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)

RESPONSE OF THE ALLIANCE FOR RETAIL ENERGY MARKETS, BLUESTAR ENERGY, DIRECT ACCESS CUSTOMER COALITION, RETAIL ENERGY SUPPLY ASSOCIATION, COMMERCIAL ENERGY AND SCHOOL PROJECT FOR UTILITY RATE REDUCTION TO THE APPLICATION FOR REHEARING OF D.11-12-018 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY AND PACIFIC GAS AND ELECTRIC COMPANY

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AND ON BEHALF OF THE JOINT PARTIES

January 23, 2011

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In accordance with the provisions of Rule 16.1(d) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the Alliance for Retail Energy Markets ("AReM"),[1] BlueStar Energy, Direct Access Customer Coalition ("DACC"),[2] Retail Energy Supply Association ("RESA"),[3] Commercial Energy and School Project for Utility Rate Reduction ("SPURR")[4] (hereafter collectively referred to as the "Joint Parties") submit this reply

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily individual members or the affiliates of its members with respect to the issues addressed herein.

[2] DACC is a regulatory alliance of educational, commercial, industrial and governmental end-use customers that utilize direct access for all or a portion of their electricity load requirements.

[3] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[4] SPURR is a joint powers authority, a membership organization that aggregates utilities services purchasing power and expertise for over 200 California public K-12 school districts, county offices of education, and community college districts.

to the January 6, 2012, application for rehearing[5] of Decision ("D.") 11-12-018 ("Decision") filed by Southern California Edison Company ("SCE") and Pacific Gas and Electric Company ("PG&E").

The Application inaccurately contends that the Commission made an "erroneous conclusion that the Energy Service Providers (ESPs) are not liable under P.U. Code Section 394.25(e) for the incremental procurement costs necessarily imposed on large Direct Access (DA) customers involuntarily returned to utility procurement service to avoid shifting costs to other utility customers."[6] The legal analysis of SCE/PG&E is wholly specious, reiterating arguments that have been previously considered and rejected by the Commission. They should be rejected yet again.

I. INTRODUCTION

The basic assertion made by SCE/PG&E is that the Decision errs in not holding Electric Service Providers ("ESPs") liable for all incremental procurement costs arising from an involuntary return of direct access ("DA") customers to utility procurement service. They offer four points in support of this conclusion:

- The language of Section 394.25(e) is plain and unambiguous that ESPs are liable for reentry fees;
- Incremental procurement costs are costs of reentry – and therefore reentry fees – under Section 394.25(e)
- How the costs of reentry are recovered from involuntarily returned DA customers has no bearing on whether they are reentry fees under Section 394.25(e); and

[5] Application for Rehearing of Decision 11-12-018 of Southern California Edison Company (U 338-E) and Pacific Gas And Electric Company (U 39-M) ("Application").

[6] Application, at p. 1.

- The Commission exceeded its authority in declining to carry out the consumer protections of Section 394.25(e) to advance its objective to help make DA more cost effective.

The Application mixes fact with rampant speculation in an effort to sound plausible. When its assertions are examined closely, however, the resulting conclusions are clearly inaccurate. Put simply, the Commission committed no legal error in its issuance of the Decision. Rather, it interpreted the applicable statute appropriately and within its well-established discretion.[7] Each of the points made in the Application are considered and responded to in the following sections.

II. RESPONSE

A. While the statute provides that reentry fees are the responsibility of ESPs, it leaves it to the discretion of the Commission to define what constitutes a reentry fee.

SCE/PG&E state that the language of Section 394.25(e) is plain and unambiguous that ESPs are liable for reentry fees. That is correct. However, what their Application critically ignores is that the statute leaves it to the Commission's discretion to define what is meant by "reentry fee." The statute provides, in part:

> If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, any reentry fee imposed on that customer that the commission deems is necessary to avoid imposing costs on other customers of the electric corporation shall be the obligation of the electric service provider or a community choice aggregator, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer's contract has expired.[8]

The statute clearly refers to "any reentry fee . . . that the commission deems is necessary…" This wording alone makes it abundantly clear that it is within the Commission's discretion to

[7] *See*, e.g. D.08-02-033, at p. 9: "The California Supreme Court has acknowledged this Commission's authority to interpret statutes and has affirmed the Commission's reasonable interpretation of statutes as long as such interpretation bears 'a reasonable relation to statutory purposes and language,'" citing *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal. 2d 406, 410 (1968).

[8] P.U. Code Section 394.25(e) (emphasis added).

determine what elements are necessary for inclusion and should constitute a reentry fee. Section 6.2 of the Decision clearly recognizes this:

> In order to implement the § 394.25(e) security requirement for ESPs sufficient to cover re-entry fees, we must determine what costs are to be included as re-entry fees to ensure bundled service customer indifference in the event of involuntary returns of ESP customers to IOU procurement service. The statute does not define *what costs* must be included in re-entry fees. We must accordingly determine what costs are necessary to include in the re-entry fees. We must also consider how to forecast the amount of re-entry costs to establish the bond or insurance during registration; and how to determine the re-entry fees when an involuntary return occurs.[9]

It is apparent from this excerpt that the Commission paid careful attention to the statute's wording with regard to the issue of determining what if any reentry fee should be established in the highly unlikely event of mass involuntary customer returns. SCE/PG&E argue that, "The Commission does not have the discretion to disregard the explicit directives of the Legislature regarding reentry fees set forth in the P.U. Code," citing *Pacific Tel. & Tel. Co. v. Public Utilities Commission*, 62 Cal. 2d 634, 653 (1965), a case that reiterated the Commission's obligation to follow express Legislative direction. This citation is, of course, totally inapposite since the obvious fact is that there is no explicit directive in the statute as to what items should be contained in reentry fees. The Decision accurately recognizes this fact, while SCE/PG&E ignore it. As discussed in the following section, although SCE/PG&E attempt to convince the Commission as to the accuracy of their expansive reading of the statute in a manner that conforms to their joint litigation position, there in fact is nothing in the statute that supports their expansive interpretation.

[9] Decision, at p. 60.

B. The Application's contention that incremental procurement costs are costs of reentry is simply the failed litigation position of SCE/PG&E and is not supported by any clear reading of the statute.

There is clearly nothing in the statute that defines what elements should be contained in a re-entry fee. The Decision acknowledges this fact.[10] Therefore, any legal analysis of the Application must rely on accepted principles of statutory interpretation.

California courts generally adhere to the so-called traditional rules of statutory construction.[11] The Court of Appeal summarized these rules in a decision involving, appropriately enough, competing interpretations of AB 1X:

> The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. To do so, a court first examines the actual language of the statute, giving the words their ordinary, commonsense meaning. The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it…"
>
> Where, however, the statutory language is ambiguous on its face or is shown to have a latent ambiguity such that it does not provide a definitive answer, we may resort to extrinsic sources to determine legislative intent. Under this circumstance, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' 'In such cases, a court may consider both the legislative history of the statute and the wider historical circumstances of its enactment to ascertain the legislative intent.'
>
> And a court may disregard the plain meaning of a statute and resort to its legislative history to aid in interpretation when applying the literal meaning of the statutory language 'would inevitably (1) produce absurd consequences which the Legislature clearly did not intend or (2) frustrate the manifest purposes which appear from the provisions of the legislation when considered as a whole in light of its legislative history. ...' But '[i]f the legislative history gives rise to conflicting inferences as to the legislation's purposes or intended consequences, then a departure from the clear language of the statute is unjustified. ...'

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[10] Ibid.

[11] *See, e.g.*, Hughes v. Board of Architectural Examiners (1998), 17 Cal.4th 763 at 775-776; *Long Beach Police Officers Ass'n v. City of Long Beach* (1988), 46 Cal. 3d 736, 741, 759 P.2d 504, 507, 250 Cal. Rptr. 869, 872; *Solberg v. Superior Court* (1977), 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470; *see also* Cal. Code Civ. Proc. § 1859 (West 1983) ("In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible. . . .").

> Another consideration where, as here, one of the parties is an administrative agency charged with enforcing the statute, is that '[t]he standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.'[12]

The courts frequently state that their authority to investigate the Legislature's intent is subject to the condition precedent that the "plain meaning" of the statute not be clear and unambiguous on its face—the so-called "plain meaning rule."[13]

Three points must be made with regard to the Application and its flawed statutory interpretation. First, the words of the statute are in fact "clear and unambiguous." The Commission (and not SCE or PG&E) is to determine what, if any, reentry fee should be imposed. It did so in the Decision based on a logical and appropriate consideration of the statutory language and the factual record in the proceeding. Second, SCE/PG&E offer no allegations that legislative history supports their overly expansive interpretation of the statute. Therefore, there is no argument that can be made that legislative history supports the SCE/PG&E theory. Third, as an independent administrative agency, the Commission is entitled to the deference due it from the courts as noted in the citation from *Pacific Gas and Electric Co. v. Department of Water Resources*. Having appropriately considered and rejected the SCE/PG&E legal theories and having based its Decision on an extremely complete factual record, the Commission has committed no legal error whatsoever and the Application should therefore be rejected.

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[12] *See, Pacific Gas and Electric Co. v. Department of Water Resources* (2003), 112 Cal. App. 4th 477, 495-496; 5 Cal. Rptr. 3d 283. [Emphasis added and citations omitted]

[13] *See, e.g., Lenna v. FTB*, 9 Cal.4th 253, 268 (1994); *Granberry v. Islay Investments*, 9 Cal. 4th 738, 744-746 (1995).

C. The Commission has the discretion to determine whether procurement costs should be considered to be reentry fees.

The Decision clearly demonstrates that the Commission considered[14] and rejected[15] the overly expansive view of the statute put forward by SCE/PG&E. It did so by determining that, in accordance with the statute, the Commission could "avoid imposing costs on other customers" by placing involuntarily returned customers on the Temporary Bundled Service ("TBS") rate:

> The TBS rate covers the IOU's costs of incremental procurement to serve returning customers. Charging the DA customers the TBS rate protects bundled customers against cost-shifting. Since the TBS rate is based on the spot market price, the returning customer may pay more procurement than do bundled IOU customers.[16]

The Decision further recognizes this when it states that, "By paying the TBS rate, such returning DA customers avoid shifting costs to utility bundled customers, and therefore, there is no need for a reentry fee to cover large commercial and industrial procurement costs in order to satisfy Section 394.25(e)."[17]

SCE/PG&E contend that "[i]t is irrelevant under Section 394.25(e) how the costs of reentry (*i.e.,* reentry fees) are "imposed" on involuntarily returned DA customers."[18] They also make the blanket statement that, "addressing cost shifting through the use of TBS is not sufficient to carry out the directives of Section 394.25(e)."[19] However, the Application fails to

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[14] Decision, at pp. 64-66.

[15] Id, at pp. 67-68.

[16] Id, at p. 61 (emphasis added).

[17] Id, at p. 68. The Application attempts to argue that "[t]he incremental procurement costs imposed through TBS must be reflected in the reentry fees for involuntary returns and recovered from the ESP to achieve the consumer protections of Section 394.25(e)." Application, p. 8. However, the TBS rate includes components that are statutorily prohibited from being included as reentry costs pursuant to section 366.2(c)(13). Thus, the TBS rate cannot form the basis for calculation of any reentry fee.

[18] Application, at p. 8.

[19] Ibid.

explain or justify this conclusion in any fashion. This unsupported assertion runs afoul of the fact that the Commission has properly made the factual determination delegated to it by the statute and concluded that other customers are protected against cost shifting (and thereby the statute is satisfied) by means of the methodology adopted in the Decision..

The question is not whether the prevention of cost shifting through any particular means is mandated by Section 394.25(e), because the statute clearly contains no specific directive on what is or is not permissible with respect to how cost shifting should be prevented. Rather, the question is whether the Commission determined that a re-entry fee based on procurement costs is necessary to protect other customers from cost-shifting. Here the Commission properly concluded that such a fee is not necessary because there is no cost shifting when involuntarily returned customers are subject to the TBS rate. Rule 16.1(c) requires that an application for rehearing must, "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."[20] The Application fails to comply with this standard as it only makes conclusory statements alleging inconsistency with the law without providing any substantive foundation.

D. The Commission did not decline to carry out the consumer protections of Section 394.25(e), as the Application mistakenly alleges.

As noted above, at issue is the proper interpretation of the phrase "other customers" and the legislative intent of this provision of § 394.25(e). The SCE/PG&E position, as was fully discussed on the record in this case, is that "other customers" as used in § 394.25(e) is intended to include not only an IOUs' bundled service customers but also involuntarily returned

[20] Rules of Practice and Procedure, (Effective June 8, 2011), at pp. 84-85.

customers, and that involuntarily returned customers therefore must receive service under their IOU's otherwise applicable tariff for the class of customers to which the returned customers belong. However, as has been made clear in the Decision, the Commission has rejected this interpretation and has recognized that the plain meaning of "other customers" as it appears in § 394.25(e) is a reference to customers of the IOU other than the involuntarily returned customer. Accordingly, §394.25(e) does not bar the Commission from adopting the reentry fee formula that was approved in the Decision.

As noted in the prior section, under the Decision's adopted reentry fee procedure, the IOUs' bundled customers face no risk of increased costs because (a) the TBS rate charged to involuntarily returned customers is designed to cover the costs incurred by the IOUs to serve them; and (b) the reentry fee imposed on such customers to cover incremental administrative costs, if any, incurred by the IOUs in connection with the returned customers will be covered by the ESP financial security requirement. Nothing in § 394.25(e) bars the Commission from adopting the approach that involuntarily returned customers are to be placed on the TBS rate. As a matter of fact, the use of the TBS rate has been a long standing policy of the Commission that addresses the concern of potential cost shifting to bundled service customers by DA customers that fail to give the IOU sufficient notice for bundled service procurement planning purposes. As a result, the SCE/PG&E contention that the Commission neglected to carry out the consumer protections in the statute is clearly specious and should be rejected.

SCE/PG&E also assert that the Decision, by "insulating" ESPs from the alleged obligation to post financial security covering incremental procurement for involuntarily returned customers, "gives a commercial advantage to ESPs and discriminates against other market

participants who are required to post security for similar transactions and risks."[21] In support, SCE/PG&E cites PG&E witness Hessami's prepared testimony that it is a "common practice in the energy industry to request security on the basis of current and future exposure."[22]

The assertion that the Decision somehow insulates ESPs from commercial realities and provides them with an unfair advantage is flatly untrue.[23] While parties in the energy industry often are asked to post security for certain risks, there is no evidence that it is industry practice to post security for the risks of incremental procurement that might be borne by third parties. SCE/PG&E would have the Commission believe that it is common industry practice for Supplier A to post financial security securing Supplier B against a possible migration of Supplier A's customers to Supplier B. However, this proposition is not, in fact, supported by the cited testimony. In the cited testimony, PG&E witness Hessami describes specific "counterparty risks" for which security is commonly sought, none of which include customer migration to another supplier.[24] In short, nothing in witness Hessami's testimony, or elsewhere in the record, shows that ESPs are gaining a commercial advantage over "other market participants" under the Decision.

[21] Application, at p. 10.

[22] Ibid, citing Exhibit 400, at p. 4-7 (PG&E, Hessami).

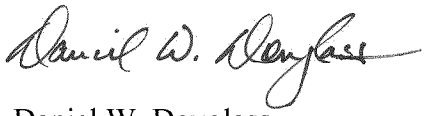
[23] In addition, SCE and PG&E completely fail to acknowledge the Decision's finding that "[b]ecause PG&E and SCE have only presented illustrative bond calculations, and omitted key inputs relating to implied volatility, there is uncertainty concerning how large an ESP's resulting bond obligation could be, as well as the resulting costs which could tend to make DA service less cost effective." Decision, at pp. 103-104, FOF 38.

[24] Exhibit 400, at pp. 4-8 – 4-10.

III. CONCLUSION

For the reasons above, the Commission should conclude that: (i) the Decision fully complies with legal obligations and requirements arising under P.U. Code § 394.25(e); and (ii) the SCE/PG&E Application should be rejected.

Respectfully submitted,



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