

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas & Electric
Company (U 39-E) for Approval of Demand
Response Programs, Pilots and Budgets for
Program Years 2018-2022.

And Related Matters.

Application 17-01-012
(Filed January 17, 2017)

Application 17-01-018
Application 17-01-019

**JOINT MOTION OF CPOWER, ENEL X NORTH AMERICA, INC., AND
ENERGYHUB (JOINT DR PARTIES) TO STRIKE PORTIONS OF
THE RESPONSE OF THE PUBLIC ADVOCATES OFFICE TO THE
ADMINISTRATIVE LAW JUDGE'S RULING OF FEBRUARY 28, 2019**

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CPower, Enel X North America, Inc. (formerly known as EnerNOC, Inc.), and EnergyHub (Joint DR Parties) respectfully submit this Joint Motion to Strike Portions of the Response of the Public Advocates Office (PAO) to the Administrative Law Judge’s (ALJ’s) Ruling of February 28, 2019 (February 28 ALJ’s Ruling). This Joint Motion to Strike is filed and served pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure.

**I.
FACTS AND LAW IN SUPPORT OF MOTION TO STRIKE**

A. FACTS

On December 6, 2018, Southern California Edison Company (SCE) filed a motion requesting that an “independent audit” conducted by SCE to “verify the data” upon which one Demand Response Auction Mechanism (DRAM) Seller “based its claimed Demonstrated Capacity under its DRAM contract” be made a part of the Energy Division’s final evaluation report of DRAM subject to confidentiality treatment.¹ That is, no DRAM Seller or market

¹ SCE Motion, at pp. 1, 2.

participant would be able to see or access this audit, referenced by SCE as the “Nexant Audit Report.”²

On December 12, 2018, Pacific Gas and Electric Company (PG&E) similarly requested inclusion of the “confidential” “PG&E Summary of 2018-2019 DRAM RFO Audit Analysis, Results As Of December 4, 2018” (“PG&E December Audit Analysis”) in Energy Division’s final DRAM evaluation report. PG&E’s motion suggested that its audit, like that performed by SCE, apparently related to a review of the “claimed Demonstrated Capacity that was invoiced to PG&E” of three DRAM sellers “to verify the data upon which the individual Seller based its claimed Demonstrated Capacity.”³

On December 21, 2018, the Joint DR Parties timely responded to SCE’s Motion. By that response, the Joint DR Parties stated that, while they did not object to the use of SCE’s audit in Energy Division final DRAM evaluation, they did “object to this being provided solely in a non-transparent fashion.”⁴ The Joint DR Parties were also concerned about representations made by SCE in support of its motion that appeared to extend the basis or outcome of that audit to other DRAM Sellers, beyond the one targeted by the audit, that could result in the audit being used to influence the outcome of the Energy Division’s DRAM evaluation.

In order to further transparency, avoid such an outcome, and ensure a level-playing field with full notice and opportunity to be heard by all stakeholders, the Joint DR Parties asked that SCE’s Motion be denied “to the extent that it would permit Energy Division to rely on a confidential audit report to inform the evaluation of DRAM or to reach generalizations about the future of DRAM or other DRAM Sellers that could serve as the basis for developing recommendations on any future DRAM structure, bidding protocol, or contract term, unless said

² SCE Motion, at p. 1.

³ PG&E Motion, at p. 2.

⁴ Joint DR Parties Response to SCE Motion, at p. 2.

report is used in a transparent fashion as one data point among many.”⁵ Instead, the Joint DR Parties urged that “a discussion regarding if and how Energy Division intends to rely on the Nexant Audit Report to support any changes to DRAM should take place in the public Workshop that is scheduled for January 16, 2019” and that such discussion would also include consideration of “whether or not SCE has actually followed the protocol required to conduct or release such an audit for any purpose.”⁶

On December 27, 2018, the Joint DR Parties also timely responded to PG&E’s Motion and requested that it be denied on grounds similar to those stated in the Joint DR Parties’ response to SCE’s Motion. Thus, in responding to the PG&E Motion, the Joint DR Parties stated that they appreciated the concerns raised by both SCE and PG&E about ensuring that the integrity of DRAM resources submitted for RA purposes, but continued to object to the use of selective information in a non-transparent manner that could negatively affect the evaluation of DRAM broadly.⁷ Again, the Joint DR Parties stressed the need for further transparency in the evaluation of DRAM, and objected to the use of confidential information in a manner that “would permit Energy Division to rely on a confidential audit report to inform the evaluation of DRAM or reach generalizations about the future of DRAM or other DRAM Sellers, as the basis for developing recommendations on any future DRAM structure, bidding protocol, or contract term, unless said report is used in a transparent fashion as one data point among many.”⁸

B. APPLICABLE LAW

On January 4, 2019, assigned Administrative Law Judge (ALJ) Hymes issued a “Ruling Issuing Evaluation Report of the Demand Response Auction Mechanism Pilot, Noticing January

⁵ Joint DR Parties Response to SCE Motion, at p. 3.

⁶ *Id.*

⁷ Joint DR Parties Response to PG&E Motion, at p. 2.

⁸ *Id.*, at p. 3.

16, 2019 Workshop, and Denying Motion[s] to Require Audit Reports in the Evaluation Report” in this proceeding (January 4 ALJ’s Ruling). By the January 4 ALJ’s Ruling, ALJ Hymes ruled as follows:

- SCE’s December 6, 2018 Motion seeking to make its Nexant Audit Report part of the Commission Energy Division’s final DRAM evaluation report is denied.⁹
- PG&E’s December 12, 2018 Motion seeking to make its December 2018 Audit Analysis for its DRAM part of the Energy Division’s final DRAM evaluation report is denied.¹⁰

Denial of these motions also had the result of denying the requests of both SCE and PG&E, included in their respective motions, for rulings authorizing SCE and PG&E to file “under seal” and be granted “confidential designation” of their audits.¹¹ To this date, no action has been taken by the ALJ to receive these audits into the record in any form, including under seal.

Instead, in denying these motions, ALJ Hymes further ruled:

“The Pilot Evaluation is a staff evaluation performed *consistently across all actors* in the Auction Pilot, including PG&E, SCE and San Diego Gas & Electric Company. The specifics of the SCE and PG&E Auction Pilot individual audits are *unknown at this time and may not be comparable to the Pilot Evaluation*. While we do not include the two utility audits as part of the Pilot Evaluation performed by staff, the *results of the two audits will be considered during this proceeding*. Parties will have an opportunity to comment on the two audits and results during discussions at the January and February workshops and in responses and comments to a ruling to be issued following the workshops.”¹²

While the January 4 ALJ’s Ruling states above that the “results of the two audits will be considered in this proceeding,” no opportunity to see or discuss those results were provided at

⁹ January 4 ALJ’s Ruling, at pp. 3-4.

¹⁰ *Id.*, at pp. 3, 5.

¹¹ PG&E Motion (December 21, 2018), at pp. 3-4; Appended Proposed Ruling granting Confidential Treatment and Declaration in Support; SCE Motion (December 6, 2018), at p. 3; Proposed Ruling granting motion to file under seal.

¹² *Id.*, at pp. 3-4; emphasis added.

the January and February workshops. In addition, no mention is made of the audits at all in the ALJ's Ruling "Directing Responses to Questions Resulting from the February 11-12, 2019 Demand Response Auction Mechanism Workshop and Comments on Proposals to Improve the Mechanism" issued in this proceeding on February 28, 2019 (February 28 ALJ's Ruling). Finally, neither audit is included or referenced in any of the attachments to the February 28 Ruling, which relate to DRAM Proposals discussed at the Workshop nor, as the January 4 ALJ's Ruling makes clear, were the audits included in the Energy Division's final DRAM evaluation report. Thus, as of this date, parties have not yet been authorized to comment or respond to the audits in any ruling, and, in accordance with the January 4 ALJ's Ruling, the SCE and PG&E motions, which included requested confidential treatment of the audits, have been denied

II.

THE PORTIONS OF THE PUBLIC ADVOCATES OFFICE'S RESPONSE TO THE FEBRUARY 28 ALJ'S RULING THAT RELY UPON AND ATTACH WHOLLY REDACTED VERSIONS OF THE SCE AND PG&E AUDITS VIOLATE THE JANUARY 4 AND FEBRUARY 28 ALJ'S RULINGS AND MUST BE STRICKEN.

On March 29, 2019, the Public Advocates Office (PAO) filed its Response to the questions posed by the February 28 ALJ's Ruling resulting from the February 11 and 12 DRAM Workshops and comments on the DRAM proposals. In offering its responses to Questions 1, 2, 10, and 22, PAO directly relies on "Independent Audit Reports" from SCE and PG&E, which are expressly identified as those referenced in SCE's December 6, 2018 Motion and PG&E's December 12, 2018 Motion.¹³

Further, PAO's Response includes both audits as Attachments A ("PG&E Confidential Audit Report") and B. (SCE Confidential Audit Report) each of which is labeled "Redacted in Its Entirety." In addition, on the same date, PAO filed a Motion for Leave to File Under Seal both

¹³ PAO Response, at pp. 4, 9, 16, and footnote 6, at p. 4 (clearly identifying that the "audits" in question were those for which SCE and PG&E sought inclusion in the DRAM evaluation and confidential treatment in their December 6, 2018 and December 12, 2018 Motions).

audits on the grounds that PG&E's December 12, 2018 Motion and SCE's December 6, 2018 Motion had "labeled" these audits as "confidential" either as market sensitive/competitive data (PG&E) or pursuant to Section 13.1 of the DRAM contract (SCE).

PAO's Response and use of these audits *never* makes any reference to the January 4 ALJ's Ruling *denying* both Motions that sought to have these audits made part of the record on the Energy Division's final DRAM evaluation and have them accorded confidential treatment. Further, PAO's Response never supports reliance on these audits by reference to any question or material made public by the February 28 ALJ's Ruling on which responses and comments were sought.

As stated above, the January 4 ALJ's Ruling not only denied SCE's and PG&E's motions on which PAO relies, but the process identified for discussing or commenting on those audits has also not yet been invoked in this proceeding. To allow PAO to now introduce, and keep confidential, the SCE and PG&E audits, which were sought to be introduced into the record through motions that were denied and are to be the subject of a process that has not taken place, violates and seeks to create an end-run around the express rulings made by both the January 4 and February 28 ALJ's Rulings. To allow these audits to become part of the record in this proceeding in the manner sought by PAO's Response also clearly violates the notice and opportunity to be heard by all stakeholders on these audits that was intended by the January 4 ALJ's Ruling.

Those portions of the PAO Response that rely on the SCE and PG&E Audits or seek to introduce them into this record, with confidential treatment, must, therefore, be stricken. Further the Commission must act to follow through on the process announced by the January 4 ALJ's

Ruling to provide all parties the equal and transparent opportunity to first publicly discuss the results of the audits and provide responsive comments in turn.

III. REQUESTED RELIEF

Based on the grounds stated above, the Joint DR Parties move for the following portions of the PAO Response to be stricken (as shown in strike-through below):

- *PAO Response, at page 4, lines 2-3:*

~~PG&E's Introduction to DRAM Working Group Proposals,⁵ and the Independent Audit Reports from Southern California Edison Company (SCE) and PG&E, before considering whether to extend the Auction Mechanism.⁶~~

- *PAO Response, footnote 6, at page 4:*

~~⁶Independent Audit Reports from SCE and PG&E raise serious concerns and identify defects in the way certain DRPs calculate capacity on monthly invoices and supply plans. The audits suggest certain DRPs significantly misrepresented actual load shedding abilities and curtailable capacity of subject customers. As a result, ratepayers (and IOUs) paid for inflated or non-existent RA capacity. See Motion of Southern California Edison Company (U 338 E) For Inclusion of Independent Audit Report in Energy Division's Final Evaluation Report of the Demand Response Auction Mechanism and Motion of Pacific Gas and Electric Company (U 39 E) For Inclusion of "PG&E Summary of 2018-2019 DRAM RFO Audit Analysis, Results as of December 4, 2018" in Energy Division's Final Evaluation Report of the Demand Response Auction Mechanism. PG&E's confidential Independent Audit Reports is attached herein as Attachment A and SCE's confidential Independent Audit Reports is attached herein as Attachment B.~~

- *PAO Response, at page 5, lines 26-28:*

~~recommendations successfully address the key issues identified by the utilities, Energy Division Staff, and the Independent Audit Reports mentioned in the above response to Question 1.~~

- *PAO Response, at page 9, second full paragraph:*

~~Two separately commissioned Independent Audit Reports from SCE and PG&E similarly found major discrepancies in the methodologies used by certain DRPs to represent Demonstrated Capacity in the monthly Supply Plans and invoices. Certain DRPs significantly overstated capacity by up to three times~~

~~overall customer usage.¹² Current DRAM rules fail to clearly address these issues, thus providing loopholes for DRPs to massively inflate Demonstrated Capacity, and thus inflate the costs to ratepayers.~~

- *PAO Response, footnote 12 at page 9:*

~~¹² Motion of Southern California Edison Company (U-338-E) For Inclusion of Independent Audit Report in Energy Division's Final Evaluation Report of the Demand Response Auction Mechanism at p. 2.~~

- *PAO Response, at page 16, Lines 13-14:*

~~DRAM identified in the Staff Evaluation Report and Independent Audits mentioned above.~~

- *PAO Response, Attachment A, to be stricken in its entirety.*
- *PAO Response, Attachment B, to be stricken in its entirety.*

Consistent with the January 4 ALJ's Ruling, the Joint DR Parties further move for the PAO's Motion for Leave to File under Seal to be denied as made moot by the material required to be stricken above and as lacking support where both the SCE and PG&E Motions on which the PAO's Motion relies were denied by the January 4 ALJ's Ruling.

Respectfully submitted,

April 10, 2019

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