

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)

**MOTION OF THE OFFICE OF RATEPAYER ADVOCATES
TO MOVE EXHIBITS INTO EVIDENCE**

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I. INTRODUCTION

Pursuant to the Administrative Law Judge (“ALJ”) Ruling issued August 13, 2014,¹ the Office of Ratepayer Advocates (“ORA”) move for a ruling admitting the exhibits marked for identification and described in this pleading into evidence. The exhibits marked for identification are described as follows:

ORA-04	PG&E 2013 AMP Performance – Public Version
ORA-04c	PG&E 2013 AMP Performance – Confidential Version
ORA-05	SCE 2013 AMP Performance – Public Version
ORA-05c	<i>Amended</i> SCE 2013 AMP Performance – Confidential Version

As set forth below, the Commission should admit the evidence into the record because (1) ORA complied with the requirements of Rule 12; (2) the evidence is relevant to the Phase Three issue of Demand Response Auction Mechanism (“DRAM”) as the preferred mechanism; (3) the evidence does not violate any party’s right to due process.

II. DISCUSSION

A. The Information Was Obtained Outside Of Settlement Discussions In Compliance With Rule 12

Rule 12 of the Commission’s Rules of Practice and Procedure prohibits the admission of evidence obtained through settlement discussions or negotiations other than by consent of the parties.²

ORA observed all the proper formalities of Rule 12. By the introduction of evidence into the record of ORA-04, ORA-04c, ORA-05, and ORA-05c, ORA does not

¹ *R1309011 Email Ruling Providing Guidance Regarding Testimony*

² Rule 12 states, “No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.”

violate Rule 12's confidentiality provisions. ORA obtained this information outside of settlement discussions.

The information contained in the exhibits was obtained through data requests made pursuant to ORA's broad discovery rights under Public Utilities Code Section 309.5(e),³ ORA received responses to those requests on July 24, 2014 from SCE⁴, and January 13, 2014 from PG&E. Thus, these responses pre-date the Settlement negotiations and admitting them as evidence is in accordance with Rule 12. In any case, the data contained in the tables of Exhibits ORA-04c and ORA-05c would not have been part of settlement discussions, as the information contained within is considered market-sensitive material.

B. All Relevant Evidence Is Admissible By the Commission

The Commissioner or the ALJ may admit and exclude proffered evidence in accordance with the Rules of Practice and Procedure of the Commission.⁵

Rule 13.7(c) of the Commission's Rules of Practice and Procedure states, "Documentary exhibits shall be limited to those portions of the document that are relevant and material to the proceeding." "Relevant evidence" means evidence having tendency to prove or disprove any disputed fact that is of consequence to the determination of the action.⁶

Here, the exhibits marked for identification (ORA-04, ORA-04c, ORA-05, and ORA-05c) are all relevant to the Phase Three issue of the DRAM Pilot.⁷ The evidence

³ ORA has the same full access to utility data as all other Commission staff. (D.06-06-066 at 72.) . *See also* California Constitution Article XII, § 6; Public Utilities Code §§ 311, 312, 313, 314, 425, 581, 582, 584, 701, 1794.

⁴ This is an updated data response from a previous response dated February 18, 2014.

⁵ Cal Pub Util Code § 311; Evidence Code § 350.

⁶ Evidence Code § 210.

⁷ *See* Motion For Adoption Of Settlement Agreement Between And Among Pacific Gas And Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, California

will help prove ORA’s arguments on whether the DRAM should be a preferred means of procuring Supply Resources. The closest potential alternative within the utilities’ DR portfolios is the procurement of AMP contracts that can be integrated into CAISO markets as Supply Demand Response. The exhibits show the overall poor performance of AMP contracts in 2013, which support ORA’s argument that DRAM should be the preferred procurement mechanism.

C. Due Process

1. Exclusion of the Evidence Would Lead to an Unfair Result As It Does Not Allow the Commission to Consider Alternative Outcomes

The Commission is obliged to properly consider evidence that offer alternative scenarios in exercising its duties when making a determination of what is just and reasonable. *Ventura County Waterworks Dist. No. 5 v. Public Utilities Com.*, 61 Cal. 2d 462 (Cal. 1964). In *Ventura*, the California Supreme Court annulled a decision by the Commission, finding that the Commission unfairly excluded evidence relevant to the determination.⁸ The court noted that the District's evidence to provide cheaper service may have been relevant to the commission's determination, and noted that the Commission was obliged to properly consider the alternatives in exercising its duties.

In the instant case, ORA offers evidence into the record that would support alternative recommendations with regard to DRAM as a preferred mechanism. Therefore, the Commission should admit the evidence in order to achieve a fair

Independent System Operator Corporation, Office Of Ratepayer Advocates, The Utility Reform Network, California Large Energy Consumers Association, Consumer Federation Of California, Alliance For Retail Energy Markets, Direct Access Customer Coalition, Marin Clean Energy, EnerNOC, Inc., Comverge, Inc., Johnson Controls, Inc., Olivine, Inc., EnergyHub/Alarm.Com, Sierra Club, Environmental Defense Fund, And Clean Coalition On Phase 3 Issues, p. 4; *See also*, Attachment A, Settlement Agreement, pp. 32-33.

⁸ In *Ventura*, the court held that “Errors in the admission or exclusion of evidence do not constitute a failure of the Commission regularly to pursue its authority unless they result in an unfair hearing.”

consideration of all alternative scenarios with respect to whether the DRAM should be a preferred means of procuring Supply Resources.

2. ORA Provided Sufficient Transparency to the Affected Parties to Afford Them Due Process Considering PG&E and SCE's Claims of Confidentiality

On August 11, 2013, ORA hand-delivered to counsels of Pacific Gas and Electric Company ("PG&E") and Southern California Electric Company ("SCE") the confidential and public versions of the exhibits identified in this motion. In addition, ORA delivered courtesy copies of non-public information with certain parts redacted to each of the following members of the "Joint DR Parties": EnerNOC, Inc., Johnson Controls, Inc., and Comverge, Inc.

Subsequently, on August 13, 2014, ORA served all parties in the R.13-09-011 docket the public versions of ORA-04 and ORA-05, with the following message:

Please find attached, the PUBLIC version of the ORA's Exhibits to be marked and identified in ORA's *Motion to [Move] Evidence into the Record* to be filed Monday, August 18, 2014, pursuant to the e-mail Ruling of ALJ Hymes issued today, August 13th. If you have any questions, or are entitled to a CONFIDENTIAL version pursuant to the Commission's Rules, please contact Lisa-Marie Salvacion at (415) 703-2069, or lms@cpuc.ca.gov.

ORA provided sufficient transparency to the aggregators affected by the claims of confidentiality to afford them due process, considering that PG&E and SCE asserted confidential treatment under P.U. Code § 583 and D.06-06-066. Other than the "courtesy copies" provided to the Joint DR Parties which revealed certain market-sensitive information pertinent to their individual corporations, no other aggregator requested information from ORA.

In any case, certain parties' inability to access *all* of the confidential material should not prohibit the inclusion of the confidential versions (Exhibits ORA-04c and

ORA-05c) into the record. Both PG&E and SCE have verified to ORA that the information is complete and accurate.

III. CONCLUSION

Because ORA's Exhibits ORA-04, ORA-04c, ORA-05, and ORA-05c:

- (1) comply with the requirements of Rule 12;
- (2) are evidence relevant to the Phase Three issue of Demand Response Auction Mechanism as the preferred mechanism; and
- (3) do not violate any parties' right to due process,

ORA requests that the Commission admit Exhibits ORA-04, ORA-04c, ORA-05, and ORA-05c into evidence.

Respectfully submitted,

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