BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Portions of AB117 Concerning Community Choice Aggregation	Rulemaking 03-10-003 (October 2, 2003)

LOCAL POWER

COMMENTS ON LIMITING A COMMUNITY CHOICE AGGREGATOR'S CUSTOMER RESPONSIBILITY SURCHARGE LIABILITY UPON SUBMISSION OF ITS IMPLEMENTATION PLAN

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At Administrative Law Judge (ALJ) Kim Malcolm's request, Local Power hereby submits its comments on a process, in accordance with AB117 and existing California Public Utilities Commission ("Commission") policy, by which a Community Choice Aggregator's filing of an Implementation Plan (IP) with the Commission limits its Customer Responsibility Surcharge (CRS) liability relative to ongoing New World Procurement and Utility Retained Generation.

A. CRS Based on Implementation Plan

AB117 states specifically that an Implementation Plan shall be filed with the Commission so that it may determine an Exit Fee, including a CRS:

> "*In order to determine the cost-recovery mechanism to be imposed on the community choice aggregator* pursuant to subdivisions (d), (e), and (f) that shall be paid by the customers of the community choice aggregator to prevent shifting of costs, the community choice aggregator shall file the implementation plan with the commission, and any other information requested by the commission that the commission determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f)" (emphasis added, PUC Section 366.2(c)(5)).

The CRS calculation for New World Procurement is therefore statutorily bound to the Implementation Plan.

AB117 clearly establishes the CCA Implementation Plan as the document which allows the Commission to determine the cost-recovery mechanism to be imposed. on a CCA's customers. Indeed, *AB117 requires the Commission*, after a 90 day information request and certification process, to present to the CCA its findings regarding any cost recovery that must be paid relative to 366.2(d), (e) and (f):

> "After certification of receipt of the implementation plan and any additional information requested, *the commission shall then provide the community choice aggregator with its findings regarding any cost recovery that must be paid by customers of the community choice aggregator* to prevent a shifting of costs as provided for in subdivisions (d), (e), and (f).

B. CCA CRS Obligations Limited to Attributable, Avoidable, Utility Contracts Reasonably Entered Into

CRS Obligations relative to New World Procurement are limited to those obligations outlined in PUC Section 366.2(f), which presents a precise definition of which kinds of costs (in addition to the utility's unrecovered past under-collections for electricity purchases, including any financing costs, attributable to that customer), that must be paid by a CCA's customers for its CRS:

> "Any additional costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated *net unavoidable* electricity purchase contract costs attributable to the customer, *as determined by the commission*, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation" (emphasis added, PUC Section 366.2(f)(2)).

Any contract costs that are avoidable or not attributable to a CCA customer may not be included in a CRS. This presents the question of the Commission's definition of "net unavoidable electric purchase contract costs attributable to the customer." In D.04-12-046, the Commission established, in Finding of Fact 20, a principle of reasonableness in determining which utility New World Procurement obligations a CRS should include:

> AB 117 provides that the CRS should include all costs that the utilities reasonably incurred on behalf of ratepayers, which may include costs incurred after the

> passage of AB 117 but should not include any costs that were “avoidable” or those that are not attributable to the CCA’s customers (p.60).

The “reasonableness” criterion is defined by the Commission’s adopted electric utility procurement framework, in R.01-10-024, and ongoing procurement authorizations in R.04-04-043.

In D.04-12-046, the Commission adopted a similar reasonableness standard in Conclusion of Law #24, requiring that CRS forecasting must be reasonable:

> “The utilities should not be required to assume the risk for CRS forecasts where CRS liabilities were reasonably incurred” (p.66).

C. Reasonable Means Forecasts Include Any Formal CCA Actions in Service Territory

The reasonableness of a utility’s contract, and thus a CCA’s CRS obligation, rests on reasonable forecasting, which the Commission should require utilities to fully include and reflect formal CCA activity in their service territories. AB117 requires that electric utilities “shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs”(PUC 366.2(c)(9)). Full cooperation with a CCA includes, but is not limited to, provision of utility data at a CCA’s request, even though AB117 does not require that such a request be made by an ordinance, resolution or Implementation Plan. It follows that the full cooperation requirement must include utility’s acknowledgment of any city council’s or board of supervisors’ formal declarations of intent to implement a CCA program.

The Commission has already determined that utility procurement plans are required to reflect Community Choice Aggregation in their service territories. In Decision 04-01-050 of R.01-10-024, the Commission required that “(i)n the long-term plans that the utilities

will prepare, we require each utility to provide a low load forecast that includes Community Choice Aggregation (CCA)" (January 22, 2004, p.4). The Commission specifically included CCA in a table containing a summary of the dimensions of the information that must be presented in the long-term plans of the utilities (D.04-01-050, p.99). In this adopted framework for long-term utility procurement, Finding of Fact 49 provided that "the utilities should also supply a range of forecasts of load in their revised 2004 long-term plans in order to account for potential changes in community choice aggregation and direct access" (p.188). Finally, Conclusion of Law 32 provided that "The utilities should include in their updated long-term plans several forecasting scenarios, including widespread formation of community choice aggregators, as well as a core/noncore scenario" (p.197).

It follows that the utilities' load forecasts should acknowledge and reflect the load forecasting implications of any formal actions of any municipality or county, in particular an CCA ordinance adopted in compliance with Public Utilities Code Section 366.2(c)(10). At the time of this Commission decision requiring CCA low load scenarios in long-term electric utility procurement plans (January 22, 2004), no California city had yet formally adopted a CCA ordinance. Since then, both Chula Vista and San Francisco have adopted formal ordinances creating CCAs.

D. Procurement Plans Must Reflect CCA Ordinance

The CCA ordinance, which AB117 requires CCAs to formally consider and adopt, provide the utilities with an initial means of reasonably avoiding over-procurement associated with departing load in these jurisdictions.

Recommended Process # 1. Therefore, the Commission should provide that any contracts entered into by a utility that fails, in its procurement plan, to acknowledge and reflect the load forecast impacts associated with any ordinance adopted, adopted pursuant to Public Utilities Code 366.2(c)(10) by any municipality, county or joint powers agency in its service territory, shall be deemed "avoidable," and furthermore shall

determine the utility to have entered into such contracts "unreasonably," and shall consider any costs associated with such contracts to be "non-attributable" to the customers of the resulting CCA formed by said municipality, county or joint powers agency.

E. CCA Implementation Plan Should Restrain Utility Procurement to One Year

The second formal action that provides the utilities with a means of reasonably avoiding over-procurement associated with departing CCA load is the Implementation Plan, which AB117 requires CCAs to consider and adopt at a duly noticed public hearing pursuant to 366.2(c)(3).

The IP is required to contain the following details about a CCA's program:

> (A) An organizational structure of the program, its operations, and its funding.
> (B) Ratesetting and other costs to participants.
> (C) Provisions for disclosure and due process in setting rates and allocating costs among participants.
> (D) The methods for entering and terminating agreements with other entities.
> (E) The rights and responsibilities of program participants, including, but not limited to, consumer protection procedures, credit issues, and shutoff procedures.
> (F) Termination of the program.
> (G) A description of the third parties that will be supplying electricity under the program, including, but not limited to, information about financial, technical, and operational capabilities (PUC 366.2(c)(3))..

Under AB117, the Commission must, within 90 days after a community choice aggregator establishing load aggregation files its implementation plan, the commission shall certify that it has received the implementation plan, including any additional information necessary to determine a cost-recovery mechanism (PUC 366.2(c)(7)).

Recommended Process #2. The Commission should request adequate information from a CCA that has filed an Implementation Plan so that it may ascertain the potential

departing load impacts, as well as a schedule, of a CCA's Implementation Plan, on a utility's ongoing procurement activities. Such information includes, but is not limited to:

1. The schedule of load departure planned by the CCA;
2. The size of a planned CCA load departure, not counting the opt-out impacts that might result pursuant to the right of customers not to participate outlined in PUC 366.2(c)(11),
3. The Renewable Portfolio Standard (RPS) or other RPS compliant portfolio requirement of the CCA, including energy efficiency programs;
4. The CCA's proposed method of ensuring resource adequacy for participating customers.
5. The minimum duration of a CCA's proposed contract to Electric Service Providers (ESPs).

Under AB117, the Commission is required to notify any electrical corporation serving the customers proposed for aggregation that an implementation plan initiating community choice aggregation has been filed, within 10 days of the filing.

Recommended Process #3. In its 10 day notification to an electric utility than an IP initiating a CCA has been filed, the Commission should order the electric utility to cease any and all multi-year procurement activity related to the load involved, and to limit any ongoing procurement activities to a one-year basis.

F. Incremental Utility Procurement Costs Associated with CCA IP Are Implementation Costs, Not CRS Costs

At present, short-term power contracts offer commodity electricity at lower rates than long-term contracts, presenting no incrementally higher cost to cover a CCA's load, and thus no cost-shifting issue. If, after a Commission-ordered one year contract, a CCA proves unsuccessful in its negotiations with Electric Service Providers, there could potentially be higher costs associated with the utility's renewed long-term procurement for the would-be CCA customers. The utilities have raised the question in Workshops of who should pay the incrementally higher cost of a one year contract compared to a long-term contract, or of a resumption of long-term procurement following an unsuccessful CCA IP, in order to provide an exit "window" for CCAs.

This is a difficult question that originates in the passage and signing of AB57 and AB117 on the same day, authorizing two separate processes - electric utility procurement and CCA service - which in an imperfect marketplace can result in incremental costs.

These are costs of the marketplace, however, and not costs not necessarily associated with a CCA's customers, whose success or failure depends on the market. The difference in price of commodity electricity in a short-term contract versus a long-term contract is determined by market conditions, and is thus not attributable to a CCA's customer. It is in fact an Implementation cost. Any funds recovered by a utility from ratepayers to pay for this incremental cost is not a CRS, because the short contract is not being stranded by the load departure. Rather, the cost of ordering short contracts to "cover" a CCA is the inherent cost of facilitating a load departure while minimizing cost shifting. If the price of short term power contracts turns out to be lower than long-term contract power (as it is now), then all ratepayers should share in the benefit; if the price turns out to be higher, than all ratepayers should share in the cost, pursuant to AB117:

> "An electrical corporation shall recover from the community choice aggregator any costs reasonably attributable to the community choice aggregator, as determined by the commission, of implementing this section, including, but not limited to, all business and information system changes, except for transaction-based costs as described in this paragraph. Any costs not reasonably attributable to a community choice aggregator shall be recovered from ratepayers, as determined by the commission. All reasonable transaction-based costs of notices, billing, metering, collections, and customer communications or other services provided to an aggregator or its customers shall be recovered from the aggregator or its customers on terms and at rates to be approved by the commission" (PUC 366.2(c)(17)).

This interpretation of implementation costs was reaffirmed by the Commission in the Phase I CCA decision:

> "The statute gives the Commission discretion to establish which costs should be borne by utility ratepayers and we find that *the assumption of implementation costs by all ratepayers is not "cost-shiftin*g." Our interpretation of Section 366.2 (c)(17) reflects our view that, while AB 117 would limit the cost liability of customers remaining with the utility, it recognizes that some program costs could not reasonably be assumed by a single CCA without creating insurmountable practical problems or barriers to entry that the statute probably did not intend" (my emphasis, D.04-12-046, p.11).

In fact, ordering utilities to limit their procurement to one year for CCAs with filed Implementation Plans is a necessary measure to facilitate Community Choice Aggregation as a meaningful option, minimizing cost-shifting between CCA customers and bundled service customers, as adopted by the Commission in Conclusion of Law #21 of its recent CCA Phase I Decision:

> "AB 117 does not permit cost-shifting of CCA CRS liabilities between utility bundled customers and CCA customers" (D.04-12-046 in R.03-10-003, p.66).

Indeed, the Commission established that having CCA as a real option is in the interests of all ratepayers, not just CCA customers:

> "The CCA program is supported by the state's legislature as good public policy and one that will promote the state's interests. For that reason alone, we do not consider future CCAs and their customers as the sole beneficiaries of the program" (D.04-12-046, p.11).

In the event that some extreme negligence by a CCA is determined to be the cause of its failure to depart from utility as planned in its IP, and the resumption of long-term contracts by the utility is occasioned by higher prices, the Commission may wish to consider legal options, but should not impose any penalties on consumers who under law have never ceased to be utility customers, but were merely attempting to negotiate with ESPs pursuant to PUC 366(a), 366.2(a)(1), and other sections of the Public Utilities Code.

Recommended Process #4. The Commission should treat any incremental costs associated with limiting electric utility procurement to one year contracts for CCAs that have filed an Implementation Plan with the Commission pursuant to Public Utilities Code Section 366.2(c)(3) and (5), as implementation costs not attributable to the customer of the CCA.

G. Commission May Delay CCA Load Departure by One Year to Minimize Cost-Shifting

Under AB117, the Commission's authorization to assign an Exit Fee to an IP is conjoined with its authority to determine the earliest date on which a CCA's load can transfer away from the utility, considering the impact on an electric utility's *annual procurement plan*:

> "No entity proposing community choice aggregation shall act to furnish electricity to electricity consumers within its boundaries until the commission determines the cost-recovery that must be paid by the customers of that proposed community choice aggregation program, as provided for in subdivisions (d), (e), and (f). The commission shall designate the earliest possible effective date for implementation of a community choice aggregation program, taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission" (PUC 366.2(c)(8)).

It is clear that the legislature intended this double authority to enable the Commission to coordinate between annual electric utility procurement plans and CCA load departures, so that a higher CRS associated with New World Procurement contracts could be avoided by a brief delay of customer transfer to CCA service.

Recommended Process # 5: The Commission should delay a CCA load transfer by no longer than a one-year period from the date on which a CCA IP was filed, if a failure to do so would result in a higher CRS.

H. Conclusion

We look forward to a fuller discussion of these ideas on this matter with parties to R.03-10-003, Judge Malcolm, and the Commission.

DATE: April 6, 2005 **Respectfully submitted,**

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CERTIFICATION OF SERVICE
R.03-10-003

I, Paul Fenn, certify that on this day April 6, 2005, I caused copies of the attached **LOCAL POWER COMMENTS ON LIMITING A COMMUNITY CHOICE AGGREGATOR'S CUSTOMER RESPONSIBILITY SURCHARGE LIABILITY UPON SUBMISSION OF ITS IMPLEMENTATION PLAN** to be served on all parties by emailing a copy to all parties identified on the service list provided by the California Public Utilities Commission for this proceeding.

Dated: April 6, 2005 at Oakland, California.

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