance with the rules as they understood them. Seeking to abrogate and reverse those actions at this point in time would be counter-productive and distract from the resolution of Phase 3 issues that are currently being examined by parties to this proceeding.

The Motion would effectively cause direct access customers that had submitted notices to switch, had them accepted by PG&E and consequently entered into contracts to purchase electricity from alternate suppliers to have those contracts nullified by Commission action. Such an action would be extremely disruptive from a commercial perspective, would undoubtedly cause disputes to occur between those customers and their suppliers and likely lead to legal challenges of the Commission's actions. In short, granting the Motion would constitute a "cure worse than the illness."

Furthermore, such action by the Commission could well be deemed to violate the Contract Clause contained in (a) Section 10 of Article I of the United States Constitution, made applicable to the States by the Fourteenth Amendment of the United States Constitution, and (b) Article 1, Section 9 of the California Constitution. Both the California and the United States Constitutions contain provisions which bar the government from enacting provisions which impair contracts.

III. CONCLUSION

For the reasons discussed above, DACC is concerned about the remedy proposed in the Commercial Energy Motion because its approval would lead to commercial disputes between those customers whose notices had been accepted and the suppliers with which they have entered into contracts. Furthermore, for the reasons briefly summarized above, legal challenges could be expected should the Commission's actions interfere with existing contractual rights and obligations. DACC does not challenge the facts alleged in the Motion, nor do we oppose the idea that some remedy may be appropriate. However, taking away direct access rights from customers to whom they have been granted would set a bad precedent for the commercial stability that is needed in the marketplace.

In essence, we are confronted with a situation where there may or may not have been a violation of the Commission's OEW rules and/or PG&E's tariffs. It is not clear whether this is the case, but it is certainly clear that the requested remedy would create further problems and issues. To draw a sports analogy, granting the Motion would be akin to changing the result of a football play after the next play has occurred. You cannot unwind everything that happens after a purportedly bad call is made, once the game moves on. In this case, parties have moved on and acted in reliance upon the grant of their notices to switch. Unwinding the results at this late point in time would be worse than the offense complained of in the Motion.

Respectfully submitted,

DOUGLASS & LIDDELL

Attorneys for the
DIRECT ACCESS CUSTOMER COALITION

October 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the ***Comments of the Direct Access Customer Coalition on Commercial Energy of California Motion*** on all parties of record in ***Rulemaking 07-05-025***, by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on October 12, 2010, at Woodland Hills, California.

Michelle Dangott

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