BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking To Enhance the Role of Demand Response in Meeting the State's Resource Planning Needs and Operational Requirements.	Rulemaking 13-09-011 (Filed September 19, 2013)

OPENING BRIEF OF JOINT DEMAND RESPONSE PARTIES ON IDENTIFIED PHASE TWO AND PHASE THREE ISSUES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CPUC DECISIONS

CALIFORNIA PUBLIC UTILITIES CODE

CPUC RULES OF PRACTICE AND PROCEDURE

SUMMARY OF RECOMMENDATIONS

Rule 13.11 of the Commission's Rules of Practice and Procedure requires a "summary of the briefing party's recommendations following the table of authorities." To this end, the Joint Demand Response (DR) Providers (EnerNOC, Inc.; Comverge, Inc.; and Johnson Controls, Inc.) provide the following summary of their recommendations on two of the issues included for briefing in Phase Two and Phase Three of this proceeding. The Joint DR Parties respectfully request that the Commission's decision in Phase Two and Phase Three of this proceeding resolve these issues as recommended by the Joint DR Parties herein.

Use of Fossil Fueled BUGS in DR Programs:

- The Commission should find that United States Environmental Protection Agency (US EPA), the California Environmental Protection Agency (CalEPA) and the local Air Quality Management Districts (AQMDs) have responsibility for establishing and enforcing laws and regulations relative to air emissions standards, including those applicable to fossil-fueled back up generation or generators (BUG).
- The Commission should find that BUGs that are compliant with federal, state and local air emissions laws and regulations, including those applicable to BUGs and BUG use restrictions, should be permitted to be included, and counted for resource adequacy, in existing and future DR programs or modules.
- An examination of the extent to which BUGs are utilized in DR programs, as directed in D.11-10-003, has not been undertaken. As such, the Commission should commence a Working Group to identify the extent to which BUGs are being utilized currently and the extent to which information relative to BUG use can be accessed from the local AQMD public data bases. Participation in the Working Group should include Commission Staff, the Investor Owned Utilities (IOUs), DR Providers, and other interested stakeholders.

Participation in DRAM Pilot:

- The Commission should find that it is premature to limit DR procurement to the Demand Response Auction Mechanism (DRAM) Pilot, proposed by the Settlement Agreement of Phase 3 Issues, while the DRAM is in a pilot stage and find that the DRAM Pilot is one possible mechanism to facilitate DR participation directly in CAISO's wholesale markets.
- The Commission should, in turn, find that no limitations on other supply solicitations or procurements of supply DR resources should exist during the DRAM Pilot period.
- The Commission should examine the results of the DRAM Pilot to determine whether the DRAM Pilot, when compared to other supply DR solicitations, achieves successful participation of DR in the CAISO markets and enhances the role DR in meeting the State's energy needs, and, if not, make program design corrections to resolve those issues.

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OPENING BRIEF OF JOINT DEMAND RESPONSE PARTIES ON IDENTIFIED PHASE TWO AND PHASE THREE ISSUES

The Joint Demand Response (DR) Parties (EnerNOC, Inc., Comverge, Inc., and Johnson Controls, Inc.) jointly submit this Opening Brief in Phase Two and Phase Three in this Rulemaking (R.) 13-09-011 (Demand Response (DR)). This Opening Brief is timely filed and served pursuant to the Commission's Rules of Practice and Procedure (Rule 13.11) and the Administrative Law Judge's (ALJ's) Email Ruling served on August 13, 2014 (August 13 ALJ's Ruling).

I.
SCOPE OF JOINT DR PARTIES' OPENING BRIEF

On March 27, 2014, the Commission issued Decision (D.) 14-03-026, which addressed the Phase Two ("Foundational Issues") issue of bifurcating demand response into two categories of load modifying resources and supply resources, but left other Phase Two issues still to be resolved. To that end, on April 2, 2014, a Joint Assigned Commissioner and ALJ Ruling and Revised Scoping Memo ("April 2 Revised Scoping Memo") was issued defining the scope and schedule for Phase Three ("Future Demand Response Program Design"), revising the schedule for Phase Two, and providing guidance for testimony and hearings.

The April 2 Revised Scoping Memo identified the remaining Phase Two issues as including "cost allocation," the "role of load impact protocols," revised "cost-effectiveness

protocols," and the "rules regarding the use of backup generators."[1] For Phase Three, the following issue areas were identified as within the scope of Phase Three: goals for demand response, resource adequacy (RA) concerns (as directed by D.14-03-026), California Independent System Operator (CAISO) market Integration Costs (as directed by D.14-03-026), Supply Resources Issues, Load Modifying Resources Issues, and Program Budget Application Process.[2] The April 2 Revised Scoping Memo also adopted a schedule for testimony and hearings on these issues and included "Guidance for Testimony" in Attachment A.

In accordance with that schedule and direction, the Joint DR Parties timely served both Opening and Rebuttal Testimony on Phase Two and Phase Three issues on May 6 and May 22, 2014. Certain testimony was identified and admitted into the record during evidentiary hearings held on June 9 and June 12, 2014, with remaining testimony identified at the evidentiary hearing of June 12 being the subject of a written motion for admission filed on August 18, 2014.

Following Workshops and evidentiary hearings held on the Phase Two and Phase Three issues the week of June 9, 2014, the Joint DR Parties actively participated in subsequent settlement discussions on these issues, held pursuant to Rule 12 of the Commission's Rules of Practice and Procedure over a seven-week period. At the end of that time, EnerNOC, Comverge, and JCI each individually executed the Settlement Agreement reached by multiple parties on Phase Three issues and, as the Joint DR Parties, joined in the filing of the Motion for Adoption of the Settlement Agreement by the Commission on August 4, 2014.

On August 13, 2014, ALJ Hymes issued an email ruling confirming that the following issues would be addressed in the Opening Briefs in Phase Two and Phase Three: (1) the Phase Two issue of cost allocation, (2) the Phase Two issue of use of fossil-fueled back-up generators,

[1] April 2 Revised Scoping Memo, at p. 3.
[2] April 2 Revised Scoping Memo, at pp. 4-6.

and (3) the Phase 3 issue of encouraging participation in the Demand Response Auction Mechanism (DRAM) pilot and the potential interaction of other solicitations for Supply Resources with the DRAM Pilot. The latter issue was an outgrowth of, and was agreed to be briefed, as part of the Settlement Agreement.[3] The Settlement Parties, including the Joint DR Parties, requested the inclusion in briefing at the Status conference held on August 11, 2014.

By this Opening Brief, the Joint DR Parties address two of the three issues reserved for briefing – the Phase Two issue of the use of fossil-fueled back-up generators and the Phase Three issue of participation in, and interaction of other supply resource solicitations with, the DRAM Pilot. This brief does not address the issue of cost allocation, but the Joint DR Parties reserve the right to respond to the Opening Briefs of other parties on this issue in the Reply Brief, as necessary.

II.
SUMMARY OF JOINT DR PARTIES' RECOMMENDATIONS

The Joint DR Parties, collectively and individually, were actively involved in the negotiation of the Settlement Agreement on Phase Three Issues. The Settlement Agreement, executed by each of the Joint DR Parties (EnerNOC, Comverge, and JCI) as Settling Parties, is reasonable in light of the whole record, consistent with law, and in the public interest, and should be adopted as a whole by the Commission.[4] As the Motion for Adoption of the Settlement Agreement details, the Settling Parties, representing a broad spectrum of interests, committed to a thorough, intense, and good faith settlement process that was conducted in full compliance with Rule 12 of the Commission's Rules of Practice and Procedure, extended over more than 7 weeks,

[3] Motion for Adoption of Settlement Agreement, at p. 3; Attachment A (Settlement Agreement), at pp. 27, 33.
[4] Rule 12.1(d); see also, D.09-10-017, at pp. 5-11; D.11-12-053, at pp. 72, 73, 76.

and ultimately reached reasonable compromises and workable solutions for the complex and contentious issues raised by Phase Three.

Of note, the settlement process fostered communications and understanding among parties of the interaction of multiple proceedings and jurisdictions (i.e., this Commission, the CAISO, and the California Energy Commission) that impact DR in this State. In fact, these negotiations continued the consensus-building momentum that started with the Workshops held on June 9 through June 11, 2014, with the same goal of "develop[ing] a better understanding of the opposing sides with respect to issues discussed."[5]

The result is a Settlement Agreement, inclusive of interrelated terms, that provides a carefully crafted and balanced approach for moving forward on future DR program design in a manner that recognizes and includes the additional groundwork that must be undertaken and completed, within a reasonable timeframe, to achieve the Commission's goal of increasing reliance on DR in meeting the future energy needs of California. Such an outcome is clearly in the public interest and fairly balances the various interests at stake in a manner consistent with applicable law, fact, and policy. It also avoids time-consuming litigation, not just in this proceeding, but other proceedings and venues, which, in the absence of this Settlement Agreement, could risk reaching unacceptable results at odds with applicable DR policy.[6] It is, therefore, the Joint DR Parties' strong recommendation that the Commission adopt the Settlement Agreement in full in its final decision on Phase Three issues.

With respect to the remaining issues identified for briefing, the Joint DR Parties address herein the Phase Two issue of fossil-fueled back-up generators and the Phase Three issue related to participation in the DRAM Pilot and its interaction with other supply resource solicitations.

[5] ALJ's Ruling (August 7, 2014), Attachment 1 (Revised June Workshop Report), at p. 1.
[6] D.11-12-053, at pp. 72, 73, 76.

Based on the applicable law and record on these issues detailed in the following sections, the Joint DR Parties recommend that the Commission take the following action in its final decision on these issues:

Use of Fossil Fueled BUGS in DR Programs:

- The Commission should find that United States Environmental Protection Agency (US EPA), the California Environmental Protection Agency (CalEPA) and the local Air Quality Management Districts (AQMDs) have responsibility for establishing and enforcing laws and regulations relative to air emissions standards, including those applicable to fossil-fueled back up generation or generators (BUG).
- The Commission should find that BUGs that are compliant with federal, state and local air emissions laws and regulations, including those applicable to BUGs and BUG use restrictions, should be permitted to be included, and counted for resource adequacy, in existing and future DR programs or modules.
- An examination of the extent to which BUGs are utilized in DR programs, as directed in D.11-10-003, has not been undertaken. As such, the Commission should commence a Working Group to identify the extent to which BUGs are being utilized currently and the extent to which information relative to BUG use can be accessed from the local AQMD public data bases. Participation in the Working Group should include Commission Staff, the Investor Owned Utilities (IOUs), DR Providers, and other interested stakeholders.

Participation in DRAM Pilot:

- The Commission should find that it is premature to limit DR procurement to the Demand Response Auction Mechanism (DRAM) Pilot, proposed by the Settlement Agreement of Phase 3 Issues, while the DRAM is in a pilot stage and find that the DRAM Pilot is one possible mechanism to facilitate DR participation directly in CAISO's wholesale markets.
- The Commission should, in turn, find that no limitations on other supply solicitations or procurements of supply DR resources should exist during the DRAM Pilot period.

- The Commission should examine the results of the DRAM Pilot to determine whether the DRAM Pilot, when compared to other supply DR solicitations, achieves successful participation of DR in the CAISO markets and enhances the role DR in meeting the State's energy needs, and, if not, make program design corrections to resolve those issues.

III.
USE OF FOSSIL-FUELED BACK-UP GENERATORS

A. Background

On November 14, 2013, a Joint Assigned Commissioner and ALJ Ruling and Scoping Memo was issued in this proceeding (November 2013 Scoping Memo). The November 2013 Scoping Memo adopted a "four-phased approach" for this rulemaking to include a "second phase [to] determine foundational issues."[7] While a key foundational issue was identified as being "whether and how to bifurcate current demand response programs in order to prioritize demand response as a utility-procured resource," "cost-effectiveness, cost allocation, and the use of back-up generators" were also included as foundational issues to be addressed in Phase Two.

On these latter issues, the November 2013 Scoping Memo posed "Foundational Questions" in its Attachment One, with parties given the opportunity to file responses and replies on December 13 and December 31, 2013, respectively. With respect to back-up generators, the three questions posed focused on Commission direction in D.11-10-003 regarding the use of fossil-fueled emergency back-up generation resources in DR programs for "resource adequacy purposes;" the impact of bifurcation, if adopted, on rules consistent with D.11-10-003; and the status of current laws and regulations governing back-up generation by other regulatory bodies.[8]

On March 27, 2014, the Commission, in D.14-03-026, "conceptually" adopted the bifurcation of current demand response programs into load modifying and supply resources "for

[7] November 2013 Scoping Memo, at p. 1.
[8] November 2013 Scoping Memo, Attachment 1, at p. 3.

purposes of studying the two categories" and with "[o]perational bifurcation" to occur beginning with the 2017 demand response year.[9] Issues related to back-up generators were among those that were not addressed by that decision, but remained to be resolved in Phase Two.

By the April 2 Revised Scoping Memo, the remaining Phase Two issue of the "use of backup generation for demand response" was among those identified as being in scope and specifically subject to "Guidance for Testimony" included as Attachment A. Namely, on this issue, parties were directed to address the following questions in their testimony:

- "*In D.11-10-003, Ordering Paragraph No. 3, the Commission adopted a policy statement that any demand response program, whether operated by a Commission-regulated Utility or another entity, that uses fossil-fueled emergency back-up generation (BUG) for demand reduction should not count towards resource adequacy obligations for any Commission-jurisdictional load shedding entity. Provide your understanding of the status of the Utilities' compliance with this policy statement.*
- "*How should the Utilities collect data on the customer's use of fossil-fuel emergency BUG during the demand response events? Identify the amount of demand response provided by BUG on an on-going basis?*
- "*How can this policy be further implemented for the Utilities' existing and new demand response programs as Supply Resource and Load Modifying Resources? What methods should the Commission use to exclude demand reduction provided through the use of BUG?*
- "*Should the Commission require on-site sub-metering for BUG and/or should the Commission require self-certification with the inclusion of data regarding the intended use of BUG during demand response events? If on-site metering is preferred, how should the costs of the metering be recovered?*"[10]

[9] D.14-03-026, at pp. 2, 28.
[10] April 2 Revised Scoping Memo, Attachment A, at pp. 7-8; italics original.

In response, the following parties addressed the use of back-up generation in testimony served in May 2014: the Joint DR Parties,[11] Pacific Gas and Electric Company (PG&E),[12] Southern California Edison Company (SCE),[13] San Diego Gas and Electric Company (SDG&E),[14] California Large Energy Consumers Association (CLECA),[15] Direct Access Customer Coalition and Alliance for Retail Energy Markets (DACC/AReM),[16] Office of Ratepayer Advocates (ORA),[17] Natural Resources Defense Council (NRDC),[18] and Sierra Club.[19] Back-up generation was also a topic of the Workshop held on the morning of June 9, 2014.

During the June 9 Workshop, various perspectives were offered on what the Commission's policy on BUGs is to date and how BUGs should be used and treated in DR programs going forward. At the end of this discussion, the ALJ determined that the parties had provided their positions in testimony and that, ultimately, the use of BUGs was a policy issue to be determined by the Commission. Again, this issue was not included in settlement discussions or the Settlement Agreement, but instead was identified as an issue for briefing.

B. The Current Commission "Policy Statement" on the Use of Fossil-Fueled Back Up Generation in DR Programs Has *Not* Been Correctly Identified in Either Scoping Memo Issued in this Proceeding and Must Be Accurately Reflected in Any Decision on This Issue Here.

In framing the issues and guidance for testimony on the use of back up generation in DR programs, both the November 2013 Scoping Memo and the April 2 Revised Scoping Memo

[11] Ex. JDP-01, at pp. 7, 58 (Joint DR Parties (Tierney-Lloyd).
[12] Ex. PGE-01, at pp. 7-1 – 7-6 (PG&E (Tougas)); Ex. PGE-03, at pp. 3-1 – 3-2 (PG&E (Tougas)).
[13] Ex. SCE-01, at pp. 46-49 (SCE (Wood)); Ex. SCE-02, at pp. 15-17 (SCE (Wood)).
[14] Ex. SGE-02, at pp. GK-10 – GK-11 (SDG&E (Katsufrakis)).
[15] Ex. CLE-01, at p. 43 (CLECA (Barkovich)); Ex. CLE-02, at pp. 1-3 (CLECA (Barkovich)).
[16] Ex. DAC-01, at p. 25-26 (DACC/AReM (Mara)).
[17] Ex. ORA-01, at pp. 2, 16 (ORA (Gokhale)).
[18] Ex. NRD-01, at pp. 2-4 (NRDC (Bull)).
[19] Ex. SCL-01, at p. 22 (Sierra Club (Binz)).

started with reference to either Conclusion of Law 5 or Ordering Paragraph 3 of D.11-10-003 as the Commission's "adopted" "policy statement" on this issue.[20] Unfortunately, neither ruling appropriately states the language of this conclusion or order nor do either appropriately characterize what that "policy statement" actually is.

Thus, the November 2013 Scoping Memo references a *portion* of Conclusion of Law 5, claiming that it only states that '"fossil-fueled emergency back-up generation resources should not be allowed as part of a demand response program for resource adequacy purposes,"' leaving out significant qualifying conditions on that statement.[21] Of more concern, the April 2 Revised Scoping Memo, in posing its questions for testimony, completely misstates Ordering Paragraph (OP) 3 of D.11-10-003. OP 3, in fact, does *not* include *any* policy statement about use of fossil-fueled back-up generation for demand reduction, but instead solely directs the Investor-Owned Utilities (IOUs), "[i]n consultation with Energy Division," to "*identify* data" on how customers use BUG and the amount of DR provided by BUG in specific circumstances.[22]

Not surprisingly, these misstatements regarding exactly what the Commission has adopted as a BUG "policy" or "policy statement" have led to similar errors in positions taken by NRDC, Sierra Club, and ORA in their testimony. Specifically, these parties assert that the Commission has already adopted and/or now must enforce a broad policy that either "BUGs shall not count towards RA [resource adequacy]," the use of BUGs is wholly disallowed for RA purposes, or "the use of BUGS for providing DR is prohibited."[23]

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[20] November 2013 Scoping Memo, Attachment 1, at p. 3; April 2 Revised Scoping Memo, April 2 Revised Scoping Memo, Attachment A, at p. 7.
[21] November 2013 Scoping Memo, Attachment 1, at p. 3.
[22] D.11-10-003, at p. 34; emphasis added.
[23] Ex. NRD-01, at p. 3 (NRDC (Bull)); Ex. SLC-01, at p. 22 (Sierra Club (Binz)); Ex. ORA-01, at pp. 2, 16 (ORA (Gokhale)).

However, none of these statements is true today regarding existing Commission policy and none represent an appropriate policy, without qualification, for DR programs going forward. To begin with, D.11-10-003 was issued within the narrow scope of the Commission's RA Rulemaking (R.) 09-10-032 and not as part of the separate pending Demand Response Rulemaking (R.) 07-01-041. Certainly, there was no consideration in R.09-10-032 or that specific decision (D.11-10-003) as to how rules adopted for RA purposes would impact or foster the growth of DR or achieve the "ultimate goal" of *this* proceeding "to enhance the role of demand response programs in meeting the state's long-term clean energy goals while maintaining system and local reliability."[24]

It is, therefore, critical for the Commission at the outset of addressing the issue of fossil-fueled BUG use in DR programs to state *precisely* and *correctly* what the Commission's "policy" or "policy statement" on DR was in D.11-10-003. First, the Commission must confirm that Ordering Paragraph 3 of D.11-10-003 *does not* make any reference to, nor does it adopt, *any* "policy" governing the use of BUGs in DR program at all, as noted above. Instead, this order directs the IOUs, "[i]n consultation with Energy Division," to begin a data collection process on how customers use back up generation and the amount of DR provided by back-up generation "when enrolling new customers in, or renewing demand response programs."[25]

Second, an order making these latter directions, and not adopting an ultimate policy, makes sense given the limitations D.11-10-003 specifically recognized existed in even making a "policy statement" on BUG use at that time. Thus, Conclusion of Law 5, only partially referenced in the November 2013 Scoping Memo, included several important qualifiers which were left out of that scoping memo:

[24] R.13-09-011 (DR) Rulemaking, at p. 2.
[25] D.11-10-003, Ordering Paragraph 3, at p. 34.

> "It is reasonable to adopt *as a policy statement* that fossil-fuel emergency back-up generation resources should not be allowed as part of a demand response program for RA purposes, *subject to rules adopted in future RA proceedings*."[26]

Read in full, this Conclusion of Law puts forth a "policy statement" that is limited to the use of BUGs for "RA purposes" and is further conditioned on rules *yet* to be adopted in *future RA* proceedings. This meaning is made clear by D.11-10-003, which specifically limited this "policy statement" to the following conditions: (1) the requirement of further action and review by the IOUs and Energy Division before developing, much less implementing, any rules based on that policy statement; (2) the confirmation that the adopted policy statement *does not* broadly prohibit the use of fossil-fueled BUGs for all DR programs; and (3) the requirement that any definition of emergency BUGs must be "consistent with" applicable, jurisdictional federal, state, and local air regulations.[27]

The discussion of these limitations by the Commission in D.11-10-003 is significant and bears repeating in full as follows:

> "At this time, we will not make any change to the RA rules to implement our policy statement regarding RA treatment of back up generation. We recognize parties' concerns regarding lack of data or analysis to the extent that customers use their BUGs for DR and enforcement related issues. Therefore, we will defer the RA rule change to a future RA proceeding when further studies or analysis become available.
>
> "We will require the IOUs work with Energy Division to identify data on how customers intend to use BUGs, and to identify the amount of DR provided by BUGs when enrolling new customers in the DR programs or renewing DR contracts. We will defer the details on the process evaluation to the IOUs' 2012-2014 DR applications.[28] We will also direct our Energy Division to make recommendations regarding ways to implement our policy statement consistent with overall Commission policies.
>
> "It appears that there was some confusion among parties in their comments that Energy Division's proposed rule would apply to all fossil-fueled BUGs used for

[26] D.11-10-003, at p. 33; emphasis added.
[27] D.11-10-003, at pp. 29-31.
[28] A.11-03-001, et al.

> emergency DR programs. *That is not correct.* We clarify that our policy statement applies only to fossil-fueled emergency BUGs as stated in our Vision Statement in D.03-06-032 used for any DR programs. In general, *the definition of emergency BUG should be consistent with the definition by the US Environmental Protection Agency (USEPA) or state or local air regulation agencies*."[29]

Thus, D.11-10-003 did not make a blanket pronouncement that BUGs were prohibited for DR, but instead, found that, if funds are used specifically for retrofitting a BUG for the sole purpose of participating in a DR Program, that "explicit" use of a BUG was prohibited.[30] An "implicit" use of a BUG, as incidental to DR performance, was not prohibited.[31]

These limitations on the "policy statement" announced in D.11-10-003 are confirmed by the testimony of multiple witnesses in this proceeding. Thus, the record here makes clear that "OP 3 of D.11-10-003 did *not* establish a policy related to whether DR programs that use back-up generation (BUG) for demand reduction should count towards RA obligations," but instead only required the IOUs to consult with Energy Division to identify data related to its use.[32] Further, D.11-10-003 only adopted a "policy statement that fossil-fueled BUG *should not* be used for DR, but "deferred making an outright prohibition to a future Resource Adequacy (RA) proceeding."[33] In turn, those "deferred" "rule changes have not been addressed," and "there are no compliance obligations related to whether a DR program that includes participants that use BUG should count towards RA obligations."[34]

Even as to the "only compliance obligation" imposed on the IOUs by D.11-10-003 (to work with Energy Division to identify BUG-related data), that process was deferred to subsequent DR applications and even research on this topic contemplated by the DR

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[29] D.11-10-003, at pp. 30-31.
[30] D.11-10-003, at p. 29.
[31] Id.
[32] Ex. SCE-01, at p. 46 (SCE (Wood)). See also, Ex. PGE-01, at pp. 7-2 – 7-3 (PG&E (Tougas)).
[33] Ex. PGE-01, at pp. 7-1 – 7-2 (PG&E (Tougas)); emphasis added. See also, Ex. SCE-01, at p. 47 (SCE (Wood)).
[34] Ex. SCE-01, at p. 47 (SCE (Wood)).

Measurement and Evaluation Committee (DRMEC) to be undertaken by Energy Division, which "was never initiated and the research question was not resolved."[35] PG&E witness Tougas further testified that since D.11-10-003 was issued, "PG&E has received no guidance from ED on complying with OP 3…"[36]

PG&E and SCE witnesses also confirm that the IOUs are in full compliance with D.11-10-003, despite contrary contentions by NRDC based on a *2010* study. Thus, OP 3 of D.11-10-003 requires only "gathering data" by the IOUs working with Energy Division and "does not condition DR qualification for [RA] credit to not using fossil-fueled emergency BUG, nor does it set a deadline" for ending any such use,[37] and, again, "rules to implement" even D.11-10-003's "policy statement" "have not been established."[38] With respect to the 2010 Study (a report by KEMA), CLECA specifically asks that this report "be given no weight in this proceeding" since "air quality regulations for BUG have changed since 2010," the "permitted uses for BUG" on which that study might have relied would no longer be allowed, and no inquiry was made as to how much of a customer's load the BUG represented.[39]

In its testimony on the use of fossil-fueled back up generation in DR programs, the Joint DR Parties specifically referenced and adopted as its testimony, its positions on this issue included in the Joint DR Parties' Joint Response on Phase 2 Foundational Questions and Joint Reply to Responses to Phase 2 Foundational Questions filed and served in this proceeding (R.13-09-011 (DR)) on December 13 and December 31, 2013, respectively.[40] Those filings confirm, as supported by the testimony of other parties and discussed further below, that the use of BUGs is

[35] Ex. SCE-01, at p. 47 (SCE (Wood)).
[36] Ex. PGE-01, at p. 7-3 (PG&E (Tougas)).
[37] Ex. PGE-03, at pp. 3-1 – 3-2 (PG&E (Tougas)), with reference to NRD-01, at pp. 2-3 (NRDC (Bull)).
[38] Ex. SCE-02, at p. 16 (SCE (Wood)).
[39] Ex. CLE-02, at p. 2 (CLECA (Barkovich)).
[40] Ex. JDP-01, at p. 58 (Joint DR Parties (Tierney-Lloyd)).

subject to complex and strict federal, state, and local jurisdictional air regulations, which include limiting their hours of operation, and any Commission policy should both respect and reflect those regulations.[41]

Further, in terms of the "use" of BUGS today in DR programs, the Joint DR Parties have also confirmed that such use is rare and would be limited to "existing" resources pursuant to D.11-10-003 that, in turn, are subject to stringent air quality regulations, but, if called upon, could avoid the need for large, new Greenfield, gas-fired generation. Thus:

> "From an aggregator perspective, BUGs are not a significant part of the DR services, and the focus on BUGs seems misaligned with the scale of their impact relative to other fossil-fueled resources. In general, BUGs are rarely, if ever, installed to provide DR capacity to a customer. Instead, BUGs participate in DR because they are an asset that is already in place, providing back-up generation for critical customer operations.
>
> "As a result, BUG installation and use are unlikely to expand as a consequence of any policy decision associated with DR, because of existing air quality requirements. Rather, a new policy designed to limit BUG use as a DR resource is likely to lead to the need for replacement resources, the most likely candidate being natural gas-fired generation.
>
> "In allowing BUGs to participate in DR programs and provide RA capacity, the Commission takes advantage of existing resources and avoids the need to develop new, green-field, fossil fuel resources. Such new potential resources, while they may be developed to meet a more narrow need, may eventually see their operations expand to meet other operational needs, thereby locking the State into a much greater potential GHG emission profile than would be the case by simply continuing the status quo and allowing the use of BUGs to provide RA." [42]

In a similar vein, DACC/AReM witness Mara testified that, "if the Commission's goal is to maximize DR resources, a prohibition on the use of BUGS will run counter to that goal by reducing participation of DR in CAISO markets," "hamper the economic development of newer back-up technologies," and fail to recognize that the limited use that exists today would avoid

[41] Joint DR Parties Response to Phase 2 Foundational Questions (December 13, 2013), at pp. 13-14.
[42] Joint DR Parties Response to Phase 2 Foundational Questions (December 13, 2013), at pp. 12-13.

and is "preferable to the construction of new larger-scale peaking facilities."[43] From DACC/AReM's perspective, this proceeding should examine how the use of BUGs can "enhance, not hinder DR expansion."[44]

Clearly, D.11-10-003 did *not* adopt any specific prohibition on BUG use, even for RA credit, but, instead, provided direction for further study to support the development of rules to reflect a policy of limiting the use of BUGs for demand reduction in certain, specific circumstances. That record has still not been developed and, as addressed below, must be accomplished in a manner that respects customer information and applicable air quality regulations.

C. Any Further Clarification of Commission Policy or Directives Governing Use of Fossil-Fueled Back Up Generation in DR Programs Requires Further Study and Must Reflect and Be Consistent with Appropriate Data Gathering and Applicable Air Quality Regulations.

Clearly, the research and data needed to develop any "final" Commission policy or rules on the use of fossil-fueled back up generation has not been undertaken and is still required, whether in the context of a DR or RA rulemaking. Until that record is established, there is no basis here to adopt any prohibition on the very limited use of existing BUG that may be called upon today to reduce demand.

In undertaking the required studies, the Joint DR Parties ask that certain principles and applicable laws be kept in mind. Thus, in terms of "data collection," there is uniform agreement among the IOUs and other parties, that the IOUs do not, and should not collect such data, from customers.[45] However, implementation of the Commission's "policy statement" in D.11-10-003

[43] DAC-01, at p. 25 (DACC/AReM (Mara)).
[44] DAC-01, at p. 26 (DACC/AReM (Mara)).
[45] Ex. SCE-01, at p. 48 (SCE (Wood)); Ex. PGE-01, at p. 7-3 (PG&E (Tougas)); Ex. SGE-02, at pp. GK-10 – GK-11 (SDG&E (Katsufrakis); Ex.CLE-01, at p. 43 (CLECA (Barkovich)).

does not require such collection given the regulation of BUG use and emissions by extensive federal, state, and local air quality regulatory agencies.[46]

In this regard, BUGs are "governed by other state and federal authorities and enforcement of the rules mandated by those authorities" [47] and "these customers are all subject to appropriate air quality regulations."[48] In turn, it is neither this Commission's nor the IOUs' role or jurisdictional responsibility to maintain such records or enforce such regulations at either the state or federal level.[49] As SCE witness Wood further explained:

> "[A]ir pollutants emitted from the use of BUG are governed by California's air pollution control districts (APCDs) and air quality management districts (AQMDs). These agencies have been granted legislative authority to exercise responsibility for comprehensive air pollution control within a particular region. The Public Utilities (P.U.) Code includes a process for IOUs to provide information to the APCDs and AQMDs to allow them to enforce BUG rules. Pursuant to P.U. Code Section 743.3, on a monthly basis, SCE provides to the APCDs and AQMDs in its territory a confidential list of SCE customers participating in an interruptible program, which enables the APCD / AQMD to cross-reference its list of BUG permits with customers participating in the interruptible program."[50]

In addition, the bifurcation of load modifying and supply DR resources itself may also have implications for implementation of a Commission policy on BUG use related to demand reduction. Thus, as PG&E witness Tougas "cautioned," "it is not clear that the Commission has the authority to prohibit the use of fossil-fueled BUG for Supply Resource DR because once the Commission allows retail load to be used for Supply Resource DR," that "participation in the

[46] Ex. SCE-01, at p. 48 (SCE (Wood)).
[47] Ex. SGE-01, at p. GK-10 (SDG&E (Katsufrakis)).
[48] Ex. CLE-01, at p. 43 (CLECA (Barkovich)).
[49] Ex. SGE-01, at p. GK-10 (SDG&E (Katsufrakis)); Ex. CLE-01, at p. 43 (CLECA (Barkovich)). See also, Ex. SCE-01, at p. 48 (SCE (Wood)); Ex. PGE-01, at p. 7-3 (PG&E (Tougas)).
[50] Ex. SCE-01, at p. 48 (SCE (Wood)).

CAISO wholesale market would be pursuant to CAISO rules, which are subject to Federal Energy Regulatory Commission's jurisdiction."[51]

The jurisdictional role and impact of air quality regulations on the use of BUGs simply cannot be ignored. The Joint DR Parties have specifically addressed the extensive regulation of BUG operation by air quality regulators that already significantly limit their use.[52] The Joint DR Parties have also confirmed that customers, not the IOUs, collect data on BUG use or operations, that is then "shared with air resources regulators" that are, in turn, charged with addressing non-compliance.[53] While the Commission could decide that "only BUGs that are compliant with local, state and federal air emissions requirements are permitted to participate in DR programs," the Commission "should not consider actions or decisions that would preempt or conflict with state and federal air quality regulatory authority or air quality regulations."[54]

Further, it must be stressed that the Environmental Protection Agency (EPA), while imposing strict limitations on BUG use, has also recognized that the importance of BUGs used in emergency demand response programs to protecting grid reliability and stability.[55] In fact, given that "BUGS are considered emergency resources" and "BUG operation could be a last line of defense to maintain the stability of the grid," the Commission must not adopt rules or policies that conflict with jurisdictional air regulations or that could lead to a unit failure in an emergency, which "could be catastrophic."[56]

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[51] Ex. PGE-01, at p. 7-5 (PG&E (Tougas)).
[52] Joint DR Parties Response to Phase 2 Foundational Questions (December 13, 2013), at pp.
[53] Joint DR Parties Reply to Responses to Phase Two Foundational Questions (December 31, 2013), at p. 9.
[54] Id.
[55] Joint DR Parties Response to Phase Two Foundational Questions (December 13, 2013), at p. 14.
[56] Joint DR Parties Reply to Responses to Phase Two Foundational Questions (December 31, 2013), at p. 8.

Based on the "record" and law to date, PG&E and SCE witnesses are quite correct in concluding that the record in this case is insufficient for the Commission, at this time, to further amplify or adopt rules on the "policy statement" made in D.11-10-003, especially if it is to include consideration of the impacts of bifurcation. Not only has key data gathering, even that contemplated by D.11-10-003 between the Energy Division and the IOUs, not taken place,[57] but the "characteristics" for each bifurcated category (load modifying and supply resources) have yet to be determined. [58] Additional research and coordination between jurisdictional regulators and stakeholders is also clearly required, but has yet to be undertaken, to support any conversion of that policy statement into reasonable rules that can be fairly implemented.[59] Recognizing that data collection on BUG use in this State takes place before the California Air Resources Board (CARB), PG&E suggests that it may make "practical" sense for the Commission "to hire a third-party consultant to perform annual evaluations to determine the extent to which fossil-fueled BUG are used during a DR event."[60]

In terms of determining "how to exclude demand reduction achieved through the use of fossil-fueled BUG," SCE recommends "a collaborative process, such as workshops, to develop appropriate rules and processes."[61] According to SCE, participants in this process "should include the Commission, the IOUs, the California Air Resources Board, the local air quality agencies, and other interested parties," with the goal of "develop[ing] a solution that considers the capabilities and concerns" of all of the jurisdictional agencies and affected parties.[62]

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[57] Ex. PGE-01, at p. 7-3 (PG&E (Tougas)).
[58] Ex. SCE-01, at pp. 47, 49 (Wood); Ex. PGE-01, at p. 7-3 (PG&E (Tougas)).
[59] See, e.g., Ex. SCE-01, at pp. 47, 49 (Wood).
[60] Ex. PGE-01, at p. 7-3 (PG&E (Tougas)).
[61] Ex. SCE-01, at p. 49 (SCE (Wood)).
[62] Id.

The Joint DR Parties support a collaborative approach to examine the regulations and the roles of the various entities charged with enforcing the regulations. However, the Joint DR Parties do not agree that BUGs, as a rule, should be excluded from counting as available DR capacity or for resource adequacy, if the BUG is in compliance with federal, state and local air emissions regulations.

D. The Record in this Proceeding Is Only Sufficient to Support a Decision Identifying Next Steps For Developing Rules Governing the Use of Fossil-Fueled Back Up Generation in DR Programs.

The record in Phase Two, both party testimony and the Workshop Report, makes clear that there are significant unresolved legal and factual issues that must be addressed before the "policy statement" announced by D.11-10-003 can be translated to any rules governing the use of fossil-fueled back up generation in DR programs.[63] In fact, given the stakeholders, regulators, and venues that should be considered in reaching any such decision, a settlement process like the one used to address Phase Three issues might be a beneficial approach on this issue as well. In this regard, as noted above, that settlement process was able to account for multiple proceedings and regulatory venues to develop a record-building path forward to reach reasonable and well-supported outcomes.

To that end, the Joint DR Parties are prepared to engage further in a collaborative process like that suggested by SCE in its testimony. However, the Joint DR Parties believe that any Commission decision that launches such a process must also find as follows:

- Contrary to the statement made in the April 2 Revised Scoping Memo, Ordering Paragraph 3 of D.11-10-003 did *not* establish a policy or adopt or implement a policy

[63] In addition to the testimony reviewed herein, the Workshop Report confirms that there are a wide range of regulatory and practical considerations that impact any such policy determination. Even NRDC admitted that this decision would need to account for the different purposes and objectives for the varied DR programs. (ALJ's Ruling (August 7, 2014), Attachment 1 (Revised June Workshop Report), at p. 10).

statement that "any demand response program, whether operated by a Commission-regulated Utility or another entity, that uses fossil-fueled emergency back-up generation (BUG) for demand reduction should not count towards resource adequacy obligations for any Commission-jurisdictional load shedding entity."[64]

- Contrary to the November 2013 Scoping Memo, Conclusion of Law 5 of D.11-10-003 concluded that it was reasonable to adopt a policy statement that fossil-fuel emergency back-up generation resources should not be allowed as part of a demand response program, but only for RA purposes *and* only upon the adoption of rules in a future RA proceeding, which has not taken place.
- Back-up generators (BUGs) are subject to federal, state and local air emissions regulations. These regulations are extremely complex and it has taken years for them to be developed. The Commission should not attempt to regulate air quality and allow the current agencies with the responsibility to do their jobs.
- BUGs do not represent a large percentage of the Joint DR Parties' services.
- BUGs are not dispatched frequently; but, may provide protection against outages. EPA and other states have determined that it is better to use a subset of generators for a short period of time to avoid a blackout, rather than waiting for a blackout to occur when it could take hours or days for the electric grid to be restored, during which time every generator whether properly permitted or not will be operating.
- Because aggregators will incur the risk of non-payment for any capacity that will not meet an LSE's resource adequacy obligation, bifurcation does not increase the likelihood that aggregators will increase BUG use.[65]

[64] April 2 Revised Scoping Memo, Attachment 1, at p. 7.
[65] See, e.g., Joint DR Parties Reply to Responses on Foundational Issues (December 31, 2013), at pp 12-13; see also, Joint DR Parties Response on Foundational Issues (December 13, 2013), at p. 12.

IV.
LIMITED BRIEFING ISSUE ON DRAM PILOT

A. Background

In identifying the remaining Phase Two issues and the Phase Three issues to be addressed in the May 2014 testimony, the April 2 Revised Scoping Memo also included, as Attachment B, a Commission staff proposal for a Demand Response Auction Mechanism (DRAM). This proposed auction mechanism was offered in response to the Commission's discussion in D.14-03-026 regarding the "development of an auction mechanism for demand response capacity, which would be integrated into the CAISO energy market."[66] Parties were directed to address their overall comments and responses to specific questions on DRAM posed in Attachment A in their testimony.[67]

The issue of DRAM and how best to proceed forward to design and implement such a mechanism, consistent with current and expected market changes, were topics of intense discussion in the settlement negotiations that led to the Settlement Agreement submitted by Motion for its Adoption on August 4, 2014. In reaching the settlement terms on this topic, an issue arose related to one aspect of the Settling Parties' approach to the development of an auction mechanism – namely, a DRAM "pilot." Within the context of this issue, the parties could not reach an agreement on the resolution of the following issue, but did reach agreement that this issue could be the subject of briefs:

> "Issues associated with encouraging participation in the Demand Response Auction Mechanism (DRAM) Pilot and the potential inter action of other (i.e., non-DRAM Pilot) solicitations for Supply Resources with the DRAM Pilot, as set forth in the Settlement Agreement."[68]

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[66] April 2 Revised Scoping Memo, at p. 6.
[67] Id.
[68] Motion for Adoption of Settlement Agreement (August 4, 2014), at p. 20.

By Email Ruling of August 13, 2014, ALJ Hymes granted this request and directed that Opening Briefs shall include this Phase Three issue, along with the remaining Phase Two issues.

B. Context of the Phase Three DRAM Pilot Participation Issue

The DRAM proposal, which was not a pilot nor did it contemplate one, was circulated to the parties as Attachment A of the April 2 Revised Scoping Memo. In part, the DRAM was intended to put into place a quasi-market mechanism through which DR capacity resource values would be established for DR resources that participate directly in the wholesale market, in recognition of the fact that the CAISO wholesale market does not include a centralized, capacity market similar to those employed by the eastern ISOs/RTOs.[69] DR is, primarily, a capacity resource and the capacity payments is, essentially, an availability payment. DR resources are paid to be available to the utility under specific conditions. While DR resources are available for a significant number of hours, there are limitations on the number of hours per year the resource can be dispatched. Therefore, DR resources count, primarily, on capacity revenues as opposed to energy rents.

The DRAM proposal was intended for DR resources that would participate directly in the wholesale market, outside of a utility program. Certain dispatchable DR resources that participate in utility programs receive capacity payments, or demand charge credits, from the utility either through a tariff or a contract. Direct participation in the wholesale market, without a mechanism to provide a capacity payment to the DR resources, would likely not succeed.

In addressing the issue of the DRAM, the Settling Parties concluded that this mechanism required at least two initial "pilot" auctions given the untested nature and design of this mechanism. In terms of participation in the DRAM *Pilot*, as proposed in the Settlement Agreement, it is first important to understand the context and development of those settlement

[69] ISO-NE, PJM and NYISO all employ various forms of a centralized capacity market.

terms. That background and support is laid out in the Settlement Agreement "Recitals" specific to "Issue Area #3," which covered the DRAM, Utility Roles, and Future Procurement.[70] Among other things, those recitals make clear that the Workshops and settlement discussions yielded "information and insights from different stakeholder groups on what would be needed to successfully procure Supply Resources through an auction mechanism involving third party direct participation in CAISO markets."[71]

In doing so, the parties came to an agreement that modifications to various requirements associated with bidding Supply Resources into the CAISO market "in ways that could reduce cost and complexity without creating any operational difficulties for the CAISO," were required, but would "take some time" for their development and adoption by the CAISO and this Commission.[72] Because there "are many issues that have to be resolved in order for the DRAM to be implemented successfully, including bidding rules, cost caps, and payment structure," the Settling Parties propose a "DRAM Pilot" to "allow the details of the auction mechanism to be refined with experience."[73] The Settling Parties also discussed "various means of mitigating third party integration costs while preserving competitive neutrality."[74]

In turn, this approach is reflected in the Settlement Agreement terms governing participation in the DRAM Pilots, which provide that the IOUs, as buyers in the auction, will not provide bids in the Pilot, but eligible bidders bear the responsibility for meeting all applicable

[70] Motion for Adoption of Settlement Agreement (August 4, 2014), Attachment A (Settlement Agreement), at pp. 9-11.
[71] Id., at p. 9.
[72] Id.
[73] Id., at p. 10.
[74] Id.

Pilot rules and RA requirements.[75] The Settling Parties further agreed to two auctions, each subject to limitations on timing and utility-specific procurement authorizations.

C. Joint DR Parties' Recommendations on DRAM Pilot Participation.

While the Settling Parties discussed various methods of encouraging participation in the DRAM Pilot and the potential interaction of the IOU solicitations for Supply Resources with the DRAM Pilot, it was on this issue that parties could not agree, other than to brief the issue. What is clear today, however, is that the DRAM Pilot has never existed before, and its "design, requirements, protocol, and standard pro forma contract" have yet to be developed.

While the Joint DR Parties expect to actively participate in this process, once authorized by the Commission, it is premature to impose restrictions on participation in the DRAM Pilot or limit IOU solicitations for Supply Resources, including Aggregator Managed Program (AMP) contracts, during the period when the DRAM Pilot will be in operation (through 2019). Given that the Commission's goal in this proceeding is to "enhance" the role played by DR in meeting this State's energy needs, there is simply no basis to assume that such restrictions will benefit either the DRAM Pilot or DR growth during the period in which the auction mechanism is being tested and developed.

In fact, today, there is simply *no record* in this or any other proceeding that would support restricting IOU DR Supply Resource procurement while this experimental auction mechanism is being developed and tested. One of the additional elements of the Settlement Agreement is the reinforcing an Aspirational Goal of 5% DR penetration by 2020 as set out in the Energy Action Plan. Restricting non-DRAM Pilot procurement of DR during the pilot period would jeopardize the IOUs' ability to achieve this Settlement Agreement Aspirational

[75] Motion for Adoption of Settlement Agreement, Attachment A (Settlement Agreement), at pp. 24-28.

Goal[76] and violate this Commission's stated intent of enhancing the role of DR in meeting California's energy needs.

It is also of note that the Commission, in adopting the concept of bifurcation in D.14-03-026, only concluded that "a demand response auction mechanism is a good *starting* point for *exploration and discussion*" as a means to increase the integration of demand response in CAISO markets.[77] In turn, the Commission did not mandate or guarantee that such a mechanism, especially at its nascence, could deliver on that promise. Instead, the Commission recognized that "bidding demand response into the CAISO energy markets is a complex process and should be based on many factors" and that bifurcation, itself, should not result in devaluing or siloing of demand response programs on either side of the bifurcation.[78] Devaluation is almost a guaranteed outcome if the Commission were to restrict IOU supply resource procurement, as needed, during a time when a novel mechanism is being developed and tested. Maintaining the existing level of DR resources in this State *must be a minimum expectation and requirement* while the transition to future DR program development is under way.

In terms of how to encourage participation in the DRAM Pilot, it is the Joint DR Parties' position that if the DRAM Pilot is well designed and structured – offering prospective participants (customers) a reasonable expectation of pricing and clear and reasonable contract terms and contract approval – it should, on its own, encourage customer participation. Transparent, stable, confidence-inspiring mechanisms are what induce customer participation. Unlike a power plant that can be developed and built on the order of the Commission, DR requires customer acceptance and appropriately-structured incentives to encourage the customers to change their behavior, at home or in their businesses.

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[76] Settlement Agreement, at pp. 6-7.
[77] D.14-03-026, at p. 27; emphasis added.
[78] D.14-03-026, at pp. 12-14, 23-24, 26.

If the DRAM Pilot is not successful, in comparison to other non-DRAM Pilot supply solicitations, it will be a strong indicator that it is the DRAM design that will need revision to become an effective Supply Resource procurement mechanism. This Commission should, therefore, first encourage and direct a robust, transparent DRAM Pilot design phase, rather than adopting any premature restrictions on other DR procurement until the DRAM Pilot auctions have been designed and tested.

IV.
CONCLUSION

Based on the applicable law and record in this proceeding, the Joint DR Parties respectfully request that the Commission's decision in Phase Two and Phase Three of this proceeding (1) adopt the multi-party Settlement Agreement, filed by Motion for Adoption on August 4, 2014, and (2) resolve the issues related to the use of fossil-fueled Back-Up Generators in DR programs and participation in the DRAM pilot as follows:

Use of Fossil Fueled BUGS in DR Programs:

- The Commission should find that United States Environmental Protection Agency (US EPA), the California Environmental Protection Agency (CalEPA) and the local Air Quality Management Districts (AQMDs) have responsibility for establishing and enforcing laws and regulations relative to air emissions standards, including those applicable to fossil-fueled back up generation or generators (BUG). .
- The Commission should find that BUGs that are compliant with federal, state and local air emissions laws and regulations, including those applicable to BUGs and BUG use restrictions, should be permitted to be included, and counted for resource adequacy, in existing and future DR programs or modules.
- An examination of the extent to which BUGs are utilized in DR programs, as directed in D.11-10-003, has not been undertaken. As such, the Commission should commence a Working Group to identify the extent to which BUGs are being utilized currently and the

extent to which information relative to BUG use can be accessed from the local AQMD public data bases. Participation in the Working Group should include Commission Staff, the Investor Owned Utilities (IOUs), DR Providers, and other interested stakeholders.

Participation in DRAM Pilot:

- The Commission should find that it is premature to limit DR procurement to the Demand Response Auction Mechanism (DRAM) Pilot, proposed by the Settlement Agreement of Phase 3 Issues, while the DRAM is in a pilot stage and find that the DRAM Pilot is one possible mechanism to facilitate DR participation directly in CAISO's wholesale markets.
- The Commission should, in turn, find that no limitations on other supply solicitations or procurements of supply DR resources should exist during the DRAM Pilot period.
- The Commission should examine the results of the DRAM Pilot to determine whether the DRAM Pilot, when compared to other supply DR solicitations, achieves successful participation of DR in the CAISO markets and enhances the role DR in meeting the State's energy needs, and, if not, make program design corrections to resolve those issues.

Respectfully submitted,

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