BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations.	Rulemaking 21-10-002 (Filed October 7, 2021)

JOINT APPLICATION FOR REHEARING OF DECISION 23-06-029 BY THE CALIFORNIA EFFICIENCY + DEMAND MANAGEMENT COUNCIL, LEAPFROG POWER, INC., OHMCONNECT, INC., CPOWER, ENEL X NORTH AMERICA, INC., AND CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES

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The California Efficiency + Demand Management Council, ("the Council") Leapfrog Power, Inc. ("Leap"), OhmConnect, Inc. ("OhmConnect"), CPower, Enel X North America, Inc., and Center for Energy Efficiency and Renewable Technologies ("the Joint Parties") hereby jointly apply for Rehearing of Decision ("D.") 23-06-029. The statutory "date of issuance" of D.23-06-029 was July 5, 2023.[1] This Application for Rehearing is, therefore, timely filed and served pursuant to Public Utilities ("P.U.") Code Sections 1731 and 1732 and Rule 16.1 of the Commission's Rules of Practice and Procedure.[2] The Joint Parties also respectfully request that the Commission hold oral argument on this Application for Rehearing pursuant to Rule 16.3(a) of the Commission's Rules of Practice and Procedure. Finally, due to the serious and irreparable harm caused by D.23-06-029 to Demand Response ("DR") and DR providers, the Joint Parties have simultaneously filed a Joint Motion for Partial Stay of D.23-06-029 today.

[1] Applications for Rehearing are due within 30 days after the date the Commission "mails" its decision (Public Utilities ("P.U.") Code Section 1731(b)(1) and Rule 16.1(a) of the Commission Rules of Practice and Procedure). D.23-06-029 was mailed on, and marked with a "Date of Issuance" of, July 5, 2023.
[2] Pursuant to Rule 1.8(d) of the Commission's Rules of Practice and Procedure, Leapfrog Power, Inc., OhmConnect, Inc., CPower, Enel X North America, Inc., and the Center for Energy Efficiency and Renewable Technologies have authorized Joseph Desmond from the California Efficiency + Demand Management Council to sign on their behalf.

I.
INTRODUCTION

On July 5, 2023, the Commission issued D.23-06-029 which is the Decision Adopting Local Capacity Obligations for 2024-2026, Flexible Capacity Obligations for 2024, and Program Refinements in Rulemaking ("R.") 20-10-002 (Resource Adequacy ("RA")). This decision contains three orders and one "clarification" directive that err in adopting rules that are contrary to applicable law, fact, and policy, and wrongly impose significant and unsupported adverse impacts on DR, particularly as it pertains to third-party DR providers.

First, the Commission in a "Discussion" section of D.23-06-029 effects a rule change to take "immediate effect" that is wrongly characterized as a "clarification" of existing policy that is not supported by any finding of fact or included in any ordering paragraph.[3] The further absence of an ordering paragraph to implement this change creates compliance vagueness and uncertainty and acts to circumvent the statutory requirement for all Commission orders to be supported by findings of fact.[4] The Commission has previously determined that rehearing is required where a decision has engaged in such an erroneous practice.[5]

Specifically, by that discussion, the Commission reverses the present limitation on using Reliability Demand Response Resources ("RDRR") as an RA resource during system emergencies only, defined by a California Independent System Operator ("CAISO") Energy Emergency Alert ("EEA") 2, and instead now directs that the CAISO "should be allowed to use RDRR, as an RA resource, for economic or exceptional dispatch upon the declaration of a day-of [Energy Emergency Alert ("EEA")] Watch (or when a day-ahead EEA Watch persists in the day-

[3] D.23-06-029, at p. 97.
[4] P.U. Code §1705.
[5] D.20-03-016 which is the Order Granting Limited Rehearing of Decision (D.) 19-10-021, issued in R.17-09-020 (RA) on March 16, 2020. , at pp. 5-8.

of)."[6] The Commission seeks to justify this change by claiming in that discussion alone, without requisite findings of fact, that the "RDRR dispatch trigger does not render RDRR a resource generally available for economic dispatch during normal system conditions, but rather maintains its availability during times of significant grid stress, which is consistent with the 2010 settlement."[7] Not only does this "clarification" fail to meet required legal standards for Commission decisions, but, if enforced by the Commission, wrongly results in eliminating RDRR as an emergency resource, which will lead to them being triggered sooner than they were intended to be, rendering them unavailable during actual emergencies.

Second, D.23-06-029 eliminates the Transmission Load Factor ("TLF") Adder, effective in 2024, due to an "administrative burden" to Energy Division which is "not currently outweighed by the relatively small ratio of MW that are being processed."[8] The TLF Adder reflects the nature of demand-based resources in that demand reductions decrease the need to procure energy and to transport that energy across transmission lines, thereby avoiding the line losses that occur during the transport process. The validity of this Adder has been reaffirmed throughout the proceeding and in the Commission's own decision and removing it will put DR at a competitive disadvantage to generation resources, which are not required to account for their transmission line losses when selling capacity in the CAISO market.

Third, D.23-06-029 also eliminates the Planning Reserve Margin ("PRM") Adder, which accounts for the ability of Supply-Side DR load reductions to lower risk from forced outages and load forecast error. This puts Supply-Side DR at a competitive disadvantage to Load-Modifying DR, which implicitly includes this Adder by reducing the amount of capacity a load-serving

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[6] D.23-06-029, at p. 96; emphasis added.
[7] D.23-06-029, at p. 126 (citing D.10-06-034, Appendix A, Settlement at Section A.(4)(e)). D.10-06-034 is the Decision Adopting Settlement Agreement on Phase 3 Issues Pertaining to Emergency Triggered Demand Response Programs, issued in R.07-01-041 (DR) on June 25, 2010.
[8] D.23-06-029, at pp. 99, 102 and 145 (Ordering Paragraph 29).

entity ("LSE") needs to procure against their RA requirement. Not only does this create an unequal compensation for two categories of DR that provide essentially the same service, but also, because IOUs have the capability to transition their Supply-Side DR resources to become Load-Modifying DR resources, it exacerbates an already unequal playing field between third-party and IOU-run programs.

Fourth, D.23-06-029 expands Proxy DR ("PDR") availability to include: (1) all days during which a CAISO Flex Alert has been issued, (2) the CAISO has issued a Grid Warning, or (3) the Governor's Office has issued an emergency notice.[9] This requirement would increase the frequency that DR providers are required to be available, potentially in conflict with the current guardrails meant to prevent customer fatigue (e.g., not dispatching on weekends or over three consecutive days). It also creates unnecessary uncertainty for DR participants because they are unable to know when they are required to be available, which, in turn, creates customer confusion that will result in a decline in participation and jeopardize the ability of third-party DR providers to assess whether they can reliably curtail consistent with the expanded availability requirements to qualify as an RA resource.

Fifth, D.23-06-029 derates third-party DR qualifying capacity ("QC") values based on test results outside of the current QC valuation process.[10] Specifically, D.23-06-029 orders that:

> test performance failures will be considered when making capacity awards to non-investor-owned utility demand response (DR) resources procured by third-party DR providers under the Load Impact Protocols (LIPs). Derates will be applied so that they correspond to performance during test events for the most recently available quarterly test results at the time of the award for the relevant quarter. The average performance results of each quarter will inform the capacity awarded through the LIPs for the respective sub-load aggregation point.[11]

[9] D.23-06-029, at p. 145 (Ordering Paragraph 30).
[10] *Id*., at p. 146 (Ordering Paragraph 32).
[11] *Id*.

This provision exacerbates the unequal treatment of third-party DR programs compared to the investor-owned utility ("IOU") DR programs, as the latter would *not* be subject to these requirements, contrary to the Commission's adopted principle of competitive parity that governs all DR programs.[12] This also would impose retroactive sanctions by penalizing DR providers for test performance in Q1 and Q2 of 2023, which occurred prior to the release of this decision.

As discussed in more detail below, in issuing these orders and making the directives, the Commission commits legal error in D.23-06-029 by failing to proceed in the manner required by law by not following its own rules and regulations, in violation of P.U. Code Section 1757.1.[13] In addition, adopting D.23-06-029 is contrary to law, is not supported by its findings of facts or conclusions of law, and violates parties' Constitutional rights by denying parties fair and reasonable notice and opportunity to be heard.

II.
APPLICABLE LAW AND STANDARDS FOR REVIEW

Rule 16.1(c) of the Commission's Rules of Practice and Procedure requires Applications for Rehearing to set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous. The purpose of an Application for Rehearing "is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[14]

Pursuant to P.U. Code Section 1757.1(a), the Commission commits legal error where it has "not proceeded in the manner required by law" in its decision or where its decision is "not supported by the findings," is an "abuse of discretion," or "violates" a party's State and U.S. Constitutional rights. P.U. Code Section 1705 further dictates that Commission decisions "shall

[12] D.16-09-056 which is the Decision Adopting Guidance for Future Demand Response Portfolios and Modifying Decision 14-12-024, issued in R.13-09-011 (DR) on October 5, 2016, at p. 56.
[13] P.U. Code §1757.1(a)(2).
[14] Commission Rules of Practice and Procedure, Rule 16.1(c).

contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision."

III.
GROUNDS FOR REHEARING OF D.23-06-029

A. Summary

Pursuant to the above legal standards, the precise purpose of this Application for Rehearing is to "alert" the Commission to significant legal errors in D.23-06-029 and permit the Commission to grant rehearing to correct those errors expeditiously.[15] Specifically, by issuing D.23-06-029, the Commission "has not proceeded in the manner required by law" by failing to follow the law applicable to the determination of requirements for DR programs and resources to qualify as RA capacity, including ignoring prior Commission decisions and by reaching conclusions and imposing orders that do not comply with or are contrary to applicable law, are not supported by the findings and conclusions, and result in abuse of discretion, and violate the Joint Parties' statutory and constitutional due process rights to their prejudice.[16] As supported by the law and record identified herein by the Joint Parties, these legal errors must be addressed and remedied by the Commission granting rehearing of D.23-06-029 to, at the least, reverse and eliminate those orders in D.23-06-029 that wrongly eliminate RDRR as an emergency resource, eliminate the TLF and PRM Adders, inappropriately expand PDR availability requirements, and derate third-party DR QC values.

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[15] Commission Rules of Practice and Procedure, Rule 16.1.
[16] P.U. Code §1757.1(a).

B. D.23-06-029 Errs by Imposing DR Requirements that are Contrary to Law.

1. Applicable Law.

Only the Legislature "has plenary power" to "confer additional authority and jurisdiction upon the [C]ommission."[17] Thus, applicable statute is the primary authority governing Commission action and, as relevant to Commission decision-making, requires the Commission to "proceed in the manner required by law," which extends to complying, not only with statute, but with procedures and legal standards adopted in the Commission's rules and decisions.[18] P.U. Code Section 1708 further confirms the significance of Commission decisional precedent by allowing the Commission to "rescind, alter, or amend any order or decision made by it" only after notice to all the parties and with an opportunity to be heard. The Commission has long recognized that this Section 1708 authority "should be exercised with great care and [is] justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues."[19]

2. History of DR and RA at the Commission.

The Commission defines DR as "reductions, increases, or shifts in electricity consumption by *customers* in response to either economic signals or reliability signals."[20] Consistent with that definition, in D.16-09-056, the Commission recognized the singular role played by customers in "growing" DR to provide a carbon-free resource that can provide grid reliability, meet State clean energy policy goals, and, as a customer-centric resource,

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[17] Cal. Const., Art. XII, Section 5.

[18] *People v. City of Los Angeles* (2014) 229 Cal.App.4th 87; 99; *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1091-1092 (also, n.3).

[19] D.17-12-006 which is the Decision Denying Petition for Modification of Decision 14-08-057, issued in R.13-05-007 (Digital Infrastructure and Video Competition Act of 2006), at p. 9.

[20] *See, e.g.,* D.23-01-006 (Decision Approving Demand Response Auction Mechanism Pilot for Pilot 2024), adopted in Application ("A.") 22-05-002, et al. (2023-2027 DR Applications), at p. 2.

distinguishes it from generation resources.[21] D.16-09-056 determined that, to do so, the Commission plans "to continue offering a broad array of demand response options to customers, including the option of either the Utilities or third parties providing these services."[22]

As to DR in the RA context, in 2014, the Commission issued D.14-12-024[23] which ordered that "all demand response programs will need to meet resource adequacy rules to either reduce the resource adequacy requirements as a load-modifying resource or to count toward meeting the resource adequacy requirement as a supply resource."[24] Previously, in D.14-03-026,[25] the Commission defined Load Modifying DR as "resources that reshape or reduce the net load curve" and Supply-Side DR as "resources that are integrated in the California Independent System Operators Energy markets."[26]

Thereafter, in 2016, the Commission adopted the following goal in D.16-09-056: "Commission regulated demand response programs shall assist the State in meeting its environmental objectives, cost-effectively meet the needs of the grid, and enable customers to meet their energy needs at a reduced cost."[27] D.16-09-056 also states that "[u]tilities and third-party providers should fairly compete on a level playing field to vie for customers to enroll in their demand response programs."[28] In addition, D.16-09-056 adopted six (6) criteria for all Commission-regulated DR programs:

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[21] D.16-09-056, at p. 51.
[22] *Id.*, at p. 56
[23] D.14-12-024 is the Decision Resolving Several Phase Two Issues and Addressing the Motion for Adopting of Settlement Agreement on Phase Three Issues, issued in R.13-09-011 (DR) on December 9, 2014.
[24] D.14-12-024, at p. 84 (Ordering Paragraph 4(a)).
[25] D.14-03-026 is the Decision Addressing Foundational Issue of Bifurcation of Demand Response Programs, issued in R.13-09-011 (DR) on April 4, 2014.
[26] *Id.*, at p. 28 (Ordering Paragraphs 2 and 3).
[27] D.16-09-056, at p. 97 (Ordering Paragraph 7).
[28] *Id.*, at p. 52.

- Demand response shall be flexible and reliable to support renewable integration and emission reductions;
- Demand response shall evolve to complement the continuous changing needs of the grid;
- Demand response customers shall have the right to provide demand response through a service provider of their choice and Utilities shall support their choice by eliminating barriers to data access;
- Demand response shall be implemented in coordination with rate design;
- Demand response processes shall be transparent; and
- Demand response shall be market-driven leading to a competitive, technology-neutral, open-market in California with a preference for services provided by third-parties through performance-based contracts at competitively determined prices, and dispatched pursuant to wholesale or distribution market instructions, superseded only for emergency grid conditions.[29]

However, contrary to its own mandated principles adopted in D.16-09-056, in the RA proceedings, the Commission has continued to issue decisions that actually disadvantage third-party DR relative to IOU programs. As examples, in D.20-06-031,[30] the Commission adopted quarterly 4-hour testing requirements for third-party DR providers, but not the IOUs, and created preferential treatment of IOU DR within the Maximum Cumulative Capacity ("MCC") buckets by counting it first against the DR procurement limit.[31] Then, in D.21-06-029,[32] the Commission excluded IOU DR from supply plans until such time that the Commission confirms that the CAISO permits DR resources to bid variably in its markets and implements a Federal Energy Regulatory Commission ("FERC")-approved RA Availability Incentive Mechanism ("RAAIM")

[29] D.16-09-056, at pp. 97-98 (Ordering Paragraph 8).
[30] D.20-06-031 is the Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Flexible Capacity Obligations for 2021, and Refining the Resource Adequacy Program, issued in R.19-11-009 on June 30, 2020.
[31] *Id.*, at p. 93 (Ordering Paragraph 13(a)) and p. 96 (Ordering Paragraph 19).
[32] D.21-06-029 is the Decision Adopting Local Capacity Obligations for 2022-2024, Flexible Capacity Obligations for 2022, and Refinements to the Resource Adequacy Program, issued in R.19-11-009 (RA) on June 25, 2021.

exemption.[33] This exemption from supply plans allows the IOUs to avoid the requirement to bid their DR programs into the CAISO market consistent with their QC values; instead, they have the freedom to bid based on their day-to-day availability, as the Council and CPower have demonstrated.[34] Conversely, third-party DR does not benefit from this flexibility and protection, and must bid into the CAISO market consistent with their QC values or are otherwise exposed to RAAIM penalties.

This continued preference for IOU DR programs by the Commission is inconsistent with the directives contained in D.16-09-056 which has not been amended, altered or rescinded. D.23-06-029 continues to contravene D.16-09-056 by giving clear preference to IOU DR programs, to the detriment of third-party DR, and further devaluing and imposing excessive requirements on Supply-Side DR, which will lead to its over-dispatch; collectively, this will contribute to an ongoing decline in the availability of third-party DR and DR in general. That decline has been established by required annual utility reports and is an alarming trend for this State, where DR plays a significant role in combatting climate change and providing capacity during system emergencies.[35]

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[33] D.21-06-029, at Ordering Paragraph 10.

[34] The Council and CPower Reply Comments on the Proposed Decision, submitted in this proceeding on June 19, 2023, at pp. 4-5.

[35] As stated in the Joint Motion for Partial Stay of D.23-06-029, which has been filed simultaneously with this Application for Rehearing: "The need to account for and ensure RA rules that do not impose unnecessary hurdles to DR participation is not mere hyperbole where the Commission's interim collective, statewide DR goal of 5 percent of the sum of the Utility's peak demands approved in 2014 has never been reached since that time and, instead, has continuously declined to only "***0.76 %*** of the IOU coincident peak load" as of June 30, 2023." [Joint Motion, at p. 14, n. 51, citing to R.13-09-011 (DR) Joint IOU Status Report on Progress Toward Interim Goal Approved in Decision 14-12-024 (June 30, 2023), at p. 3; emphasis added)

3. D.23-06-029 Errs in Failing to Proceed in the Manner Required by the Commission Decisions Governing the Treatment of DR Resources.

Despite the clear direction in D.16-09-056 that the Commission intends to grow DR by offering a broad array of DR options to customers, and that IOU DR programs, and third-party DR should be treated equally,[36] D.23-06-029 contains both orders and a directive that are not supported by law, fact, or policy. Further, these orders and directive will not only disadvantage DR generally, but, in some cases, wrongly provide a clear preference to IOU DR programs to the disadvantage of third-party DR providers.

To begin with, D.23-06-029, in a "Discussion" section only, directs that RDRR can be dispatched for "economic or exceptional dispatch" upon the declaration of a day-of EEA Watch."[37] This is contrary to previous Commission decisions D.10-06-034 and D.18-11-029[38] which make clear that RDRR should *not* be used prior to an emergency.[39] For example, D.10-06-034 stated that RDRR can be triggered at the point immediately prior to the CAISO's "need to canvas neighboring balancing authorities and other entities for available *exceptional* dispatch energy or capacity (emphasis added)."[40] However, the conditions triggering an EEA Watch do not approach this degree of urgency. CAISO Operating Procedure 4420 states: "CAISO issues an Energy Emergency Alert Watch (EEA Watch) notice by 15:00 PPT the day before when the Day-Ahead analysis is forecasting that one or more hours *may be* energy deficient."[41] Despite the presence of the word "Emergency" in the term "EEA Watch," a potential energy deficiency does not constitute an emergency, only the possibility that one might occur. This unsupported

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[36] D.16-09-056, at pp. 51, 52, and 56.
[37] D.23-06-029, at p. 96.
[38] D.18-11-029 is the Decision Resolving Remaining Application Issues for 2018-2022 Demand Response Portfolios and Declining to Authorize Additional Demand Response Auction Mechanism Pilot Solicitations, issued in A.17-01-012 (2018-2022 DR Applications) on December 10, 2018.
[39] D.10-06-034, at p. 14 and Appendix A to D.10-06-034, at p. 5 and D.18-11-029, at p. 40.
[40] D.10-06-034, at p. 14.
[41] CAISO Operating Procedure 4420, Section 3.6.1, at p. 12.

change effectively modifies D.10-06-034 in all but name only by downgrading RDRRs from an emergency DR resource that, as D.23-06-029 acknowledges, under North American Electric Reliability Corporation ("NERC") protocols would not be eligible for dispatch until an EEA 1 is declared by the CAISO,[42] to a non-emergency hybrid DR program that can be dispatched prior to emergencies while remaining exempt from the CAISO Must Offer Obligation as PDR RA resources typically are now.

Furthermore, D.23-06-029 effectively ignores the concerns expressed by numerous parties regarding the impact that utilizing RDRR in a non-emergency fashion would have on participating customers, including that it would be a change from current dispatch rules, could lead to attrition and thereby jeopardize reliability, could be a premature use of emergency DR, could be operationally challenging or infeasible, and could result in customer fatigue.[43] The use of a "clarification" in a discussion to "immediately" effect such a change without inclusion in an ordering paragraph and without support by required findings of fact also fails to comply with legislative mandates that govern Commission decision-making, and is impermissibly vague.[44]

D.23-06-029 also eliminates the TLF Adder starting in 2024[45] which will either lead to fewer DR providers entering or expanding their operations in California or to DR providers being forced to increase their contract prices to make up for the revenue lost from the removal of the Adder. Both of these results run counter to the Commission's long-standing goal of growing DR and increasing the number of new DR providers that participate in the state's energy

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[42] D.23-06-029, at 91.
[43] Council and CPower Opening Comments on the Proposed Decision, submitted in this proceeding on June 14, 2023, at pp. 9-10. *See also*, D.23-06-029, at pp. 93-96.
[44] D.20-03-016 is the Order Granting Limited Rehearing of Decision (D.) 19-10-021, issued in R.17-09-020 (RA) on March 16, 2020, at pp. 5-8.
[45] D.23-06-029, at pp. 99, 102 and 145 (Ordering Paragraph 29).

markets, as articulated in D.16-09-056.[46] Furthermore, the claim in D.23-06-029 that applying the TLF Adder imposes a "significant administrative burden on Energy Division Staff" is unsupported and contrary to fact.[47] The Decision does not describe how much of an administrative burden the TLF Adder represents, nor does it quantify the "small number" of MW impacted by its removal. Without a better idea of exactly how much of an "administrative burden" (*i.e.*, the cost of applying the Adder) the TLF Adder represents, or the incremental DR RA capacity associated with it (*i.e.*, the benefit), it is impossible for the Commission to credibly make this determination.

In fact, there is almost no administrative burden associated with applying the TLF Adder to IOU DR programs because it can be applied as a single combined adder with the Distribution Loss Factor ("DLF") Adder to IOU DR QC values which are credited against IOU and LSE RA requirements. In the IOUs' three-year DR totals spreadsheets on the Commission's Resource Adequacy Compliance web page, a *combined* loss factor adder is applied, pursuant to D.15-06-063, which directed that transmission and distribution line loss assumptions from the Long-Term Procurement Plans proceeding be used for grossing up QC values for DR resources.[48] In fact, as D.15-06-063 states, it was the Energy Division's own proposal to utilize a single, combined transmission and distribution ("T&D") loss factor in order to reduce administrative burden.[49]

Any additional administrative burden would only be applicable to third-party DR because the TLF Adder for these resources is "grossed up" retroactively via an RA credit, whereas the DLF Adder is added directly to a resource's QC value and reflected in supply plans. While this

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[46] D.16-09-056, at p. 66.
[47] D.23-06-029, at p. 132 (Finding of Fact 20).
[48] D.15-06-063 is the Decision Adopting Local Procurement and Flexible Capacity Obligations for 2016, and Further Refining the Resource Adequacy Program, issued in R.14-10-010 (RA) on June 30, 2015, at p. 83 (Ordering Paragraph 5A).
[49] *Id*., at pp. 14-15 and pp. 79-80 (Conclusion of Law 4).

may create differing degrees of administrative costs to apply the two Adders, there is no clear reason why this difference needs to exist. In fact, the DLF Adder was also applied as an RA credit up until last year, when it was changed to be added directly to QC values.[50] The Commission did not provide any reason why the TLF Adder could not be applied in the same way, instead deciding to simply eliminate it. Given that the TLF Adder could instead just be applied directly to a resource's QC just as the DLF Adder is, the basis for eliminating it to address an administrative burden is non-existent.

D.23-06-029 also eliminated the PRM Adder, again citing administrative burdens.[51] Similarly to the TLF Adder, it is highly suspect that the administrative burden associated with the PRM Adder is either significant or necessary, given that it simply consists of another factor that can be applied to System RA DR QC values. In addition, the Commission again did not quantify this administrative burden to show how it outweighed the loss of MW that were associated with this Adder. However, considering the overall impact that this decision will have on the DR industry and capacity markets, it is hard to see how this could be outweighed by administrative costs for the Commission.

The Joint Parties have no visibility as to the administrative burden that is imposed by Energy Division application of the TLF and PRM Adders, and none is specifically cited in D.23-06-029, but a very conservative estimate of the financial value of lost DR capacity based on 2023 IOU and DR provider DR NQC values is far greater than what the Joint Parties would surmise as the administrative cost of applying the TLF and PRM Adders.

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[50] D.21-06-029, at p. 78 (Ordering Paragraph 13).
[51] D.23-06-029, at p. 132 (Finding of Fact 20).

Estimated Value of "Lost" IOU and Third-Party DR Capacity - 2023

	PG&E	**SCE**	**SDG&E**	**Third-Party DR**	**Total**
Total 2023 Unadjusted QC Values (kW-mo.)	2,268,000[52]	7,395,000[53]	66,000[54]	3,404,000[55]	**13,132,000**
PRM Adder	9%	9%	9%	9% for LIP/0% for DRAM	-
TLF Adder	3%	2.5%	2.5%	2.5%	-
Proxy Value of RA Capacity ($/kW-month)	$8.88	$8.88	$8.88	$8.88	-
Lost August 2023 DR RA Capacity (kW-mo.)	272,200	850,400	7,600	225,520	**1,355,720**
$ Value of Lost August 2023 DR RA Capacity	$2,417,000	$7,552,000	$67,337	$2,003,000	**$12,039,000**

Based on the Joint Parties' calculation, utilizing the Commission's $8.88/kW-month[56] RA capacity penalty as a proxy value of RA capacity, the value of the 2023 DR capacity that would be lost by eliminating the TLF and PRM Adders is over $12 million. By any standard, this value far exceeds the cost of the administrative burden of applying the TLF and PRM Adders. It is clear that these adders represent more than a "small number" of MW, and the notion that the value of the administrative burden related to the TLF and PRM Adders could exceed the value of the lost DR RA capacity is simply not supported by reality.

The Commission also supported eliminating the PRM Adder on the grounds that it would "remove the risk that the PRM over-estimates the amount of capacity available to CAISO on

[52] 2023-2025 PG&E Demand Response Totals, PG&E 2023 DR Allocations tab.
[53] 2023-2025 SCE Demand Response Totals, SCE 2023 DR Allocations tab.
[54] 2023-2025 SDG&E Demand Response Totals, SDG&E 2023 DR Allocations tab.
[55] July 6, 2023 NQC List for CPUC Compliance, Other tab.
[56] D.20-06-031, at pp. 60-61.

high stress days." However, this ignores the fact that the PRM Adder (and the TLF Adder) is also implicitly applied to Load-Modifying DR, which reduces an LSE's overall RA requirement and thereby their PRM procurement needs. The Commission fails to explain how this "over-estimation" risk is applicable only to Supply-Side DR, given that it and Load-Modifying DR provide identical services to the grid. This discrepancy also creates a bias towards Load-Modifying DR, which translates into a bias towards IOU-run DR programs (which are capable of transitioning their DR portfolios from Supply-Side to Load-Modifying Programs). In addition to contravening the principle established in D.16-09-056 of ensuring competitive parity between IOU-run and third-party DR programs, this also harms third-party DR providers by causing LSEs to preference Load-Modifying, IOU-run programs when purchasing DR capacity.

In addition, D.23-06-029 expands PDR availability to include: (1) all days during which a CAISO Flex Alert has been issued, (2) the CAISO has issued a Grid Warning, or (3) the Governor's Office has issued an emergency notice.[57] This measure, which is intended to increase availability and dispatch requirements for DR, ironically comes at the risk of reducing the overall availability of DR in the market, as customers that have economic or operational limits to the number of times they can dispatch may just opt to end their participation entirely. Furthermore, these three events constitute out-of-market signals and consequently are not reflected in the CAISO's Automated Dispatch System ("ADS"). Tying these additional DR availability requirements to those signals hinders the ability to dispatch PDRs in the CAISO market via automation, which is a critical component of modern DR programs to ensure resources are dispatched seamlessly in response to DR events. This again contradicts D.16-09-056 by adopting a requirement which would stifle DR instead of "growing" it.

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[57] D.23-06-029, at p. 145 (Ordering Paragraph 30).

D.23-06-029 also derates QC values of third-party DR when dispatches, either in the form of test events, are below the supply plan values.[58] Third-party DR on supply plans are obligated to be bid into the CAISO market at its QC value regardless of the weather conditions. IOU DR is not required to be on a supply plan and thus, IOUs have the freedom to tailor their bids to reflect the capability of their DR resources on that day, which does not need to reflect the QC value awarded it by the Energy Division. As such, derating third-party DR for under-performance when not applying the same standard to IOU DR is highly discriminatory and contrary to D.16-09-056. Furthermore, the ability to derate DR QC values based on a single dispatch ignores and undermines the existing DR QC valuation process which currently relies on the DR Load Impact Protocols ("LIP") which require extensive regression analysis of multiple DR events under different weather conditions to ensure an "apples to apples" comparison of DR performance to QC values.

4. D.23-06-029 Errs in Failing to Proceed in the Manner Required by Law.

The issuance of D.23-06-029 through its negative treatment of DR is contrary to law, including California's Loading Order, California legislation, and the California Energy Commission's ("CEC's") recently-adopted statewide 7,000 MW Load Shift Goal ("LSG"), as well as federal legislation and directives by FERC. As stated in the Commission's Energy Action Plan II, DR and energy efficiency are "the State's preferred means of meeting growing needs."[59] Instead of treating DR as a preferred resource, D.23-06-029 undermines the DR market in California by sending mixed signals to current and potential DR participants and DR providers.

[58] D.23-06-029, at p. 146 (Ordering Paragraph 32).
[59] Energy Action Plan II, at p. 2.

Furthermore, while the California Legislature continues to prioritize load shifting, the Commission through enacting D.23-06-029 moves away from that goal. Assembly Bill ("AB") 205 requires the CEC "to implement and administer the Demand Side Grid Support Program to incentivize dispatchable customer load reduction and backup generation operation as on-call emergency supply and load reduction for the state's electrical grid during extreme events[.]"[60] AB 2143 requires the Commission to annually publish and "submit to the Legislature a report on the progress made to grow the use of distributed energy resources ("DERs") among residential customers in disadvantaged communities and in low-income households[.]"[61]

In addition, Senate Bill ("SB") 846 requires the CEC to develop a statewide goal for load shifting to reduce net peak electrical demand.[62] In response to SB 846, in May 2023, the CEC issued the "Senate Bill 846 Load-Shift Goal Report" which sets forth a Proposed Statewide Load-Shift Goal of 7,000 MW by 2030.[63] In addition, the CEC issued Clean Energy Reliability Investment Plan on March 2, 2023 which proposes major investments in demand side resources with the need to increase efforts to expand DR explicitly.[64] The Commission's issuance of D.23-06-029 takes measures to impede the success of DR in California in contravention of California legislation and measures taken by the CEC.

In addition, this Decision would put CAISO out of alignment with wholesale market responsibilities as identified under Sections 205 and 206 of the Federal Power Act ("FPA") which prohibits undue discrimination or preference in organized electricity markets. In its Order

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[60] AB 205 (Committee on Budget, Stats. 2022, ch. 61).
[61] AB 2143 (Carrillo, Stats. 2022, ch. 774).
[62] SB 846 (Dodd, Stats. 2022, ch. 239).
[63] CEC's Senate Bill 846 Load-Shift Goal Report (May 2023), at p. 3. This Report can be found here: https://www.energy.ca.gov/publications/2023/senate-bill-846-load-shift-goal-report.
[64] CEC Clean Energy Reliability Investment Plan (March 2, 2023), at p. 9. This Plan can be found here: https://www.energy.ca.gov/publications/2023/clean-energy-reliability-investment-plan#:~:text=The%20Clean%20Energy%20Reliability%20Investment,plan%20for%20clean%20energy%20resources.

719, FERC identified that, as a result of this requirement, its past orders had adopted a goal "of removing unnecessary obstacles to DR participating in the wholesale power markets of [Regional Transmission Organizations ("RTOs")] and [Independent System Operators ("ISOs")]" the theme of which was to "allow DR resources to participate in these markets on a basis that is comparable to other resources."[65]

The Commission itself acknowledged in D.23-06-029 that "the Commission's Avoided Cost Calculator includes avoided transmission line losses for distributed energy resources,"[66] recognizing that DR does in fact provide a benefit in the form of avoided line losses. Removing the TLF Adder would then put DR at a competitive disadvantage to generation resources, which are allowed to offer their nameplate capacity in electricity markets regardless of line losses that would reduce their ability to deliver that full capacity. In doing so, it would implicitly preference generation resources in California's capacity markets, creating an unfair playing field that would hinder DR's ability to participate on a basis that is "comparable to other resource." This would cause LSEs to discriminate against DR resources when procuring capacity from the CAISO, contravening the requirements established in the FPA.

The expanded availability requirements set forth in this decision are also out of step with FERC Order 2222, which requires "each RTO/ISO to establish market rules that … incorporate appropriate bidding parameters into its participation models as necessary to account for the physical and operational characteristics of distributed energy resource (DER) aggregations."[67] By ignoring the fact that many DERs have limitations on the number of times they can dispatch in a month, D.23-06-029 forces DR resources to participate in California's electricity markets via bidding parameters that do not account for their operational characteristics. Although DR

[65] FERC Order 719, at pp. 10 and 11.
[66] D.23-06-029 at p. 102
[67] FERC Order 2222, at pp. 175-176.

resources can and do make significant contributions to grid reliability, like any other resource, they cannot do so when pushed to dispatch outside of their operational limitations, a condition that FERC recognized in Order 2222 and that the Commission has ignored in this decision. The Commission seems not to have considered how CAISO, which is required to operate according to FERC directives like Order 2222, would remedy this discrepancy.

In addition, change in RDRR dispatch conditions would also result in a "no-notice" change for participants in the program that signed up for a commitment period under different program operating parameters and receive no notice of this change, based upon the immediate implementation timeframe. In fact, participants in the IOUs' respective Base Interruptible Program ("BIP") tariffs have a 30-day window each year during the month of November during which they may disenroll from the program or revise downward the amount of load curtailment they are able to provide during an event. Denying BIP participants the opportunity to modify their commitments in response to this "no notice" Decision on RDRR resources will subject them to greater financial risk.[68]

C. D.23-06-029's Elimination of RDRR as an Emergency Resource, and the TLF and PRM Adders, Expansion of DR Availability, and Derating of DR QC Are Not Supported by Its Findings of Facts or Conclusions of Law.

Pursuant to Section 1705, a Commission decision must "contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision…." In applying this provision, the California Supreme Court has found:

> "Findings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning

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[68] PG&E Schedule E-BIP, at Sheet 13; SCE Schedule TOU-BIP, at Sheet 17; and SDG&E Schedule BIP, at Sheet 2.

activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.'"[69]

The California Supreme Court has instructed that the required findings must include both those that include basic facts in support of the "ultimate finding" on the material issue, as well as the ultimate finding itself.[70]

D.23-06-029 does not contain a Finding of Fact, Conclusion of Law or Ordering Paragraph which states that RDRR can be dispatched for "economic or exceptional dispatch" upon the declaration of a day-of EEA Watch."[71] Instead, that provision and direction is contained in the body of the decision and the Commission, by failing to include it in an Ordering Paragraph, wrongly seeks to evade the requirement for inclusion of "findings of fact" that support such an order. This is not only contrary to law, but also will lead to confusion as to how parties are to proceed. The Joint Parties are also concerned that by characterizing this change as only a "clarification," it avoids any evidentiary requirement for overturning the settlement approved by the Commission in D.10-06-034. Characterizing this significant change as a "clarification" also allows the Commission to forego providing customers participating in RDRR DR programs an opportunity to disenroll from their program, or in the case of the BIP, to adjust their Firm Service Level ("FSL").

Furthermore, D.23-06-029 claims that the "record does not demonstrate this administrative burden for both the TLF and PRM Adders is outweighed by the potential value of the relatively small amount of MW associated with the adders."[72] However, D.23-06-029 does not provide any evidence to support its contention that the administrative burden of

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[69] *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 258-259 (citing five other California Supreme Court decisions in support, including *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337).
[70] *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273.
[71] D.23-06-029, at p. 96.
[72] *Id.*, at p. 102.

implementing the TLF and PRM Adders outweighs the value of the DR capacity that would be lost.[73] Furthermore, D.23-06-029 does not quantify the "administrative burden" nor does it quantify the DR capacity that would be lost with the elimination of the TLF Adder. As such, it is unclear how D.23-06-029 can make such a claim. D.23-06-029 also ignores the impact that removal of the TLF and PRM Adders would have on certain DR providers.

Furthermore, combined with the DLF Adder, the TLF and PRM Adders put DR at parity with other supply-side resources, including fossil-fueled generation, because generators are not derated for the line losses and their impact on planning reserves determination. The net result of voiding the adders that are vital to Supply-Side DR is that natural gas generation receives more credit than Supply-Side DR for providing the same service to customers. Such a result is contrary to State decarbonization policies and gives California the ignoble distinction as an outlier for its failure to appropriately recognize the full value of DR as a RA resource. For example, the New York Independent System Operator ("NYISO") incorporates the TLF Adder into DR capacity value as common practice.[74]

In addition, D.23-06-029 fails to address the concern expressed by the Council and CPower that eliminating the TLF and PRM Adders for Supply-Side DR while retaining them for Load Modifying DR creates an uneven playing field despite the fact that they provide virtually the same service.[75] This will bestow a cost effectiveness advantage to Load Modifying DR compared to Supply-Side DR. This will further disadvantage third-party DR providers because, unlike the IOUs, they do not have the ability to request transitioning their DR programs from Supply-Side to Load Modifying DR. This has occurred in the IOUs' 2024-2027 DR

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[73] D.23-06-029, at p. 132 (Finding of Fact 20) and p. 135 (Conclusion of Law 20).
[74] NYISO Special Case Resources can be found here: https://www.nyiso.com/documents/20142/30712914/Demand-Response-Special-Case-Resources.pdf/12d8aba5-94bb-ec85-fe47-28ba681da270
[75] Council and CPower Opening Comments, at p. 10.

Applications proceedings where Southern California Edison Company ("SCE") has proposed to de-integrate its Capacity Bidding Program.[76]

Finding of Fact 22 states that "[a]djustments are needed to the existing DR availability requirements to ensure DR is available during the types of prolonged weather events experienced in recent years."[77] Conclusion of Law 21 states that "DR availability requirements should be expanded so that resources are available when most needed."[78] However, neither of these provide the appropriate basis for the Commission to adopt Ordering Paragraph 30, which as discussed above, requires all PDRs to be available during days when a CAISO Flex Alert is called; CAISO has issued a Grid Warning, Alert, or Notice; or the Governor's Office has issued an emergency notice.[79] The Commission has not demonstrated how enacting this Ordering Paragraph will improve DR availability. Instead, this provision will have negative impacts on availability through loss of a substantial amount of DR RA capacity by creating uncertainty for current and prospective participating customers surrounding the required availability of DR.

Finding of Fact 24 claims that third-party DR "is not performing reliably in comparison to monthly supply plans."[80] Conclusion of Law 23 states that third-party DR "QC should be derated based on performance during test events relative to their QC values."[81] These do not provide a basis for adopting Ordering Paragraph 32 which derates third-party DR QC based on test performance failures.[82] Basing this Ordering Paragraph on a broad Finding of Fact and

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[76] Southern California Edison Company's (U 338-E) Supplemental Testimony In Support Of Its Application for Approval Of Its 2023-2027 Demand Response Programs – Exhibit 10 – Capacity Bidding Program Elect Proposal, submitted in A.22-05-002, et al. (DR Applications) on March 3, 2023, at p. 10, lines 3-14.
[77] D.23-06-029, at p. 132 (Finding of Fact 22).
[78] *Id*., at p. 135 (Conclusion of Law 21).
[79] *Id*., at p. 145 (Ordering Paragraph 30).
[80] *Id*., at p. 133 (Finding of Fact 24).
[81] *Id*., at p. 135 (Conclusion of Law 23).
[82] *Id*., at p. 146 (Ordering Paragraph 32).

Conclusion of Law will lead to an overly punitive hurdle for third-party DR providers. Furthermore, there is a strong possibility that a third-party DR provider could lose a substantial amount of its quarterly revenue in a given year based on one bad test event the preceding year. This will ultimately push third-party participants toward IOU DR programs and potentially away from participating in California's energy market in general, in a manner that is averse to maintaining the "customer choice" required to "grow" DR.[83]

Finding of Fact 24 also ignores the evidence provided by OhmConnect, Leap, the Council and CPower showing that third-party DR performed comparably with IOU DR programs during the hottest days of Summer 2022.[84] It is a fact that, unlike third-party DR, IOU DR programs are not included on supply plans, so they are under no obligation to make their bids to the CAISO market consistent with their QC values. Consequently, the IOUs have the discretion to bid their DR based on the day-to-day availability of their programs rather than their QC values. Therefore, when comparing IOU and third-party DR performance relative to their respective QC values, their performance is similar. The Council and CPower summarized this by saying:

> [D]uring the hottest non-holiday weekdays of 2022 (September 3-5 was Labor Day weekend), the quantity of IOU PDR schedules ranged from approximately 0 percent out of approx. 390 MW of total Resource Adequacy ("RA") credit values on August 31 to less than 40 percent (on September 7-8) out of approx. 380 MW on September 7-8. Figure 2.7 also shows IOU PDR performance being less than their scheduled quantities. The third-party DR performance cited in the PD to support derating third-party DR based on a quarter's test results was 27-35 percent of supply plan QC values in Q2 2022 and 23-58 percent of supply plan QC values in Q3 2022. [footnote omitted] IOU PDR performance, relative to credited RA values (a maximum of less than 40 percent), was no better than third-party DR performance in Q3 2022 (a maximum of 58 percent). Though that is a rough comparison, it demonstrates that limiting claims of DR underperformance

[83] D.16-09-056, at pp. 51, 52, and 56.

[84] OhmConnect Opening Comments on the Proposed Decision, submitted in this proceeding on June 14, 2023, at pp. 3-4; Leap Opening Comments on the Proposed Decision, submitted in this proceeding on June 14, 2023, at pp. 4-5; and the Council and CPower Reply Comments, at pp. 4-5.

to third-party DR is not supported. In fact, this demonstrates that IOU and third-party DR perform comparably.[85]

D. By Imposing Several Provisions in D.23-06-029, the Commission Abused Its Discretion and Violated Statutory and Constitutional Rights of Due Process.

As stated in Section II, judicial review also extends to a Commission decision that "was an abuse of discretion" or that "violates" a party's State and U.S. Constitutional rights. Courts have interpreted the phrase "abuse of discretion" to mean that the "discretion" of a decision-maker is "not unlimited" and '"is not a whimsical, uncontrolled power, but a *legal discretion*, which is subject to the limitations of *legal principles* governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.'"[86]

Due process, including fair and reasonable notice and opportunity to be heard are embedded not only in the federal constitution, but the California Constitution and P.U. Code Section 1708. Section 1708 requires that the Commission may only "rescind, alter, or amend any order or decision made by it" by further "order" of the Commission and only upon notice to the parties and opportunity to be heard. The courts have interpreted the phrase "opportunity to be heard" to mean "at the very least that party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal."[87] The Commission has further made clear that its authority to alter its decisions should also only "be exercised with great care and [is] justified only by extraordinary circumstances to protect parties from endless re-litigation of the same issues."[88]

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[85] The Council and CPower Reply Comments, at pp. 4-5.
[86] *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; emphasis added.
[87] *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240, 244.
[88] D.17-12-006 which is the Decision Denying Petition for Modification of Decision 14-08-057, issued in R.13-05-007 (Digital Infrastructure and Video Competition Act of 2006) on December 21, 2017, at p. 9.

In the case of D.23-06-029, the Commission was required to follow the express mandate of Section 1708, allowing it to modify decisions regarding treatment of DR RA requirements only with notice and opportunity to be heard. But, here, D.23-06-029 modifies those prior orders by eliminating RDRR as an emergency resource, eliminating the TLF and PRM Adders, expanding DR availability requirements, and derating third-party DR QC values.

Furthermore, D.23-06-029 states that the rule regarding derating DR QC "is effective beginning with the capacity awards granted through the LIP process for the 2024 compliance year" and that "[d]erates will be applied so that they correspond to performance during test events for the relevant quarter."[89] Implementing this new rule in 2024 based on tests conducted in 2023 – before the adoption of D.23-06-029 – violates basic considerations of equity and fair notice by imposing retroactive civil penalties.[90] Derating QC based on testing conducted prior to the issuance of D.23-06-029 did not provide third-party DR providers fair notice that the test results would be used in this manner.

IV.
REQUEST FOR ORAL ARGUMENT

Pursuant to Commission Rules of Practice and Procedure, Rule 16.3 allows an applicant seeking rehearing to seek oral argument.[91] Rule 16.3(a) states that:

> The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
>
> (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;

[89] D.23-06-029, at p. 112.
[90] *Landgraf v. Usi Film Prods.* (1994) 511 U.S. 244, 265-266. *See, also E. Enters v. Apfel* (1998) 524 U.S. 498, 532 which states that "fundamental notions of justice that have been recognized throughout [American and English legal] history" disfavor retroactivity (citation and internal quotation marks omitted).
[91] Commission Rules of Practice and Procedure, Rule 16.3(a).

(2) changes or refines existing Commission precedent;

(3) presents legal issues of exceptional controversy, complexity, or public importance; and/or

(4) raises questions of first impression that are likely to have significant precedential impact.[92]

The Joint Parties respectfully request that the Commission schedule oral argument on this Application for Rehearing. This Application meets the requirements for the Commission to hold an Oral Argument where it clearly "raises issues of major significance for the Commission" demonstrating that D.23-06-029 "adopts new Commission precedent," "departs from existing Commission precedent without adequate explanation," "changes or refines existing Commission precedent" and "presents" law and conclusions that are controversial, complex and with an adverse impact on the public. Furthermore, the Joint Parties can present in further detail its arguments as to the broad and dangerous precedent the provisions discussed above in D.23-06-029 and the impacts imposing these provisions will have on third-party DR providers. This information would materially assist the Commission in resolving this Application for Rehearing.

V.
CONCLUSION

On the multiple grounds demonstrated in this Application for Rehearing, the Joint Parties respectfully request that the Commission grant rehearing of D.23-06-029 and modify and reverse D.23-06-029 to, at the least, eliminate the language which eliminates RDRR as an emergency resource and Ordering Paragraphs 29, 30 and 32, which wrongly eliminates the TLF and PRM Adders, expands DR availability requirements, and derates third-party DR QC.

[92] Commission Rules of Practice and Procedure, Rule 16.3(a)(1)-(4).

Dated: August 4, 2023

Respectfully submitted,

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