BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Refinements, and Establish Annual Local and Flexible Procurement Obligations for the 2019 and 2020 Compliance Years.	Rulemaking 17-09-020 (Filed September 28, 2017)

APPLICATION FOR REHEARING OF DECISION 19-10-021 OF POWEREX CORP.

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November 18, 2019

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Pursuant to Rule 16.1 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Powerex Corp. ("Powerex") respectfully submits this Application for Rehearing of Decision 19-10-021 issued on October 17, 2019 ("October 17 Decision").

I. INTRODUCTION

A. Paper Capacity in the Resource Adequacy Program Must Be Eliminated

Sufficient capacity must be available when and where the California Independent System Operator Corporation ("CAISO") needs it to ensure the reliability of the California grid. Every Resource Adequacy ("RA") contract—whether with internal or external suppliers—must be backed by the physical generating capacity, reserves, and firm transmission rights necessary to ensure that the associated supply can be delivered to the CAISO with a high degree of confidence under a full range of operational conditions. Thus, Powerex fully supports the Commission's objective of safeguarding that genuine capacity backs *all* import RA contracts.

The CAISO and the CAISO Department of Marketing Monitoring (DMM) have demonstrated that current sales of "paper capacity" undermine the Commission's objective. Paper capacity involves contracts where the seller (i) has no intent (and/or ability) to deliver any energy to the CAISO grid, or (ii) merely speculates on its prospective ability to acquire energy in

the bilateral short-term market if called upon by the CAISO to deliver. Gaps in the RA program allow a handful of sellers to enter into import RA contracts without committing genuine physical generating capacity on a forward basis and acquiring firm transmission rights necessary to ensure reliable delivery of firm energy to the CAISO grid. These gaps expose California to heightened reliability risks, particularly when California most needs the energy.

Paper capacity import RA contracts appear to meet the Commission's RA requirements; however, in reality, they fail to meet the reliability needs of the California grid – the RA program's very purpose. Sellers of paper capacity submit offers into the CAISO markets at elevated prices to limit the likelihood of a CAISO dispatch and/or rely on their ability to acquire supply in the short-term markets when dispatched. Thereafter, these sellers often fail to deliver energy in accordance with their schedules. Yet they displace suppliers ready to commit the real physical capacity and firm transmission investments necessary to support deliveries to the CAISO throughout the contract term.

Thus, Powerex remains committed to working with the Commission, CAISO, and other stakeholders to eliminate the use of paper capacity in California's RA program. Furthermore, Powerex supports the Commission and the CAISO strengthening California's RA program by requiring that all import RA contracts be resource-specific (*i.e.,* backed by identifiable, surplus, physical generation capacity) consistent with all other RA programs in the nation.

B. The Commission Can Better Eliminate Paper Capacity in the RA Program Without Harm to Wholesale Markets By Eliminating Non-Resource-Specific RA Contracts

Powerex fully supports the Commission's objective of eliminating paper capacity in the RA program. However, Powerex is compelled to seek rehearing of the October 17 Decision because the Commission's decision will harm wholesale markets in California and throughout

the West. First, the October 17 Decision's self-scheduling requirement is contrary to the efficient, centralized, economic dispatch that serves as the basis of the CAISO's wholesale electricity markets. Second, the October 17 Decision's self-scheduling requirement impermissibly interferes with the orderly process for scheduling transmission on external transmission paths under the Open Access Transmission Tariff ("OATT") framework developed by FERC. Therefore, the October 17 Decision encroaches on Federal Energy Regulatory Commission ("FERC") jurisdiction and may chill further efforts towards the regional expansion of CAISO's markets.

The Commission can meet its objective of eliminating paper capacity while avoiding harm to the wholesale markets. California is the only region with organized markets that allows unspecified resources to meet RA requirements. Accordingly, the Commission should grant rehearing of its October 17 Decision to eliminate paper capacity by eliminating non-resource-specific RA contracts altogether.

All RA contracts should be backed by real, surplus, physical generating capability—whether in the form of a specific generating unit or a system of coordinated generation resources—and the ability to reliably deliver firm energy when called upon. The Commission can most-effectively achieve this through the:

i. unambiguous elimination of non-resource-specific supply from the RA program;

ii. development of clear and robust, but broadly workable, definitions and requirements for firm, resource-specific, surplus capacity that requires the delivery of firm energy on firm transmission when called upon; and,

iii. close coordination with the CAISO to align definitions and applicable provisions in the CAISO tariff.

Moving to a resource-specific framework can and should be completed promptly in advance of Summer 2020, when the adverse consequences of paper capacity import RA contracts

are likely to become significant. However, the Commission should first give stakeholders an opportunity to provide input before modifying program requirements and then give stakeholders enough time to comply with the modified requirements. Doing so will maintain certainty in the market, encourage much-needed participation in the RA program, and eliminate years of unnecessary and costly litigation before the Commission and the courts.

II. THE OCTOBER 17 DECISION COMMITS LEGAL ERROR

The October 17 Decision commits legal error because:

(i) the Commission exceeds its jurisdiction and interferes with FERC's jurisdiction over wholesale markets;

(ii) the October 17 Decision was an abuse of discretion and is not supported by substantial evidence as a result of:

  a. the requirements set out in the October 17 Decision do not reflect existing Import RA requirements; and,

  b. the Commission failed to consider the significant adverse consequences that will flow from the imposition of a self-scheduling requirement; and,

(iii) the Commission does not proceed in the manner required by law[1] because the October 17 Decision:

  a. violates the Commerce Clause;

  b. violates the Equal Protection Clause;.

  c. violates Public Utilities Code section 399.11;

  d. violates due process requirements;

  e. represents an unlawful taking; and,

  f. is not a valid exercise of the State's police power.

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[1] Powerex identifies these errors for the sake of completeness and reserves its right to raise such claims in federal court in accordance with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

A. The October 17 Decision Exceeds the Commission's Jurisdiction by Interfering with FERC's Jurisdiction Over Wholesale Markets

In the October 17 Decision, the Commission redefines the performance obligations imposed on import RA contracts. Thus, the October 17 Decision exceeds the permissible scope of the Commission's jurisdiction and encroaches on FERC's jurisdiction over wholesale markets.

Under the Federal Power Act ("FPA"), FERC has exclusive jurisdiction over the rates, terms, and conditions of wholesale sales of electric energy and transmission service offered by public utilities.[2] This includes both the rates, terms, and conditions of participation in the CAISO markets and the rules governing the reservation and use of transmission capacity under the OATT framework. State actions that attempt to fix the rates, terms, or conditions of wholesale service invade "FERC's regulatory turf" and are unlawful.[3] Furthermore, a state may not "tether" participation in, or receipt of revenues under, a state program to the manner in which a supplier participates in the FERC-jurisdictional markets.[4]

The October 17 Decision exceeds the limits on the Commission's authority in several respects. *First*, the October 17 Decision's self-scheduling requirement effectively modifies the tariff-based rules governing how suppliers with import RA contracts may participate in the CAISO market and the wholesale rate these suppliers will receive for energy delivered during the

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[2] 16 U.S.C. § 824d.

[3] *Hughes v. Talen Energy Marketing,* 136 S. Ct. 1288, 1297-1298 (2016) ("States may not seek to achieve ends, however, legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates"); *FERC v. Elec. Power Supply Ass'n,* 136 S. Ct. 760, 780 (2016) (stating that the FPA "leaves no room either for direct state regulation of the prices of interstate wholesales" or for regulation "that would indirectly achieve the same result").

[4] *Hughes*, 136 S. Ct. at 1299*; Coal. for Competitive Energy v. Zibelman,* 906 F.3d 41, 51-52 (2nd Cir. 2018); *Elec. Power Supply Assoc. v. Star,* 904 F.3d 518, 523 (7th Cir. 2018).

term of their contracts. Thus, the October 17 Decision's mandate that certain suppliers offer into the CAISO market as price-takers[5] constitutes an adjustment of the rates, terms, and conditions of wholesale service, and is beyond the Commission's authority.

Second, the Commission oversteps its authority by conditioning the eligibility of external resources to provide import RA on their wholesale market participation. Notably, the courts have held that a state may not "tether" participation in, or receipt of revenues under, a state program to the manner in which a supplier participates in the FERC-jurisdictional markets.[6] By requiring non-resource specific imports to self-schedule in the CAISO markets to provide RA, the October 17 Decision impermissibly tethers eligibility to supply RA to a supplier's specific wholesale market participation.

Third, the October 17 Decision adopts a requirement that will undermine the efficient functioning of markets subject to FERC's exclusive jurisdiction. Not only have CAISO, DMM, and numerous other parties to this proceeding demonstrated that imposing a self-scheduling requirement will create significant pricing and other distortions in the CAISO markets,[7] the Commission itself acknowledges that its ruling will create inefficiencies in the CAISO markets.[8]

Finally, the October 17 Decision will interfere with the terms and conditions of service under the OATT on external systems, effectively replacing the FERC-approved framework for the use of firm transmission reservations. Imposition of the self-scheduling requirement on RA imports combined with the framework for allocating CAISO intertie capability for RA

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[5] *See* October 17 Decision, at 3.

[6] *Supra* at 5, fn. 3. *See Hughes*, 136 S. Ct. at 1299*; Coal. for Competitive Energy v. Zibelman,* 906 F.3d 41, 51-52 (2nd Cir. 2018); *Elec. Power Supply Assoc. v. Star,* 904 F.3d 518, 523 (7th Cir. 2018).

[7] Powerex Comments at 8-9; CAISO Comments at 2; DMM Comments at 7; NRG Comments at 4-5; Public Generating Pool at 2.

[8] October 17 Decision, at 19.

effectively eliminates FERC-granted transmission access and scheduling rights on external transmission paths to California. Entities that have secured RA commitments with the particular holders of CAISO import capability will improperly become the entities scheduled on external transmission facilities as a result of the self-scheduling requirement. Thus neither the FERC approved priorities under external transmission providers' OATTs nor the CAISO's centralized economic dispatch will determine who flows electricity on external transmission systems. The October 17 Decision will thus contravene the proper operation of FERC's OATT framework. Further, the October 17 Decision is unlawful because it interferes with the operation of dispatch and pricing in the wholesale markets, as well as the scheduling and use of external transmission rights, subject to FERC's jurisdiction.[9]

B. The October 17 Decision Is an Abuse of Discretion and Unsupported by Substantial Evidence

Powerex and many other parties in the underlying proceeding have detailed specific adverse consequences that will flow from imposing a "must-deliver" or "self-scheduling" requirement on import RA resources, including disrupting existing contracts, impairing the functioning of the CAISO markets, and reducing the supply of resources willing to supply capacity to California.[10] The October 17 Decision is an abuse of discretion and unsupported by substantial evidence because (i) it claims that the Commission is merely affirming existing RA

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[9] *FERC v. Elec. Power Supply Ass'n,* 136 S.Ct. at 780. *See also Northern Natural Gas Co. v. State Corp. Comm'n of Kansas,* 372 U.S. 84 (1963) (finding that state regulation preempted where it had the practical effect of regulating wholesale gas prices subject to FERC's jurisdiction).

[10] *See, e.g.,* CAISO Comments at 2; Powerex Comments at 8-10; ARem Comments at 4; Calpine Comments at 2; CalCCA Comments at 9-9; Middle River Power Comments at 1.

requirements and (ii) disregards the effect it will have on the CAISO markets and the RA program as a whole.[11]

1. There Is No Basis for Finding That the Requirements Set Out In the October 17 Decision Reflect Existing Import RA Requirements

The Commission characterizes the October 17 Decision as an affirmation of the Commission's existing rules respecting import RA contracts[12] and specifically references D.04-10-035 and D.05-10-042.[13] But the October 17 Decision identifies no previous Commission ruling or regulation expressly requiring self-scheduling in order for a contract to be eligible to fulfill RA requirements or distinguishing between resource-specific and non-resource-specific import RA contracts.

D.04-10-035 and D.05-10-042 require that import RA contracts be for an "Import Energy Product with operating reserves . . . that cannot be curtailed for economic reasons." Neither decision defines "Import Energy Product" nor suggests that the term carries with it an obligation to self-schedule or a must-delivery requirement distinct from the performance obligations imposed on other RA contracts.

The opposite appears to be the case. In D.05-10-042, the Commission recognized that a key purpose of the RA program is to "ensure that resources are made available to the CAISO when and where they are needed" and it acknowledged that CAISO's imposition of a must-offer

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[11] *Cal. Hotel & Motel Ass'n v. Indus Welfare Comm'n,* 25 Cal. 3d 200 (1979) (explaining that there must be rational connection between consideration of relevant factors, the choices made, and the purposes of the enabling statute); *San Pablo Bay Pipeline Co. LLC v. Pub. Util. Comm'n,* 221 Cal. App. 4th 1436 (2013) (finding that decision that exceeds the bounds of reason will constitute an abuse of discretion).

[12] *See, e.g.,* October 17 Decision, at 6.

[13] October 17 Decision, at 8.

requirement would help achieve this result.[14] The Commission never suggested that it was imposing a more stringent "must-deliver" or "self-scheduling" requirement on import RA contracts. Rather, the Commission recognized that import RA contracts were subject to the must-offer protocols adopted in D.04-10-035.[15]

Nor do D.04-10-035 or D.05-10-042 set out the October 17 Decision's distinction between resource-specific and non-resource specific import RA. Rather, these decisions established counting conventions for import resources more generally and are devoid of any reference or discussion of resource-specific and non-resource specific import RA contracts.[16]

The Commission concludes that it is "reasonable" that non-resource-specific RA imports are required to self-schedule into the market. However, the October 17 Decision is an abuse of discretion and not based on substantial evidence because it cannot articulate how the existing RA framework supports this conclusion nor identifies any link to the Commission's prior decisions.

The Commission also fails to articulate a rational connection between requirements distinguishing resource-specific and non-resource specific resources and the goal of ensuring that sufficient capacity is available to meet RA needs. While the Commission suggests that dynamically scheduled resources are not subject to a self-scheduling requirement, the Commission has provided no basis for concluding that the manner in which a resource

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[14] D.05-10-042, at 14-15.

[15] D.05-10-042, at 68. Notably, the Commission's suggestion that non-dynamically scheduled resources have been subject to a self-scheduling or must-delivery requirement directly contradicts the Commission's determinations in later orders. *Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning*, D.06-12-037, Ordering Paragraph 2e (exempting Non-Dynamic System Resources—as defined by the CAISO Tariff—from real-time availability requirement).

[16] *See* D.05-10-042, at 66-67.

participates in the CAISO markets should not determine its eligibility to supply RA. RA contracts that are backed by the physical capability of a system of coordinated generation resources can be counted upon to deliver when called upon by the CAISO with a high degree of confidence regardless of whether they are dynamically scheduled, pseudo-tied, or bid at a CAISO intertie.[17]

2. The Commission Erred in Failing to Consider the Significant Adverse Consequences That Will Flow From the Imposition of a Self-Scheduling Requirement

The October 17 Decision disregards the adverse consequences that will flow from imposing a self-scheduling requirement. Furthermore, the Commission provides no legal or factual support for its contention that its duty to "ensure a reliable, adequate energy supply for the state" overrides any market efficiency concerns raised by CAISO and other parties. Accordingly, the October 17 Decision is an abuse of discretion and not supported by substantial evidence.

The Commission must take necessary and appropriate steps to assess the impact of its decision and potential alternatives, including the economic and competitive impact of its decisions, and failure to do so is an abuse of discretion.[18] Furthermore, the Commission must

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[17] In fact, CAISO has relied on non-dynamically scheduled resources to meet reliability needs and compensate for RA deficiencies. For instance, last year, CAISO procured backstop capacity from Powerex through its Capacity Procurement Mechanism framework. Powerex's commitment was supported with schedules from the BC Hydro system and was not provided on a dynamic or pseudo-tie basis.

[18] *United States Steel Corp. v. Pub. Util. Comm'n,* 29 Cal. 3d 603, 608 (1981) ("The commission must consider alternatives presented and factors warranting adoption of those alternatives"); *N. California Power Agency v. Pub. Util. Comm'n,* 5 Cal. 3d 370, 380 (1971) (stating that "[t]he Commission may and should consider *sua sponte* every element of public interest affected by facilities which it is called upon to approve").

"assess the consequences of its decisions, including economic effects, and assess and mitigate the impacts of its decision" on customers and the public.[19]

During the proceeding, the majority of stakeholders, including Powerex, raised serious concerns and detailed adverse consequences that will arise from imposing a must-deliver requirement on import RA contracts. Among other things, these parties explained that a must-flow requirement would:

- Abrogate existing contracts;[20]
- Reduce the supply of RA by external entities and increase the cost of meeting reliability requirements within California;[21]
- Increase congestion at the CAISO interties;[22]
- Increase CAISO's reliability and flexibility challenges, including making it more difficult for the CAISO to meet resource sufficiency requirements;[23]
- Interfere with CAISO market dispatch and scheduling;[24] and
- Act as a barrier to further regional integration.[25]

Yet, other than summarizing these concerns raised by these parties, the October 17 Decision does not actually address these significant adverse consequences on both the RA program and the CAISO markets.[26]

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[19] Cal. Pub. Util. Code § 321.1(b).

[20] Powerex Comments at 6-7.

[21] Powerex Comments at 10.

[22] Powerex Comments at 11.

[23] Powerex Comments at 8-9; CAISO Comments at 2; DMM Comments at 7; NRG Comments at 4-5; Public Generating Pool at 2.

[24] CAISO Comments at 7; NRG Comments at 4-5.

[25] Powerex Comments at 13.

[26] To the limited extent that the October 17 Decision addresses issues raised by commenters, the Commission's reasoning ignores record evidence. For instance, while the October 17 Decision claims that one of the goals of

Similarly, while the Commission states that its duty to "ensure a reliable, adequate energy supply for the state" overrides any market efficiency concerns raised by CAISO and other parties, no legal or factual basis in the record supports the Commission's statement. In fact, Powerex and other parties demonstrated that a self-scheduling requirement will cause significant inefficiencies and price distortions and will likely reduce the willingness of external suppliers to make their capacity available to California LSEs. Furthermore, the Commission has expressly rejected arguments that the RA program can be designed in a manner that ignores the operational needs of the CAISO, explaining that "[t]he Commission's policy that the [RA program] should ensure that capacity is available when and where it is needed means that the [RA] program design must be consistent with CAISO's operational needs."[27]

C. The October 17 Decision Does Not Proceed in the Manner Required by Law

1. The October 17 Decision Violates the Commerce Clause of the U.S. Constitution

The Commerce Clause grants Congress the power to regulate commerce among the states, and functions "as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[28] Thus when a state action "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state

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the RA program is to ensure that sufficient energy flows into California when the system is peaking in order to maintain grid reliability, the Commission does not address evidence introduced by Powerex and other parties that a must-flow requirement on import RA contracts will often not increase the quantity of energy delivered to the CAISO during peak periods, when transmission facilities are already fully utilized during these periods. *See* Powerex Comments at 4.

[27] D.05-10-042, at 10.

[28] U.S. Const. Art. I, § 8, Cl. 3; *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (quoting *South–Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984)). This "negative" aspect of the Commerce Clause, meant to "restrict[] state protectionism," has been labeled the dormant Commerce Clause. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2453 (2019).

economic *interests* over out-of-state *interests*, [the U.S. Supreme Court has] generally struck down the statute without further inquiry.'"[29] A state law that discriminates against out-of-state goods or nonresident economic actors will only be sustained upon a showing that it is narrowly tailored to "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[30]

Both on its face and in practical effect, the October 17 Decision imposes a substantial and impermissible burden on interstate commerce by imposing new, discriminatory rules on import RA that are not imposed on in-state RA resources. *First,* the October 17 Decision expressly treats import RA differently than RA supplied by in-state resources by creating a discrete class of import suppliers without articulating a clear definition of that class that is tailored to the Commission's expressed concerns, and thereafter by imposing specific direct and consequential burdens (including the new self-scheduling requirement) on import RA suppliers based on that classification, which it does not place on in-state contracts.

Second, even if it were not discriminatory on its face—which it is—the October 17 Decision is discriminatory in its purpose and effect against interstate commerce as it will subject certain external resources to significant costs and uncertainty that are not imposed on internal generation resources and will favor in-state suppliers. While internal generation resources with

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[29] *Tennessee Wine*, 139 S. Ct. at 2471 (quoting *Granholm v. Heald*, 544 U.S. 460, 487 (2005)) (emphasis in original).

[30] *Tennessee Wine*, 139 S. Ct.at 2461; *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008). The Ninth Circuit has noted that "discrimination simply means *differential treatment* of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010) (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Oregon*, 511 U.S. 93, 99 (1994)) (quotation and citation omitted) (emphasis in original). And "[s]tate laws discriminating against interstate commerce on their face are virtually *per se* invalid." *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575, 117 S. Ct. 1590, 1598, 137 L. Ed. 2d 852 (1997) (quotation and citation omitted).

RA commitments economically bid their units into the CAISO markets and will only be dispatched when it is economic to do so, the October 17 Decision will subject external suppliers to the risk of substantial costs associated with being required to deliver energy during periods when the market clearing price at their applicable import location is below their actual costs.

Third, not only will the October 17 Decision impose costs and risks on certain external suppliers that are not borne by in-state suppliers, it appears designed to encourage the use of in-state supply to meet RA requirements.[31] Even if the Commission adopted the self-scheduling requirement to advance a legitimate local purpose, there are reasonable nondiscriminatory alternatives that can achieve the same result. Specifically, the Commission could modify the RA framework to eliminate non-resource-specific RA and require that all RA contracts—whether involving internal or external capacity—be backed by genuine physical capacity capable of delivery to the CAISO. External resources seeking to provide RA would then be subject to the same requirements as internal generation resources, which do not have the option of participating on an "unspecified" or non-resource- specific basis. Such a requirement would ensure that internal and external generation resources are subject to comparable eligibility requirements associated with RA supply.

Finally, the Decision effectively imposes an impermissible import duty.[32] External suppliers of capacity will be required to participate in the CAISO market on less advantageous terms than those imposed on internal generation resources and that will expose them to

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[31] October 17 Decision at 9-10 (stating that the effect of the decision may be to encourage reliance "on resource-specific RA from within California rather than import RA energy products").

[32] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (identifying such action as violating the dormant Commerce Clause).

significant additional costs. State taxes that discriminate against out-of-state products are unconstitutional.[33] The fact that external suppliers may respond to these costs and uncertainties by increasing the price at which they will supply RA does not rehabilitate this legal infirmity.[34]

2. The October 17 Decision Violates the Equal Protection Clause

The Decision also violates the Equal Protection Clause of the U.S. Constitution,[35] which prohibits a state from discriminating against foreign corporations unless the discrimination bears a rational relation to a legitimate state purpose.[36] "[P]romotion of domestic business within a State . . . is not a legitimate state purpose"[37] and the courts will strike down state actions that discriminate against foreign corporations to promote domestic corporations.[38]

Here, the October 17 Decision is facially discriminatory and does not bear a rational relationship to a legitimate state purpose. Specifically, the October 17 Decision will burden external suppliers and favor in-state RA suppliers. At the same time, the Commission's decision to impose a self-scheduling requirement will not accomplish the stated purpose of preventing external suppliers from selling paper capacity. Instead, the October 17 Decision continues to

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[33] *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (citations omitted) (holding that the dormant "Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace'").

[34] *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203 (1994) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984)).

[35] *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) ("Equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned."). It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment. *See id.* at 881 n. 9.

[36] *Id.* at 878 (quotation omitted); *S. R. Co. v. Greene*, 216 U.S. 400, 418 (1910) ([T]o tax [a] foreign corporation for carrying on business . . . , by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws . . . .").

[37] *Metro. Life Ins.*, 470 U.S. at 880.

[38] *See id.* at 877-80.

permit RA contracts that are not supported by a forward commitment of physical capacity, with the sellers of these paper capacity RA contracts continuing to rely on their ability to procure short-term energy during the delivery term if CAISO calls upon the seller to deliver. Like paper capacity where the seller does not have the intent to deliver energy during the delivery term, such contracts contradict the purposes of the RA program and undermine reliability.

3. The October 17 Decision Violates Public Utilities Code Section 399.11

Section 399.11 "requires generating resources located outside of California that are able to supply . . . electricity to California end-use customers to be treated identically to generating resources located within the state, without discrimination."[39] The October 17 Decision violates this requirement by subjecting external generation resources capable of supplying capacity and electricity to California to a discriminatory self-scheduling requirement that does not apply to RA resources within California.

4. The October 17 Decision Violates Due Process Requirements

a. The October 17 Decision Is Void for Vagueness

"The void-for-vagueness doctrine incorporates several important due process principles. It requires that a law give fair notice of its mandate.'"[40] It "also requires that a law provide explicit standards for those who are to apply it."[41]

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[39] Cal. Pub. Util. Code § 399.11(e)(2).

[40] *Finley v. Nat'l Endowment for the Arts*, 100 F.3d 671, 675 (9th Cir. 1996), *rev'd on other grounds* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'").

[41] *Finley*, 100 F.3d at 675 (quoting *Grayned*, 408 U.S. at 108–09). *Accord People v. Iniguez*, 247 Cal. App. 4th Supp. 1, 6 (2016) (alterations, citations, and quotation marks omitted) (emphasis retained) ("Due process of law is based on the concepts of preventing arbitrary law enforcement" and "bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common

Here, the October 17 Decision fails to provide Powerex and other suppliers reasonable opportunity to know the new specifications now required for their contracts to be eligible to satisfy RA requirements. The October 17 Decision does not expressly define or provide guidance regarding the terms "resource-specific" and "non-resource-specific" despite its reliance on those terms in setting the new requirements. Nor were these terms even used, let alone defined, in the decisions that the Commission claims to have affirmed in the October 17 Decision. As a result, Powerex and other external suppliers have no way of knowing whether their contracts will be classified as "resource-specific" or "non-resource-specific."[42]

b. The October 17 Decision's Modification of the RA Requirements Applicable to Import RA Violates Procedural Due Process Requirements

No government may deprive any person of property without due process of law.[43] The "fundamental requirement" of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner."[44] In evaluating the sufficiency of the process, the Ninth Circuit considers: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedure used and the probable value, if any, of

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intelligence must necessarily guess at its meaning and differ as to its application. A vague law not only fails to provide adequate notice to those who must observe its strictures…. In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that abstract legal commands must be applied in a specific context, and that, although not admitting of mathematical certainty, the language used must have *reasonable* specificity.")

[42] Furthermore, even classification of a contract as "resource-specific" or "non-resource-specific" may not provide clarity as to whether the contract will qualify as an "energy product" that "cannot be curtailed for economic reasons." Ordering Paragraph 2 and 3 of the October 17 Decision when read together are contradictory as a resource-specific RA import does not have to self-schedule pursuant to Ordering Paragraph 2, however, a resource-specific RA import that fails to self-schedule would not qualify as an "energy product" that "cannot be curtailed for economic reasons" pursuant to Ordering Paragraph 3.

[43] U. S. Const., Amend. 14, § 1; Cal. Const., Art. I, § 7(a).

[44] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

additional procedural safeguards.[45] "[A] regulation [may] be so arbitrary or irrational so as to violate due process" and the "failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry."[46]

The Commission declared that non-resource specific contracts are ineligible to meet import RA requirements unless they provide for self-scheduling in the CAISO markets and applied its decision to all existing contracts. In doing so, the Commission has deprived external suppliers and California LSEs of the value of their contracts without affording affected parties the requisite notice or an opportunity to be meaningfully heard.[47] The October 17 Decision itself was the first time that Powerex and other parties were given notice that the Commission was considering adopting a self-scheduling requirement. The Proposed Decision Clarifying Resource Adequacy Import Rules issued on September 6, 2019 ("September 6 Proposed Decision") did indicate that the Commission was considering imposing a must deliver requirement. However, the September 6 Proposed Decision did not expressly mandate the use of self-scheduling or distinguish between resource-specific and non-resource specific requirements as the October 17 Decision did. Adopting a new rule that impacts constitutionally-protected rights without giving interested parties notice of what is being proposed or the opportunity to comment on the proposal does not satisfy minimum due process requirements. Moreover, the October 17 Decision makes fundamental changes to the eligibility requirements for import RA contracts after affording

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[45] *Franceschi*, 887 F.3d at 935.

[46] *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 548–49, (2005) (Kennedy, J., concurring) (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 502, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

[47] "[I]t has long been settled that a contract can create a constitutionally protected property interest." *San Bernardino Physicians' Servs. Med. Grp., Inc. v. San Bernardino Cty*., 825 F.2d 1404, 1407-08 (9th Cir. 1987); *accord Walker v. N. San Diego County Hosp. Distr.*, 135 Cal.App.3d 896, 901(1982).

Powerex and other parties with only limited opportunity to submit comments and reply comments on an expedited basis in this proceeding. Given the significant adverse consequences that the Commission's decision will have on the value of existing contracts, the Commission was required to provide parties with an opportunity for hearing as well as the examination and presentation of material evidence. Any additional administrative burden associated with providing parties with a meaningful opportunity to comment is outweighed by the significant damage that the Commission's decision will have on the value of existing contracts. Indeed, the Commission provided extensive due process when it altered other elements of this regulatory scheme in 2005. The need for, and entitlement to, such process is no less here.

In addition, the October 17 Decision failed to comply with due process requirements by refusing to consider the substance of the objections raised by Powerex and other commenters based on the Commission's claim that it is only affirming existing requirements. As noted above, there is no basis for concluding that the October 17 Decision merely affirms existing requirements that have been thoroughly vetted through a prior administrative process. And the Commission's refusal to meaningfully consider the concerns raised by Powerex and other parties based on the assumption that it is affirming existing requirements deprives these parties of the meaningful opportunity to be heard that is their right under the Due Process clause.

c. The October 17 Decision Violates State Due Process Requirements

The October 17 Decision is legally infirm because it is materially different than the September 6 Proposed Decision, yet the Commission did not provide public notice or a comment period. Therefore, the Commission failed to comply with state law and the Commission's own rules.

When a Commission decision materially differs from a proposed decision, California law requires public notification and comment on the changes.[48] Furthermore, an alternate proposed decision ("APD") must "be served upon all parties to the proceeding without undue delay and shall be subject to public review and comment before" the Commission votes.[49] "Alternate means either a substantive revision to a proposed decision that materially changes the resolution of a contested issue *or* any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs."[50] A revision is not an APD if it "does no more than make changes suggested in prior comments,… or in a prior alternate."[51]

The Commission's October 17 Decision should have been issued as an APD. The Commission went far beyond making changes suggested in prior comments. Instead, the Commission made substantial and material modifications. For example, it substantially changed the language of more than half of the September 6 Proposed Decision's Findings of Fact and Conclusions of Law; one of the two Findings of Fact was entirely rewritten and a new Conclusion of Law was added.[52] It eliminated the "peak system period" from the initial finding

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[48] *See e.g. Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner'"). *See also Railroad Com. of California v. Pacific Gas & Electric Co*., 302 U.S. 388, 393 (1938) ("In order to satisfy the requirements of the due process clause … there must be due process and an opportunity to be heard").

[49] Cal. Pub. Util. Code § 311(e).

[50] *Id.*

[51] Commission Rules of Practice and Procedure 14.1(d).

[52] *See* September 6 Proposed Decision, at 13 and October 17 Decision, at 20-21 (*Compare* "2. It is reasonable that RA import contracts should be structured to require energy to flow during peak system periods." *with* "2. It is reasonable that non-resource-specific RA imports are required to self- schedule into the CAISO markets. This requirement should not apply to resource-specific RA imports, including dynamically scheduled resources.").

and added a differentiation between resource-specific and non-resource-specific import RA contracts and created and imposed a new self-scheduling requirement that would apply to the latter. These changes are highly substantive and material. Despite these material and substantive changes, the Commission did not serve on all parties the final draft version of the October 17 Decision prior to the Commission decision conference where the Commission adopted the final draft version as the October 17 Decision, and there was no opportunity for public review and comment.

5. The October 17 Decision Represents An Unlawful Taking

No government may take private property for public use without just compensation.[53] Courts have long recognized that the government must compensate a property owner when a regulation decreases the value of that property.[54] In evaluating whether there is an unlawful taking, the court will consider the economic impact of the regulation, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.[55]

The Commission's decision to apply a new self-scheduling requirement on external resources supplying RA has deprived purchasers and sellers of the value of their contracts. Powerex and other parties entered into contracts for the specific purpose of purchasing and selling RA capacity, and these contracts were structured to comply with the existing eligibility and performance requirements reflected in the Commission's regulations and the CAISO Tariff.

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[53] U.S. Const. Amend V; U.S. Const. Amend. XIV; *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 536 (2005).
[54] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922).
[55] *Lingle*, 544 U.S. at 538-39 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

In fact, the Commission acknowledges that its ruling is inconsistent with parties' long-held understanding of the requirements imposed on RA contracts,[56] but claims that these parties merely misunderstood the requirements that were established in prior decisions. However, the reason that parties have operated with the understanding that there is no self-scheduling requirement is because no such requirement exists under existing program requirements.
The October 17 Decision will also deprive Powerex and other market participants of the value of the investments that they have made in obtaining firm transmission rights on the systems of external transmission providers in order to support the physical delivery of capacity to California ratepayers. However, as previously discussed, the October 17 Decision, by virtue of the self-scheduling requirement, ensures that those entities that hold import capability—rather than the priorities under the external OATT framework—will now dictate who gets to flow on the high-volume transmission corridors that link the western states to the California grid.[57] In this manner, the October 17 Decision unlawfully deprives Powerex and other firm rights holders of using their rights.

III. CONCLUSION

Powerex fully supports the Commission's objective of safeguarding that genuine capacity back *all* import RA contracts and eliminating paper capacity in the RA program. However, the October 17 Decision commits legal error and will harm wholesale markets. For the reasons described above, the Commission should allow rehearing of the October 17 Decision and can better eliminate paper capacity in the RA program without harm to wholesale markets by collaborating with the CAISO to develop a workable framework that requires that *all* import RA

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[56] October 17 Decision, at 15.
[57] *See, infra,* at 3 (Section I.B).

contracts be resource-specific (*i.e.,* backed by identifiable, surplus, physical generation capacity that requires the delivery of firm energy on firm transmission when called upon) and by eliminating non-resource-specific RA contracts.

Respectfully submitted,

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November 18, 2019

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