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)

REPLY TO JOINT DEMAND RESPONSE PARTIES AND PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO THE OFFICE OF RATEPAYER ADVOCATES' MOTION MOVE EXHIBITS INTO EVIDENCE

LISA-MARIE SALVACION
Attorney for the Office of Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2069
Email: lms@cpuc.ca.gov

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I. INTRODUCTION

Pursuant to the Administrative Law Judge (ALJ) e-mail Ruling issued August 25, 2014,[1] the Office of Ratepayer Advocates (ORA) hereby submits its reply to the *Response of the Joint Demand Response Parties* (Joint DR Parties) *in Opposition to ORA Motion for Admission of Exhibits* and to *Pacific Gas and Electric Company* (PG&E) *To Motion of Office of Ratepayer Advocates Motion To Move Exhibits Into Evidence*, filed August 21, 2014. ORA filed a motion to move its exhibits onto the record on August 18, 2014. 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	*Amended* SCE 2013 AMP Performance – Confidential Version

ORA disagrees with the arguments set forth by the Joint DR Parties and PG&E.

The Joint DR Parties misconstrue facts in order to hinder ORA's ability to present an alternative scenario regarding the ability to encourage participation in the DRAM Pilot. This violates ORA's due process and substantial rights as a party to present evidence on a *new issue presented*. If this is permitted, the Commission risks committing substantial error in not considering all relevant evidence put before it as ORA noted in its *Motion to Move Exhibits into Evidence*.[2] With regard to PG&E's argument that ORA's timing in presenting the evidence is too late, the accusation is incorrect and PG&E's opposition to ORA's motion should be dismissed.

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[1] *R1309011 Email Ruling Providing Guidance Regarding Testimony*

[2] Motion of ORA, pp. 3-4.

II. DISCUSSION

Joint DR Parties opposes ORA's motion based on three arguments: (1) ORA "mischaracterizes or ignores the Settlement Agreement, the ALJ's Rulings in this Proceeding, and Timing of the Request"; (2) ORA's motion and the subject exhibits are without foundation; and (3) the admission of the exhibits are prejudicial and will not preserve the rights of the parties. Each of the three arguments lacks merit, as ORA explains below.

A. Joint Parties' Arguments that ORA Mischaracterized or Ignores the Settlement and ALJ's Rulings are Irrelevant and Misrepresent the Facts

The Joint DR Parties first argument, that ORA "mischaracterizes or ignores the Settlement Agreement, the ALJ's Rulings in this Proceeding, and timing of the request," has no legal basis on the admissibility of the evidence and should be dismissed.

ORA is surprised the Joint DR Parties object to the fact that ORA extended "sufficient transparency" by serving the confidential versions (with appropriate areas redacted) to PG&E, SCE and the Joint DR Parties, and the public versions to all parties in R.13.09-011 on August 11 and August 13, 2014, respectively. Rather than address the confidentiality provisions afforded to them and the fact that the Joint Parties were given *access to confidential information not normally provided to market participants*,[3] the Joint Parties present a list of nonsensical arguments ("these claims are ludicrous and damaging"[4]) in an attempt to divert the Commission's attention from the valid legal issues presented in ORA's motion. ORA considers each of the Joint DR Parties' bullet points in turn.

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[3] Under the Rules of Confidentiality, D.06-06-066, or GO 66-C, market participants are not allowed to receive confidential, market sensitive data. ORA is under no obligation to provide market sensitive data to market participants under the Confidentiality Rules.

[4] In response that ORA observed the formalities of Rule 12 that it did not seek to introduce evidence "obtained outside of settlement discussions", and (b) it extended sufficient transparency to the affected parties to afford due process.

The Joint DR Parties first argue:

- The existence of the issue of participation in the DRAM Pilot did arise, and could only have arisen, in the context of the Settlement Agreement, since *no* DRAM "Pilot" had been proposed by Staff or any other party prior to the execution of that agreement and its submission by Motion for Adoption on August 4, 2014.[5]
- Instead, the DRAM Pilot was a "proposal" made first, and only, by the Settlement Agreement.

This argument is irrelevant. Nothing here shows that ORA violated the Settlement based on the timing of when the Settlement Pilot proposal arose. The Joint DR Parties attempts to distract the Commission by raising a frivolous timing issue.

ORA, in fact, raised the issue of timing in its *Motion to Move Exhibits into Evidence*, only to demonstrate that the exhibits were not procured as a product of the Settlement discussions—which would in that case have been a violation of Commission procedure.[6] Rather, the point of ORA's timing was to show that ORA's evidence was obtained *outside* of the Settlement discussions (and in the case of ORA-04c, several months *before* Settlement discussions commenced), as is proper under Rule 12.

The Joint DR Parties continue, stating:

- The sole issue related to the DRAM Pilot that was identified by the Settling Parties, including ORA, as one to which agreement could not be reached, but with an express agreement on how it would be addressed procedurally, was: "Parties agreed that the narrowly scoped additional question of whether the DRAM should be a preferred means of procuring Supply DR and if so, with respect to encouraging participation in the DRAM Pilot, the potential interaction of IOU solicitations with the DRAM Pilot with respect to

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[5] Response of Joint DR Parties, p. 3.

[6] Rule 12.6 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."

> encouraging participation in the DRAM pilot and possible limitations on the IOUs' solicitations for Supply Resources, will be briefed and that request is included in the Motion for Approval of this Settlement Agreement."

This is an accurate statement of the issue to be briefed in the proceeding. However, the Joint DR Parties continue:

> - Nowhere in the Settlement Agreement or Motion for Adoption did the parties agree that this issue could or would be addressed anywhere but in briefs. As is self-evident by reading the referenced language above as to the discreet additional matter to be addressed in brief, there is no mention, and there is no agreement among the settling parties, to supplement the record with additional evidence.

Again, this argument is irrelevant. The Joint Parties' statement that "no agreement to among the settling parties, to supplement the record with additional evidence" does not show how ORA violated either the terms of the Settlement, or Rule 12.

However, if the Joint DR Parties' assertion is that ORA somehow violated the Settlement by introducing evidence for this issue, because the Settlement Parties should have agreed to supplement the record with briefs by inserting such a provision, this contention is inappropriate and would be at odds with the requirements of due process. Because there is "no mention" of additional evidence within the settlement agreement itself, silence should not bind parties to such limitations. Moreover, ORA made clear to the ALJ at the prehearing conference (PHC) when discussing the briefing schedule, that it reserved the right to introduce new evidence into the record.[7] Joint DR Parties fail to cite to any relevant case law or Commission rule prohibit or restrict parties from introducing new evidence simply because a "narrowly scoped additional issue" was scoped through settlement.

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[7] Tr. Vol 3, p. 198: 3-20.

The Joint DR Parties' next few arguments regarding ORA's supposed violation of the Settlement and/or ALJ Rulings are as follows:

- The ALJ, based on this specific request, allowed this specific issue to be added to the briefs to be filed on August 25, 2014.

- No provision was made either in the Settlement Agreement or the ALJ's Ruling for additional evidence to be taken on this issue and no formal request was made at any time by ORA or any other party at any of the Prehearing Conferences held on July 29 or August 11, 2014, to move for this issue to be the subject of additional testimony and hearings.

Again, the arguments regarding the provisions for additional evidence are irrelevant.

The Joint DR Parties state, "ORA did not undertake any distribution of these exhibits or make its intention to seek admission of these exhibits known before August 11, 2014 … the last day scheduled for hearing." Joint DR Parties further complain ORA did not make any offer to present witnesses on these exhibits for which there had only been limited distribution at the time, and did not propose that any other party be given the opportunity to serve rebuttal on those exhibits or any other additional testimony or exhibits on any issue.[8]

These arguments are irrelevant. Neither of these arguments show that ORA violated either the Settlement Agreement or Rule 12. Once again, Joint DR Parties suggest that new exhibits related to DRAM are prohibited by the Settlement Agreement—which is not true. Further, DR Parties insinuates that ORA acted in bad faith by going against the majority of the Settlement Parties by introducing new exhibits for the new issue, "gravely advantaging all other participants both in this proceeding and the Settlement Agreement who had proceeded in good faith in the identification and

[8] Response of Joint DR Parties, p. 5.

manner of addressing the issue of DRAM Pilot participation by briefs only."[9] This is untrue and unfair—nothing prohibited any other Settlement Party from introducing new exhibits into evidence. ORA reserved the right to present evidence before August 11th and explains the reasons why it did not distribute the exhibits prior to that date in the due process section below.

B. ORA's Motion Clearly Establishes Relevancy of the Identified Exhibits

Joint DR Parties make a convoluted argument on relevancy that raise two sections in the Evidence Code, §§ 342 and 400, saying that ORA completely ignored these provisions. While the Commission does not formally follow the Rules of Evidence,[10] ORA responds to each of the arguments in turn.

1. Evidence Code Section 342 Does Not Apply

Joint DR Parties argue Evidence Code § 342, as an important consideration of "relevancy." Evidence Code § 342 states,

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create danger of undue prejudice, of confusing the issues, or of misleading the jury.

In support of this point, Joint DR Parties assert ORA provided no foundation for the exhibits in the motion. Joint DR Parties state, "ORA offers *no citations* to any part of the record in this proceeding, including all the exhibits identified, even if not admitted as of this date, that would provide a foundation for its proffered exhibits."[11]

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[9] Response of Joint DR Parties, p. 5.

[10] Rule 13.6 states, "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved."

[11] Response of Joint DR Parties, p. 6.

But, establishing the foundation for exhibits and weighing the probative value of the evidence are two issues that should be considered separately. Joint DR Parties have not proven either issue.

a) Evidence Code Section 342 Discussion

Joint DR Parties neither cite case law nor define "undue prejudice" under Evidence Code § 342. While it is within the court's discretion to exclude evidence that would cause undue prejudice, case law shows that courts exercised this only in exceptional circumstances, typically in criminal cases. *Ajaxo Inc. v. E*Trade Group, Inc.* 135 Cal. App 4th 21, 37 (2005) ("Exclusion of evidence under Evidence Code section 352 is reserved for those cases where the proffered evidence has little evidentiary value and creates an emotional bias against the defendant"). *People v. Zambrano,* 63 Cal. Rptr.3d 297, 345-46 (2007) (an neuropsychologist's testimony about victim's recovery and prognoses after defendant's assaults on them was not unduly prejudicial; the evidence was "presented in a nonsensational way"; "For this purpose, 'prejudicial' means uniquely inflammatory without regard to relevance.") *cert. denied, 128 S. Ct. 1478.* Joint DR Parties fail to indicate where such undue prejudice, waste of time, or confusion of the jury (or decision-maker) exists.

As to the probative value of the evidence, ORA has demonstrated the high value of the proffered evidence in it's Motion.[12] The evidence was used in the August 25, 2014 *Opening Brief of the Office of Ratepayer Advocates* in the discussion of whether the DRAM should be a preferred means of procuring Supply Resource. ORA discussed how AMP is the closest potential alternative within the utilities' DR portfolios 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. Thus, even if the Commission

[12] Motion of ORA, p. 2.

were to apply the Rules of Evidence in this situation, ORA's proffered evidence would satisfy the requirements of Evidence Code § 342.

b) ORA Clearly Established Foundation In Its Motion To Move Evidence Into the Record

Joint DR Parties state that ORA offers no citation to the record in this proceeding, including all exhibits identified, even if not admitted as of this date, that would provide a foundation for its proffered exhibits.[13]

ORA is not obligated to cite to the record in this proceeding in order to establish a foundation for the exhibits it is offering onto the record. This is not a brief. ORA clearly established the foundation in its Motion.[14] The information contained in the exhibits were procured through ORA's broad discovery rights under Public Utilities Code § 309.5(e), and are the product of data requests received on January 13, 2014 from PG&E, and on July 24, 2014 from Southern Gas and Electric Company. Both utilities confirmed the authenticity of the information prior to the submission of ORA's Motion, and PG&E's Response to ORA's Motion also confirms the accuracy of the data.[15]

Joint DR Parties assert further arguments in its response that requires ORA to further explain its "arguments on whether the DRAM would be a preferred means of procuring Supply Resources."[16] Again, this is neither a brief nor testimony. The only issue for the ALJ to rule upon is whether ORA's exhibits conform with Rule 13.7 of the Rules of Practice and Procedure: "Documentary exhibits shall be limited to those portions of the document that are relevant and material to the proceeding." Joint DR

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[13] Response of Joint DR Parties, p. 6.

[14] Motion of ORA, p. 2.

[15] Response of PG&E, p. 1. ("PG&E has confirmed that the monthly 2013 data contained in ORA-04c for each of its AMP contracts is accurate, including the footnotes for three of the contracts. Currently, the Comverge, EnergyConnect and EnerNOC contracts are the subject of Advice Letter 4457-E, filed July 3, 2014, which seeks to extend the contracts for the 2015-2016 bridge period, consistent with the bridge funding decision, D.14-05-025.")

[16] Response of Joint DR Parties, p. 6.

Parties' additional demands would require ORA draft its entire brief, giving an unfair advantage to parties. ORA needs not reassert its relevancy claims again here. However, given the fact that it already submitted briefs,[17] AMP is the closest potential alternative within the utilities' DR portfolios that can be integrated into CAISO markets as Supply Demand Response, ORA needs the evidence to propose possible limitations on the IOUs' solicitations for Supply Resources and its potential interaction of ***encouraging participation*** in the DRAM Pilot.

2. Evidence Code Section 400

Joint Parties also raise Evidence Code § 400 to contest ORA's relevancy claims. Evidence Code § 400 states,

> As used in this article, a "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

This argument is irrelevant. The Settlement Parties agreed to briefs, according to the Settlement Agreement. The August 11, 2014 PHC determined hearings were unnecessary, and ORA made clear in an email to ALJ Hymes (and the entire service list) on August 13, 2014 that testimony was not was not going to be served, only exhibits. The exhibits are sponsored by Sudheer Gokhale, as is stated on each cover page. The Joint DR Parties have not asserted any facts or case law on the disqualification of Mr. Gokhale or asserted any privilege to determine that a "preliminary fact" would require the exclusion of the evidence. As for a "preliminary fact" that the admission of evidence would lead to an undue consumption of time,[18] the Commission should dismiss this

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[17] ORA submitted briefs on August 25, 2014.

[18] Response of Joint DR Parties, p. 7.

argument since "undue consumption of time" is not considered under any of the definitions of privilege.[19]

C. Due Process

Joint Parties make three arguments with respect to due process: (1) no party had notice of ORA's exhibits until the Motion was filed on August 18;[20] (2) no party will have an opportunity to conduct discovery related to ORA's exhibits, serve rebuttal testimony, or cross examine ORA's witnesses on the exhibits;[21] and (3) the exhibits reference performance of aggregators not parties to the proceedings, which ORA provides no confirmation of whether or not a courtesy or public copy of these exhibits have been provided.[22]

First, parties had ample notice of the exhibits—ORA provided copies of the confidential exhibits to PG&E, SCE, and the Joint DR Parties on August 11, 2014; served electronic copies of the public version on August 13, 2014. ORA could not serve the exhibits prior to this date because this was a newly scoped additional issue from the Settlement, this was *not* in the original testimony served by ORA on May 6, 2014, nor was this originally anticipated by the ALJ's Ruling or Energy Division workshop. As the Joint DR Parties note, the DRAM Pilot did not exist until proposed by the Settlement Parties until August 4, 2014, when the Settlement itself was filed. To give the ALJ context without specifics of the substance of the negotiations, the new issue arose relatively late in the process of the Settlement. In an email dated July 25, 2014 at 3:19 p.m., counsel for ORA made known to counsel to the Settlement Parties that ORA would be reserving the right to enter new evidence onto the record that would support the

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[19] Evidence Code § 900, et seq.

[20] Response of Joint DR Parties, p. 8.

[21] Response of Joint DR Parties, p. 9.

[22] Response of Joint DR Parties, p. 8.

DRAM briefs, and that it would do that separately from the general motion to enter the Settlement Parties' testimony onto the record.

Second, the substance of the information contained in Exhibits ORA-04c (PG&E 2013 AMP Performance – Confidential Version) and ORA-05c (*Amended* SCE 2013 AMP Performance – Confidential Version) have been verified as true and correct, and are not subject to further testimony and hearings. With briefing on the horizon and exploration of proposals to be made, ORA's expectations on what exhibits to present and whether to request hearings was up in the air prior to August 11, 2014 PHC. In order to facilitate an expedited process, ORA submitted these exhibits knowing that the information was accurate and could not be factually disputed as it was information submitted *by* the utilities based on the actual performance of the aggregators.

Third, that "ORA provides no confirmation of whether or not a courtesy or public copy of these exhibits have been provided," is not required by the Commission's Confidentiality Rules or D.06-06-066. This argument should be dismissed. The Joint DR Parties cannot argue on behalf of parties of unknown participation in this proceeding. ORA publicly served the Exhibits as was required by the Rules of Practice and Procedure and in the ALJ's Ruling.[23] The Joint DR Parties had an opportunity to review the information that was relevant to their own information. However, given the market sensitive nature of the data and the composition of the information, the Joint DR Parties as *market participants* are *not* entitled to market sensitive information under the Commission's Confidentiality Rules, nor have they raised any objections to the IOU's claims for confidentiality. This argument should be dismissed.

In PG&E's Response, the due process issue is mainly a timing issue: "The information about PG&E's AMP contracts contained in ORA 04-c has been in ORA's possession since January 2014, well before its May 2014 testimony was served." PG&E

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[23] Rule 13.7; August 13, 2014 ALJ Ruling, "*R1309011 Email Ruling Providing Guidance Regarding Testimony*"

asserts that "ORA did not put the information into its prepared testimony and instead waited approximately 7 months before letting parties know that it wanted to include the data in the record."[24]

As noted above, ORA's analysis was ongoing regarding the new issue and while ORA had *access* to the information provided in the proposed exhibits, ORA was still in process of developing its strategy. ORA could not have foreseen the Settlement Party discussions nor have anticipated which exhibits to use prior to August 4, 2014 filing, especially when much of the DRAM briefing issues were not still being considered toward the end of negotiations.

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,

/s/ LISA-MARIE SALVACION

Lisa-Marie Salvacion

Attorney for the Division of Ratepayer Advocates

[24] Response of PG&E, p 2.

California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2069
Fax: (415) 703-2262

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