

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 RESPONSE OF CPOWER, ENEL X NORTH AMERICA, INC., AND  
ENERGYHUB (JOINT DR PARTIES) TO MOTION OF THE PUBLIC ADVOCATES  
OFFICE TO ADMIT THE CONFIDENTIAL AUDIT REPORTS OF SOUTHERN  
CALIFORNIA EDISON COMPANY AND PACIFIC GAS AND ELECTRIC COMPANY**

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CPower, Enel X North America, Inc. (formerly known as EnerNOC, Inc.), and EnergyHub (Joint DR Parties) respectfully submit this Joint Response in opposition to the Motion of the Public Advocates Office (PAO) to Admit the Confidential Audit Reports of Southern California Edison Company and Pacific Gas and Electric Company filed on April 25, 2019. This Joint Response is timely filed and served pursuant to Rule 11.1(e) of the Commission's Rules of Practice and Procedure. Pursuant to Rule 11.4(b) of the Commission's Rules of Practice and Procedure, the Joint DR Parties have also responded this same day in opposition to a companion Motion for Leave to File Under Seal filed by PAO.

Today, May 3, 2019, an ALJ's Ruling was issued that addresses and denies an earlier motion by PAO filed on March 29, 2019, seeking to file the confidential audit reports under seal. The May 3 ALJ's Ruling, however, did not reference either of PAO's April 25 Motions described above. While the Joint DR Parties believe that the May 3 ALJ's Ruling should be dispositive of PAO's April 25 Motions as being without merit, the Joint DR Parties are necessarily filing these responses out of an abundance of caution to complete the record and ensure that the April 25 Motions by PAO are also denied.

## **I. BACKGROUND**

On April 10, 2019, the Joint DR Parties filed a Motion to Strike Portions of the Response of the Public Advocates Office to the Administrative Law Judge's (ALJ's) Ruling of February 28, 2019. In that Motion, the Joint DR Parties detailed the factual background related to two motions filed in December 2018 – one filed by Southern California Edison Company (SCE) on December 6, 2018, and one filed by Pacific Gas and Electric Company (PG&E) on December 12, 2018. By those Motions, SCE and PG&E requested that “confidential” audits performed by the utility (PG&E) or by a consultant at the direction of the utility (SCE (Nexant)) to “verify the data” upon which one DRAM Seller had based its claimed Demonstrated Capacity under its DRAM Contract be made a part of the Energy Division's final evaluation report of the Demand Response Auction Mechanism (DRAM) and be given complete confidential treatment. As detailed in that Motion to Strike, the Joint DR Parties had responded in opposition to both motions on similar grounds, principally objecting to the audits “being provided solely in a non-transparent fashion”<sup>1</sup> and suggesting that the basis or outcome of that audit could be extended to DRAM itself or other DRAM Sellers beyond the one seller targeted by their audits. The Joint DR Parties had urged that the Commission hold a public discussion at the DRAM Workshops on the audits and the protocols followed by both utilities in conducting those audits.<sup>2</sup>

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 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 denied both Motions and ruled:

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<sup>1</sup> Joint DR Parties Response to SCE Motion (December 21, 2018), at p. 2.

<sup>2</sup> *Id.*

*“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.”*<sup>3</sup>

That opportunity for parties to see or discuss those results at the January and February workshops did not occur and no mention was made of either audit in a later 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).

Yet, on March 29, 2019, the Public Advocates Office (PAO), in offering its responses to Questions 1, 2, 10, and 22, to the February 28 ALJ’s Ruling, directly relied 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.<sup>4</sup> Further, PAO’s March 29 Response also included each audit as an Attachment labeled “Redacted in Its Entirety.” In addition, on the same date, PAO filed a Motion for Leave to File Under Seal both audits in full 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).

On April 10, 2019, the Joint DR Parties filed a Motion to strike those portions of PAO’s March 29 Response that referenced the confidential audits and the attachments that included the

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<sup>3</sup> January 4 ALJ’s Ruling, at pp. 3-4; emphasis added.

<sup>4</sup> PAO Response (March 29, 2019), 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 as wholly redacted. The Joint DR Parties stated that PAO in its March 29 Response never referenced the January 4 ALJ's Ruling, which had denied SCE's and PG&E's motions on which PAO relied to include the audits, never supported reliance on these audits, and never stated how or if the process identified for discussing or commenting on those audits been invoked in this proceeding, which, again, it has not through this date.

On April 24 and 25, 2019, SCE jointly with the California Large Energy Consumers Association (CLECA) and PAO separately filed responses in opposition to the Joint DR Parties' Motion to Strike, on which the Joint DR Parties requested permission to file a reply. In addition, on April 25, 2019, PAO also filed two further Motions – one seeking to admit the Confidential Audit Reports into the record of this proceeding (addressed here) and the other to have the reports filed under seal.

On May 3, 2019, an ALJ's Ruling (May 3 ALJ's Ruling) was issued that denied PAO's March 29 motion to file the confidential reports under seal, along with the earlier requests to do so by SCE and PG&E. The May 3 ALJ's Ruling also granted the Joint DR Parties' April 10 Motion to Strike portions of PAO's March 29 Response that relied on the confidential audits.

However, the May 3 ALJ's Ruling did not address PAO's April 25 Motions seeking to admit the confidential audits into the record and have them filed under seal. While the Joint DR Parties believe that the May 3 ALJ's Ruling should be dispositive of PAO's April 25 Motions as being without merit, the Joint DR Parties are necessarily filing responses to both of PAO's April 25 Motions out of an abundance of caution to complete the record and ensure that the April 25 Motions by PAO are also denied.

**II.**  
**PAO HAS NO LEGAL BASIS TO MOVE FOR THE ADMISSION INTO THE  
RECORD OF THE AUDIT REPORTS PREPARED BY SCE AND PG&E.**

PAO has not established any legal basis for it to seek admission of or offer into the record the two documents it labels as “Confidential Audit Reports” identified as “SCE’s Nexant Audit Report” and “PG&E’s Summary of 2018-2019 DRAM RFO Audit Analysis, Results of December 4, 2018.”<sup>5</sup> PAO’s effort to have these two audits admitted into the record of this proceeding violates Commission rules that apply to *all* parties that appear before the Commission, without exception, as well as the January 4 ALJ’s Ruling.

First, it is PAO’s claim that it can seek admission of these audits because they were requested by PAO and provided by the PG&E and SCE through a “data request.”<sup>6</sup> A similar claim is made by SCE and CLECA in their Response to the Joint DR Parties’ April 10 Motion to Strike.<sup>7</sup>

Neither PAO, SCE, nor CLECA cite to *any* authority to support that claim. Instead, each reference Rule 10.1 of the Commission’s Rules of Practice and Procedure, which simply permits discovery of documents that are “*admissible in evidence*” or reasonably calculated to “lead to the discovery of *admissible evidence*.”<sup>8</sup> That Rule, however, is not determinative of whether the document is “admissible” in the first place. PAO offers the additional citation to PU Code Section 309.5, but that section only allows PAO to “compel the production” of “information it deems necessary to perform its duties from any entity regulated by the commission,” but, again, like Rule 10.1, says nothing about and, is certainly not determinative as to whether those documents are “admissible in evidence” an a motion by PAO in the first place.

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<sup>5</sup> PAO Motion for Admission of Confidential Audits Into the Record (April 25, 2019) (Motion to Admit), at p. 2.

<sup>6</sup> *Id.*, at p. 1.

<sup>7</sup> SCE/CLECA Joint Response to Joint DR Parties’ April 10 Motion to Strike, at p. 3.

<sup>8</sup> *Id.*; emphasis added.

Instead, admissibility of documents offered by “parties” to Commission proceedings, without exception, is governed by Rule 13.7 of the Commission’s Rules of Practice and Procedure. That Rule states quite clearly: “(e) *All documents* that are prepared, directly or indirectly, by the *party offering them into evidence* shall be *certified under penalty of perjury* by *the person preparing or in charge of preparing them as being true and correct*, unless the person preparing them is dead or has been declared incompetent, in which case any other person having knowledge of such statements of fact may certify such documents.” (Emphasis added.) PAO did *not* prepare either audit nor was PAO or anyone employed as part of PAO “in charge of preparing them” and certainly did not and could not “certify” them as “being true and correct.” (Rule 13.7.) Further, nothing in Rule 13.7 permits the utilities to use another party as a conduit for offering documents into the record that the utility alone has prepared or be in charge of preparing. PAO’s Motion for the admission into the record of the Confidential Audit Reports seeks relief that is not permitted by law and must be denied with prejudice.

As a second point, PAO’s Motion and its Response to the Joint DR Parties’ April 10 Motion to Strike clearly confirm that the process required by the January 4 ALJ’s Ruling to permit consideration of these audits has *not* occurred. Therefore, a key condition precedent to these audit ever making their way into the record of this proceeding has never happened, and to grant PAO’s Motion would be a direct violation of the due process rights of the Joint DR Parties and other “parties” that have *not* “had an opportunity to public discuss the audit[s] and provide responsive comment,” a fact that PAO admits.<sup>9</sup>

Finally, by seeking to wholly redact the audits is further prejudicial to those parties that have never seen word one of either. What is particularly disingenuous is the response by SCE and CLECA in opposing the Joint DR Parties’ Motion to Strike that asserts that the Joint DR

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<sup>9</sup> PAO Motion to Admit, at p. 2.

Parties “do not argue that SCE’s statements about the audit results are without basis or lack support” or cannot be “referenced.”<sup>10</sup> It would be impossible for the Joint DR Parties to make any such assertion when they are blind to all of the contents of both audits. That is, how could the Joint DR Parties offer any comment on either audit when they do not know what either says?

This is the precise problem that the Joint DR Parties identified in opposing SCE’s and PG&E’s December 2018 Motions to introduce the audits in the first place. Further, the very fear that the Joint DR Parties have identified regarding the extrapolation of these audits to pass judgment on DRAM or the performance of other bidders is expressly borne out by PAO’s justification for the introduction of the audits. Thus, PAO states that the confidential audits are a means to “support the concerns” that PAO and other “parties” have “raised about the DRAM pilot that must be addressed prior to the adoption of DRAM as a permanent mechanism,” with citation as to the other “parties” that share these concerns to the PG&E and SCE December 2018 Motions.<sup>11</sup>

This statement confirms that the Joint DR Parties’ objections to those Motions as extending the audit targeted to one DRAM bidder to apply to the DRAM or other bidders as a whole was, in fact, a correct reading of the intent of SCE’s and PG&E’s Motions to require the audits to be part of the Energy Division evaluation of DRAM. In that circumstance, to deny the Joint DR Parties any visibility as to any of the contents of the audits without notice and opportunity to be heard is the grossest violation of due process where those audits may be used to their prejudice. Further, while PAO claims to support a “transparent public review of the audit reports,” that claim is rendered false where PAO uses the timing of a June 2019 decision as a

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<sup>10</sup> SCE/CLECA Joint Response, *supra*, at p. 3.

<sup>11</sup> PAO Motion to Admit, at p. 2.



basis to deny parties' rights to engage in such a process.<sup>12</sup> The Joint DR Parties are not aware of a rule allowing the timing of a Commission decision to cut-off party's due process rights.

**II.**  
**PAO'S MOTION TO ADMIT MUST BE DENIED WITH PREJUDICE.**

For the reasons stated above, the Joint DR Parties request that PAO's April 25 Motion to Admit the confidential audit reports into the record of this proceeding be denied with prejudice, especially where PAO has not established a legal basis to offer the reports pursuant to Rule 13.7 of the Commission's Rules of Practice and Procedure. The Joint DR Parties further believe that denial of PAO's Motion to Admit is fully supported by the May 3 ALJ's Ruling.

Respectfully submitted,

May 3, 2019

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<sup>12</sup> PAO Motion to Admit, at p. 2.