BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill 237 Related to Direct Access.	Rulemaking 19-03-009 (Filed March 14, 2019)

OPENING COMMENTS OF NRG ENERGY, INC. ON STAFF REPORT PROVIDING RECOMMENDATIONS ON THE SCHEDULE TO REOPEN DIRECT ACCESS

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October 16, 2020

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Pursuant to the ruling issued on September 28, 2020 by Administrative Law Judge McKinney, NRG Energy, Inc. ("NRG") hereby submits these comments on the September 28, 2020 Report Providing Recommendations on the Schedule to Reopen Direct Access ("Staff Report") prepared by Energy Division staff of the California Public Utilities Commission ("CPUC" or "Commission").

I. INTRODUCTION

NRG appreciates Commission staff's effort in preparing the Staff Report as the next step in addressing California's evolving electricity market. NRG supports the general conclusion that recommends expansion of the direct access market.

NRG does not currently operate as a direct access provider in California. However, with nearly four million customers, NRG is one of the country's largest competitive retailers. Our customers are free to hire us or fire us. We are able to offer innovative flexible-demand products to our customers without years-long administrative proceedings. We have no recourse through

public utility regulation or public ownership to after-the-fact surcharges should our costs exceed our revenues. Accordingly, NRG welcomes the opportunity for the direct access market to expand both in its permitted volumes and, indeed, across additional customer classes.

While, again, NRG commends the Staff Report for concluding that the market should continue to be opened, the Staff report is permeated with suggestions that the presence of direct access providers may cut against California's policy priorities on both decarbonization and reliability. This is wrong—or, at least, it does not have to be this way. In other markets in this country and around the world, competitive markets in retail electricity are supportive of public policy requirements around both reliability and decarbonization. Specifically, an efficient, competitive retail structure in ERCOT has successfully attracted new investments in renewable energy, energy storage, and demand response.[1] In NRG's case, our retail customer base in ERCOT led us to sign long-term contracts for 1,600 MWs of solar installed capacity last year alone.[2]

The Commission, itself, through its California Customer Choice initiative in 2018-2019, surveyed a variety of retail competition models to identify market design components to support improvements to the California retail structure.[3] As such, the Commission should consider broader recommendations to the legislature on foundational market design features under which a fully competitive retail choice model can deliver policy success at scale and across all customer classes.

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[1] "Resource Adequacy Challenges in Texas: Unleashing Demand-Side Resources in the ERCOT Competitive Market," Alison Silverstein, Environmental Defense Fund, May 2020. https://www.edf.org/sites/default/files/documents/EDF-ERCOT-Report.pdf

[2] NRG Energy, Inc., 2019 Form 10-K, p. 10.

[3] *See* "Choice Action Plan and Gap Analysis," (December 2018), published in connection with the Commission's undertaking, "California Customer Choice: an Evaluation of Regulatory Framework Options for an Evolving Electric Market" (https://www.cpuc.ca.gov/customerchoice/).

II. PROPOSED ADDITIONS TO STAFF RECOMMENDATIONS

A. The Commission report should propose an exemption from the Direct Access cap to facilitate the deployment of demand-side resources in support of grid reliability

The Staff Report should recommend to the legislature a fast-track for an opening of the retail market tied to direct-access providers' ability to deliver demand flexibility in support of grid reliability. A diverse set of retailers working to sell flexible-demand rate plans or technologies to customers is something that would *help solve* California's reliability problems, not exacerbate them. The California agencies' *Preliminary Root Cause Analysis for the Mid-August Heat Storm* recognizes that the rapid deployment of "demand response and flexibility" is the only new resource, not already under construction, that can add resource adequacy ("RA") to the CAISO system at a rapid pace.[4] The *Preliminary Root Cause Analysis* commits the Commission to "focus on 'demand side' resources such as demand response" and "to expedite the regulatory and procurement processes to develop additional resources" in a timely manner.[5]

With recent experience of relying largely on voluntary and uncompensated load reductions to stave off additional rolling blackout events after the CAISO Stage 3 emergencies on August 14 and 15, 2020, the Commission should appropriately expect that potential demand response resources in California are greater than those captured under existing programs. The Commission should consider ways to leverage retail competition to unleash untapped demand response potential similar to that which is occurring in other markets. While the Commission has made great strides in adopting time-of-use retail rates to shift load, these reforms have been time-consuming and the current moment calls for more flexibility and creativity, which can best be

[4] *See Preliminary Root Cause Analysis for the Mid-August Heat* (Oct. 6, 2020), joint publication of CAISO, CPUC, and CEC ("California agencies"), cover letter at p. 2.
[5] *Id*. at 65.

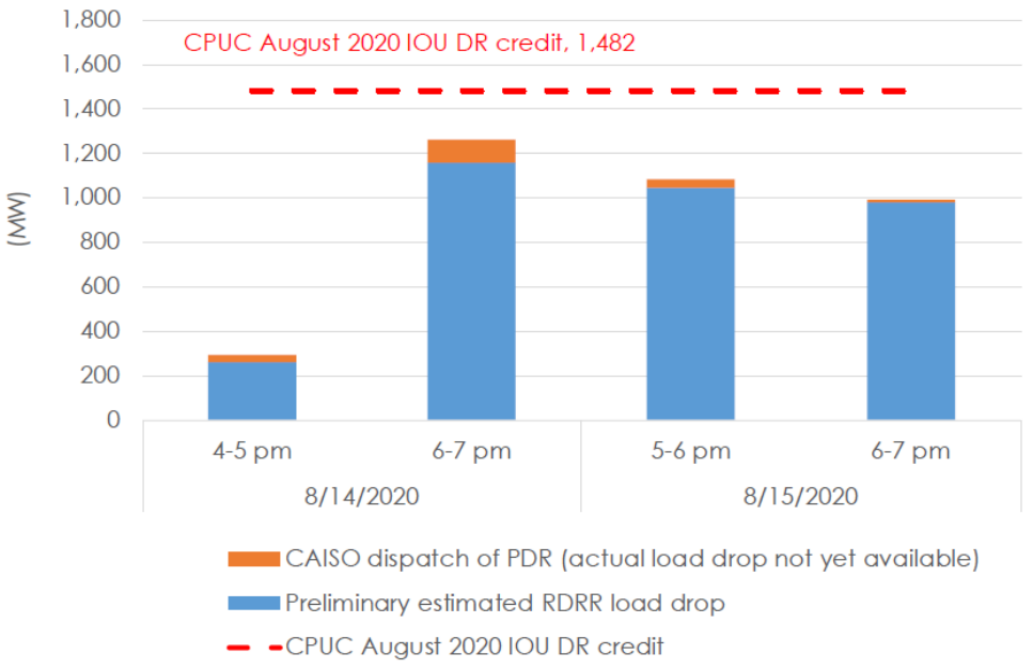
accomplished through numerous retailers vying for the business of customers interested in demand-response products. For comparison, under the retail competitive model in ERCOT, Load-Serving Entities ("LSEs") are able to offer a wider range of retail pricing options and to popularize demand response adoption among all classes of end-use customers.

The Commission should recommend that the Legislature adopt an exemption from the direct access cap for existing and new Electric Service Providers ("ESPs") to offer services that shed or shape load as part of their direct access supply function. This would establish a limited opportunity for the competitive retail market to flourish at a time when customers have been faced with mass public appeals for conservation to preserve reliability—but frequently have not been compensated for doing so, nor faced with options ahead of time to enroll in rate plans or install demand-side technologies that would rationalize and automate the energy conservation that has provided enormous assistance in keeping the lights on in California this year.

The *status quo* business model that exists for the deployment of demand response in California is not adequate. Today, most demand response is deployed through the investor-owned utilities who act as gatekeepers of demand response programs. For RA purposes, this demand response is recorded *ex ante* as a credit before the utilities' RA obligations are transmitted to the CAISO.[6] A small amount of additional demand response is not supplied through LSEs, but is bid directly into CAISO's markets. The *Preliminary Root Cause Analysis* suggests these programs underperformed substantially, when compared with the credit for RA they received.[7]

[6] *Id.* at 52-53.
[7] The analysis notes that because settlement data becomes available only two months after the fact, the early October 2020 analysis did not include full and final data around the mid-August 2020 outage events. *Id* at 54.

Figure 4.5: Credited IOU Demand Response: Preliminary Estimated RDRR Response and PDR Dispatch vs. CPUC August 2020 DR Credit



Even if these resources *had* performed to the expectation that 1,339 MW in demand response capability would be available in the CAISO market for summer 2020,[8] this is not a substantial quantity of demand-side resources in a system peaking at roughly 30 times that quantity. In a marketplace that is becoming infused with intermittent sources of supply, it is critically important that demand become more flexible.

By contrast, the ERCOT market is becoming a proof of this competitive retail concept in support of grid reliability. There, it would not be an understatement to conclude that the marginal unit of resource adequacy is a demand-side resource—not a supply-side one. And those resources are being deployed by ERCOT's version of ESPs, which engage in a competition at retail across all customer classes. The product offers these direct access providers in ERCOT

[8] California Independent System Operator's 2020 Summer Loads and Resource Assessment. May 2020. http://www.caiso.com/Documents/2020SummerLoadsandResourcesAssessment.pdf .

make are less constrained by the long implementation timelines of regulation.[9] Moreover, because customers are free to hire and fire their direct access provider, the products offered in a competitive retail market are tailored both to customer preference *and* to economic efficiency in providing actual responsiveness to avoid critical load hours and their resulting high prices.

The result in ERCOT has been a market where nearly *one-fifth* of all customers, across classes, adopt a price-responsive demand retail rate plan.[10] More than one million customers served by ESPs in ERCOT collectively contributed 3,603 MWs in demand response in the critical hours of the 2019 summer.[11] Additionally, 5,506 MWs of load is estimated by the market operator to be eligible to bid into ERCOT's ancillary services market, and roughly half of that load does make an offer during critical hours.[12] Even allowing for the larger size of the ERCOT market versus the CAISO market,[13] ERCOT has a substantially greater volume of resources that are actually working to shed or shape demand—made possible through that market's version of ESPs.

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[9] SCE's time-of-use rate program was proposed in mid-2017, approved in late 2018, and was implemented this month, two and a half years after it was first proposed and nearly a decade after the company's ratepayers began paying for smart meters. https://www.sce.com/residential/rates/Time-Of-Use-Residential-Rate-Plans (rates effective Oct. 1, 2020). Decision 18-11-027. https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M248/K308/248308326.PDF .

[10] "Who's the Buyer: Retail Electric Market Structure Reforms in Support of Resource Adequacy and Clean Energy Deployment," Rob Gramlich & Frank Lacey, *Grid Strategies,* (prepared for Wind Solar Alliance) (March 2020), p. 4. Available at: https://windsolaralliance.org/wp-content/uploads/2020/03/WSA-Retail-Structure-Contracting-FINAL.pdf .

[11] 2019 Annual Report of Demand Response in the ERCOT Region (March 2020) at 13-14. Available online for download at: http://www.ercot.com/services/programs/load .

[12] *Id.* at 2.

[13] ERCOT is approximately 50% larger on a peak-load basis than CAISO.

B. The ESP business model is a more natural conduit to deploy demand-side resources

While the Staff Report speaks to concerns about load "fragmentation" as a driver of reliability concerns, it can also work in the opposite direction.[14] System reliability *benefits* from motivated retailers who create customer-driven solutions to support reliability, while avoiding unnecessary capital investments and high wholesale energy prices. In California, where smart meters are now nearly ubiquitous after billions of dollars of utility investments backed by ratepayers, the technological backbone is already in place for the introduction and optimization of many of these demand-side resources.

Law and regulation should provide an opening for LSEs with a strong financial incentive to provide efficient and responsive demand-side resources to market them to customers and deploy them as part of an LSE's overall offer. ESPs face an especially pronounced financial incentive to deploy demand-side resources. That is because other variants of LSEs, including investor-owned utilities and community choice aggregators, are permitted to make what amounts to a retail offer of a *non-fixed* quantity of kWhs of energy at a *fixed* price. Such a rate plan leads to rising customer consumption at high-priced/high-demand hours that outpaces the revenue collected at that fixed price. But certain LSEs are permitted to surcharge future rates to account for these past losses through utility rate regulation or other government rate-setting. That is not the case for ESPs, whose shareholders—not customers—bear the risk of these price/quantity excursions and have no avenue for an after-the-fact recovery of these losses. That alone imposes

[14] Staff Report at 10.

a strong imperative on ESPs to sign up customers to either demand response technologies or to price-responsive demand retail rate plans.[15]

In short, it is important for the Commission, in its consideration as an economic regulator, to identify that the economic incentives at play in the ESP business model will tend to promote demand-side resource solutions that the *Preliminary Root Cause Analysis* has identified as critical. At the same time, it is important to identify that the economic incentives facing other LSE business models on this point are not as pronounced. Properly structured, a competitive retail market will create conditions where a competition in product offers to customers around demand-side resources can be as robust as the wholesale competition between generating assets.

III. RESPONSES TO SPECIFIC STAFF RECOMMENDATIONS

In subsections below, NRG responds to specific staff recommendation.

A. DA expansion schedule

1. Annual increment of 10 percent of eligible non-residential load

As described above, there should be a general exemption to the direct access cap for ESPs who serve customers, in any customer class, with products that incorporate features to shed or shape load in support of reliability.

A phase-in along the lines the Staff Report recommends might be appropriate, but the gating at every step for the Commission to determine whether the increment will in fact be opened will not promote the certainty in the market model. This could dampen existing and new

[15] For the same reasons, ESPs have a strong incentive to contract forward their likely supply requirements so to hedge and not be exposed to high pricing in the day-ahead and spot markets. While the staff report worries about ESP compliance with RA and IRP goals, the report should acknowledge that ESPs possess a fundamental economic incentive to be resource adequate on a portfolio basis. If ESP compliance with RA and IRP is a problem—and we agree with AReM's comments simultaneously filed that CCA compliance appears to be a much greater one—then that is likely a comment about the design of those policies, and not the ESP business model itself.

ESPs' willingness to enter the market and make long-term investments, the lack of which is something the Staff Report identifies as a problem.

Additionally, as the Staff Report recognizes, the challenges with reliability planning while managing load migration are not isolated to direct access, but are also a function of the emergence of community choice aggregators ("CCAs").[16] No such restriction exists on the growth of CCAs, and if the Commission does propose a restriction on ESP load migration, it should propose to the legislature symmetrical restrictions on CCAs, since the perceived harms underlying the growth of either are identical. However, as described above, NRG recommends caution on such limitations.

2. Condition each expansion on Commission review and approval of compliance with RA, Integrated Resource Planning, and Renewable Portfolio Standard requirements, as subject to CPUC approval

The Staff Report is ambiguous on whether each single ESP would have to be in compliance for direct access to be further opened. This would be inappropriate. Authorizing expansion of direct access is a separate consideration from enforcement of the agency's regulations on particular market participants. The entrance or disqualification of ESPs into or out of the market should be considered on the basis of an individual provider's performance and financial health, not on the basis of the whole class. This is clearly not an approach the Commission has taken or would take with respect to investor-owned utilities or community choice aggregators, and it would similarly be inappropriate here.

Indeed, the presence of additional competition, subject to meaningful qualification standards to be an ESP, serves to discipline the market and drives out of the market companies that do not serve customers well or in compliance with the law. If the Commission exercises its

[16] Staff Report, p. 23.

authority to revoke the license of an ESP for non-compliance with applicable state law and regulation, the Commission would not need to create conditions for expansion based on collective performance in the same LSE class.

NRG is not currently registered as an ESP in California. If NRG were to expand its retail operation to California, then the Commission should only use NRG's performance in serving retail customers and compliance with governmental programs to assess whether NRG can successfully perform as an ESP in California. Our company has teams that specialize in regulatory compliance, origination and procurement, and customer care. It would be unreasonable, were NRG to apply to become an ESP in the state, for NRG's commercial opportunities to serve customers to be defined by another ESP's limitations. If the Commission is concerned about potential bad actors, it should consider establishing a score card for ESPs (and, for that matter, other LSEs) as other jurisdictions have done.[17]

3. Order annual expansion to take place on a schedule that will allow LSEs the ability to fully comply with RA requirements

NRG agrees that any retail competitive service expansion should synchronize with the annual RA compliance schedule and provide a predictable seasonal window to help match buyers and sellers in transacting RA resources. As NRG noted in its informal comments on the Retail Choice Gap Analysis,[18] it is important that retail choice providers be held accountable for their share of RA requirements. Having a predictable annual service expansion schedule that synchronizes with RA compliance cycles would help position every LSE in meeting its share of RA requirements and help each provider avoid noncompliance.

[17] *See, e.g.,* "Power to Choose" website http://www.powertochoose.org/scorecard/Scorecard.pdf .
[18] NRG, Informal Comments on Draft Gap Analysis, (November 2018) https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy_-_Electricity_and_Natural_Gas/NRG%20Comments.pdf .

B. Recommendations for Legislative Action

1. Statutory authority to enforce compliance with IRP GHG under Public Utilities Code Section 454.52(b)

NRG agrees in concept with the need to ensure that the integrated resource planning ("IRP") process delivers greenhouse gas ("GHG") reductions, but the Commission already has authority granted by the legislature under Public Utilities Code Section 454.52(a) whereby the Commission "shall ensure" load serving entities meet the GHG reduction targets, procure at least 60 percent eligible renewable energy by 2030, and ensure system and local reliability on both a near-term and long-term basis, including meeting the near-term and forecasted long-term RA requirements.

Each LSE, under the IRP process, should be allowed to tailor its resource mix to meet the needs and desire of its customers. The Commission, under the IRP process, continues to consider and develop GHG metrics to evaluate LSE portfolios and has already initiated a citation program authorizing staff to cite LSEs for non-compliance with IRP filings and reporting requirements.[19] If the Commission recommends expansion of statutory authority under Section 454.52, it should clearly articulate what aspect of existing authority is insufficient and why.

2. Statutory authority to enforce Public Utilities Code Section 380

NRG agrees that the Commission should continue to have clear authority to enforce RA requirements. However, the Commission should use the occasion for legislative action in connection with the expansion of direct access to seek a modification in the statute to designate a non-utility central procurement entity to carry out needed reliability procurement on a residual basis. As background, in the Commission's decision to adopt a central buyer framework for the

[19] Energy Division Final Resolution E-5080, (August 6, 2020) https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M344/K806/344806352.PDF .

procurement of RA, the Commission addressed issues of statutory authorization in connection with its determination to identify PG&E and SCE as the central procurement entity for local RA in their service areas.[20] To eliminate any ambiguity in this regard and to further the Commission's ability to create market rules that do not favor one participant over another, NRG recommends that the Commission include a request for statutory authorization to administer the RA program in a competitively neutral manner. Specifically, the Commission should seek legislative authority to allow it to remove the central buyer responsibility from PG&E and SCE and place it with an entity unlikely to be a participant in the direct access market.

3. Statutory authority to expand CPUC authority to revoke ESP licenses and CCA registration for repeated non-compliance with RA, RPS, or IRP

NRG agrees in concept that a clear risk and reward structure is necessary for a healthy competitive retail market. However, the Legislature has already granted authority to revoke ESP operating licenses under Public Utilities Code Section 394.25(b), with additional enforcement authority granted to enforce Public Utilities Code Sections 2102, 2104, 2107, 2108, 2111, 2112, and 2114 against ESPs as if those ESPs were public utilities as defined in those sections. As described above, ESPs have a strong, organic incentive to be "resource adequate" as that term is properly understood—to have contracted in advance for their expected load service obligations, or to have consummated retail agreements around demand-side resources that allow demand to shed or be shaped to supply trends. The same is not true of other LSEs who rely on rate regulation or for whom governmental ownership means there is no shareholder financial responsibility. Consequently, oversight of ESPs as it relates to RA and IRP should be less necessary and less onerous than LSEs who do not have a similar business model that exposes shareholder-owners to financial losses.

[20] See D.20-06-002 (June 11, 2020), mimeo, pp. 36-37.

4. Provisions to address cost shifting as a result of load migration between LSEs

NRG disagrees with the way the "cost shifting" is framed in the Staff Report with respect to community choice aggregators when it advocates the legislature's establishment of a "stranded cost" recovery mechanism because of "unforeseen load departure."[21] CCAs are not a provider of last resort, a regulatory obligation that primarily justifies a Commission ratemaking remedy to address cost-shifting. It would be absurd for the California market to devolve into a situation where multiple LSEs in a single service territory each had an opportunity to charge customers supplied by a different provider for "stranded costs." Additionally, nothing seems to restrict CCAs from the opportunity to offer contracts to customers of a sufficient length or terms to cover the risk in question here.

A robust and healthy competitive retail market must have clear signals for risk and reward. The risk of load migration disciplines purchases that have a high risk of being or becoming "out of the money." The introduction of a stranded cost recovery mechanism for an LSE that is *not* a provider of last resort would introduce substantial moral hazard into the market. It would further relieve certain LSEs, which already lack strong financial incentives, of one of the incentives (not losing customers) that they possess that does serve to discipline uneconomic behavior.

Additionally, with respect to investor-owned utilities, the Staff Report opines, "Direct Access expansion could lead to cost shifting by changing the composition of customers within each rate class. This could occur because customers with a *lower cost of service* have an economic incentive to depart IOU service, leaving the IOUs with customers with *a higher*

[21] Staff Report at 26.

average cost-of-service" (emphasis added).[22] But in this example, the cost shift is caused not by load migration, but by the fact that these hypothetical customers with different costs of service are served under an average rate. That ratemaking *is* the cost shift—direct access is a *remedy* to the cost shift. The Staff Report has it backwards. The Staff Report should make clear that Direct Access helps discipline cost shifts that are introduced by the Commission's rate regulation.

The experience of implementing the PCIA fee, frustrating to every LSE provider regardless of LSE type in recent years, showcases the infeasibility of an administratively assessed fee structure as a solution to address LSE commodity over- or under-procurement due to load migration. In lieu of an exit fee that is arbitrarily assessable to certain LSE types, the Commission could explore processes to support all LSEs to transact and trade surplus commodities (with associated regulatory compliance instruments' value protected) as the primary tool to allow individual LSEs to mitigate load migration risks. Such process could be built into the annual competitive service expansion schedule.

IV. CONCLUSION

In summary, NRG urges the Commission to recommend that the legislature provide a fast-track to allow ESPs that desire to provide demand response solutions to customers to do so in support of reliability. ESPs wishing to serve customers with products that shape or shed demand should not have those loads counted against the cap on direct access. Additionally, restrictions on customer classes eligible to do business with ESPs should be lifted for the purpose of offering demand response products into the market.

NRG also generally agrees with the Commission's posture in opening the market more broadly. However, the Commission should not recommend to the legislature or impose itself

[22] Staff Report at 25.

extraneous constraints on ESPs that do not exist for other LSEs, or create entitlements for other LSEs that ultimately hamper the choices and product availability customers in California should have, now more than ever.

Respectfully submitted on October 16, 2020.

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