

**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 UTILITY INTERIM TARIFFS TO
IMPLEMENT COMMUNITY CHOICE AGGREGATION**

February 28, 2005

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Local Power submits its comments on the utility interim tariffs to implement Community Choice Aggregation. Local Power has a number of concerns about these proposals, but will limit its Comments to the most important ones.

While we will address more detailed elements of the proposed interim tariffs at a later date, Local Power will focus its efforts on elemental concerns with the assumptions or structure of these proposals.

A. PG&E's "Community Choice Provider" a Confusing Invention

First among these, Pacific Gas & Electric (PG&E) employs a curious and unexplained nomenclature of the "Community Choice Provider" ("CCP") throughout its February 22, 2005 document, in a manner that confuses statutorily distinct parties, and if allowed would further muddy the regulatory waters at the Commission. Indeed, PG&E's use of the CCP conflates the Community Choice Aggregator (CCA), as defined in great detail under AB117, with the Electric Service Provider (ESP)¹ which AB117 selects as the only kind of entity authorized to *provide electricity services to CCAs* (PUC 218.3).

Under law, certain obligations apply only to CCAs, and other obligations apply only to ESPs. They are different, and should in no way be confused. Indeed, the legislature and

¹Indeed, PG&E's proposed tariffs refer to an ESP as an "*Energy Service Provider*," which is particularly confusing, as AB117 uses the acronym uniformly to mean *Electric Service Provider*."

governor took pains to erect a firewall in AB117 between CCAs, electric service providers and utilities:

“SEC. 6. Section 394 of the Public Utilities Code is amended to read:
394. (a) As used in this section, ‘electric service provider’ means an entity that offers electrical service to customers within the service territory of an electrical corporation, but does not include an electrical corporation, as defined in Section 218, does not include an entity that offers electrical service solely to serve customer load consistent with subdivision (b) of Section 218, and does not include a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. ‘Electric service provider’ includes the unregulated affiliates and subsidiaries of an electrical corporation, as defined in Section 218” (PUC Section 394 (a)).

PG&E’s proposed tariffs are replete with requirements and obligations for CCPs that should either belong to a CCA or to an ESP, but certainly not to both. For example, on the one hand, PG&E’s proposed tariffs replace every instance of “ESP” with “CCP” as if ESPs and CCPs were somehow comparable; but then PG&E’s proposed tariffs also impose requirements on CCPs that AB117 specifically requires only of CCAs.

B. PG&E Unlawfully Adds Requirements to the Statutory Implementation Plan

One glaring example of this error is a proposal that a CCP is responsible for submitting an implementation plan to the Commission:

“CCPs shall demonstrate to the CPUC as a part of its implementation plan, its resource adequacy requirements necessary to serve its customers at the start of its CCA Service and for the following year and for subsequent years as required by the CPUC” (PG&E, February 22, 2005, Section B, subsection 5).

Yet this is contrary to law. AB117 states very clearly that it is a CCA, not a CCP (which does not legally exist anyway) nor even an ESP, that must submit an implementation plan to the Commission:

“A community choice aggregator establishing electrical load aggregation pursuant to this section shall develop an implementation plan detailing the process and consequences of aggregation. The implementation plan, and any subsequent changes to it, shall be considered and adopted at a duly noticed public hearing”

(PUC 366.2(c)(3).)

Specifically, the implementation plan is required in order for the Commission to assign a Customer Responsibility Surcharge (CRS) to the CCA, *which the CCA will need in order to negotiate with ESPs:*

“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)” (PUC 366.2(c)(5)).

AB117 defines an Implementation Plan as a CCA requirement because it is needed for coordination between CCA load departures and electric utility procurement, in order to minimize stranded costs and cost shifting between CCA customers and bundled service customers.

Furthermore, PG&E’s conflation of CCAs and ESPs suffers additional confusion when it asserts that CCPs “shall demonstrate to the CPUC as a part of its Implementation Plan, its resource adequacy requirements necessary to serve its customers at the start of its CCA Service and for the following year and for subsequent years as required by the CPUC.”

Yet the required components of the implementation plan are not left to the Commission, nor is the Commission authorized to add new requirements. Rather, these requirements are established by statute:

“The implementation plan shall contain all of the following:

- (A) An organizational structure of the program, its operations, and its funding.
- (B) Ratesetting and other costs to participants.
- ©) 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” (*Ibid.*)

While AB117 allows the Commission to request “any additional information necessary to determine a cost-recovery mechanism,” it does not allow the Commission to add requirements to a CCA’s statutorily defined implementation plan, such as to demonstrate resource adequacy, even though an ESP serving a CCA may be required to do so under the Commission’s most recent Electric Procurement decision.

Given that the implementation plan must be prepared by a CCA prior to negotiation with an ESP (as pointed out in D.04-12-046), requiring a level of detail about the nature of an ESPs service at this point in time is not only contrary to AB117 but unnecessary and burdensome to CCAs in the process of preparing for negotiations with ESPs.

C. PG&E Violates D.04-12-046 By Requiring Opt-Out for Utility Data

PG&E appears to ignore the clear orders given by the Commission in D.04-12-046 when it decided that all useful utility data shall be made available to any CCAs upon request, provided that the CCA signs a confidentiality agreement and certifies that its is a CCA.

PG&E proposes cursory terms for release of confidential information:

“PG&E will provide customer-specific usage data to a CCP subject to schedule CCAINFO....By electing or not opting-out of CCA Service from a CCP, the customer consents to the release of the CCP metering information required for billing, settlement and other functions required for the CCP to meet its requirements and twelve (12) months of historical usage data. (PG&E, February 22, 2005, Section C, Subsection 3)”

PG&E’s terms would appear to delay availability of data until after the opt-out period - a proposal which directly contradicts D.04-12-046.

In D.04-12-046, the Commission decided that certain types of data are needed for a CCAs to investigate, pursue or implement CCA:

“CCAs must have certain types of information in order to plan their procurement strategies, assess the viability of offering energy services, and to contact

customers. Section 366.2©(9) anticipates the needs of CCAs for certain types of customer data and information” (D.04-12-046, p.50)

The Commission agreed that the data is needed in advance of actual CCA implementation:

“AB 117 is clear in its intent to require the utilities to provide CCAs all customer and usage data that is relevant to CCA operations even before the CCA begins offering service. In addressing the informational needs of CCAs, Section 366.2©) (9) provides that the utilities shall “cooperate” with CCAs that “investigate or pursue” CCA programs. Because a CCA is most likely to “investigate or pursue” CCA programs before it begins offering service, we read the plain language of the statute to mean relevant information must be provided on demand, without distinguishing between a customer who is still with the utility or a customer of the CCA or between the time a CCA is created and the time it provides service. By law, CCAs are entitled to receive certain types of information as long as they are investigating, pursuing or implementing a CCA program”(pp.49-50).

The Commission agreed that the CCA customer notification requirements would depend on access to customer-specific information:

“Section 366.2 (c)(13) (A) supports this finding in its requirement that CCAs provide opt-out notifications to prospective customers prior to cut-over. Although Section 366(2) (13)(B) gives the CCAs the option to request utility assistance with the notifications, each CCA must assume ultimate responsibility for the notices. The CCA cannot satisfy this responsibility without access to customer names and addresses. Thus, if the Legislature had intended for customer information to remain with the utility, it would have not required the CCA to issue the opt-out notices”(p.50).

The Commission agreed that AB117 requires CCAs to have access to data that would be considered confidential under Direct Access rules:

“The information the CCAs may need from the utilities may be confidential, for example, (1) basic load and usage data required to estimate energy procurement needs and (2) customer information needed to contact customers and provide services, including name, address, and meter information”(p.47).

The Commission rejected utility arguments that Direct Access confidentiality rules should apply, “*primarily because the statute itself directs the provision of customer information to a CCA*”:

“Moreover, unlike a district attorney investigating criminal activity. The statute permits the CCA to receive such information. Unlike the unwilling subject of a criminal investigation, the customers for whom the CCA seeks information have implicitly agreed to permit the CCA to aggregate their energy requirements and offer service. We believe AB 117 assumes, as we do, that CCAs can be entrusted with confidential customer information. Unlike energy service providers offering direct access, CCAs are government agencies. As long as some basic protections are in place, the risks of providing confidential information to these entities is outweighed by the dictates of the statute and the potential benefits CCA customers would realize only if CCAs have the information they need to make fully informed decisions regarding energy procurement, service requirements and resource planning decisions” (p.51)

Note the observation that “CCAs can be entrusted.” Moreover, the Commission cites AB117 rather than any policy argument of the other parties to confirm that even customer-specific billing data (as opposed to masked load data) must be made available to CCAs:

“In addition to its requirement that utilities provide information to CCAs before and after they initiate operations, AB 117 specifies the types of information the utilities must provide to CCAs. Section 366. 2©)(9) refers to “appropriate billing and electrical load data, including, but not limited to, data detailing electricity needs and patterns of usage.” The statute specifically refers to “billing” data as distinct from “electrical load data.” We are not aware how aggregated or masked billing data could satisfy the statutory requirement. Again, the plain language of the law means that the CCA is entitled to any and all billing data that is reasonably useful to the CCA. It also refers to information “detailing” electricity needs and patterns of usage. Use of such specific terms reflect the Legislature’s intent for CCAs to have information that is neither masked nor aggregated, to the extent such information is required by CCAs that would reasonably “investigate, pursue or implement” a CCA program”(p.52)

The Commission followed Local Power’s cross-examination of SDG&E’s witness on whether city and county tax rolls include renters, who would be utility customers who must be notified by the CCA:

“We are not convinced by utility testimony that city and county tax rolls will provide the kind of information CCAs need to accomplish those ends” (p.52)

The Commission then adopted the position that confidentiality concerns may be addressed by imposing limits on the CCA’s use of the information it gets, by requiring CCA nondisclosure agreements:

“We direct the utilities to provide all relevant usage information, load data and customer information to CCAs. The CCA shall sign nondisclosure agreements for any confidential information that is not masked or aggregated. We will also require that all notices relevant to CCA programs inform customers that the utility may share customer information with the CCA and that the CCA may not use the utility’s information for any purpose other than to facilitate provision of energy services” (p.52)

This nondisclosure requirement underscores the critical importance of not conflating CCAs and ESPs, as to do so would in effect make all data available to ESPs.

Finally, the Commission stated its “intent to enforce the law with respect to its requirement that the utilities ‘cooperate’ with CCAs in the provision of all relevant information, a *term which we interpret broadly*”:

“The utilities may not determine what information is “relevant” to CCA operations as long as the utility is reimbursed for the reasonable costs of providing the information. While we welcome the utilities’ tariff proposals for the secure and cost-effective sharing of information, we will not tolerate utility actions or delays that may affect the provision of information to CCAs or CCA services to customers” (p.53).

Thus, PG&E’s reference to a customer’s not opting-out as constituting consent is contrary to both law and Commission policy as represented by the following Findings of Fact, Conclusions of Law and Orders that AB117 itself requires a full disclosure, interpreted broadly, with a CCA nondisclosure agreement to protect confidentiality of customers:

Finding of Fact # 38: “CCAs would ‘investigate or pursue’ CCA programs prior to offering service and a CCA would need relevant customer and load data in order to conduct a meaningful investigation of CCA programs” (p.62).

Finding of Fact # 39: “A CCA cannot notify customers of its intent to offer electrical service if it does not have access to relevant customer information” (p.62).

Finding of Fact # 40: “In the CCA’s effort to satisfy customer notice requirements, tax rolls are not a reasonable substitute for customer information held by utilities partly because property owners would not necessarily be a utility customer of record” (p.63).

Finding of Fact # 41: “Nondisclosure agreements would provide reasonable protections against the disclosure by a CCA of a utility’s customer information.

Finding of Fact # 42: “CCAs may need specific customer information in order to market energy services and tailor those services to individual customers or groups of customers” (p.63).

Finding of Fact #43: “CCAs need load data in order to develop cost-effective and reliable energy procurement strategies” (p.63).

Finding of Fact # 44: “Customers would benefit from notification that contact information and usage data may be shared with the CCA and may not be disclosed to others” (p.63).

Conclusion of Law #30: “Section 366.2©)(9) requires the utilities to provide all relevant information required by CCAs to “investigate, pursue or implement” meaningful programs. This requirement does not permit the utilities to deny CCAs access to relevant customer or load information” (p.67).

Conclusion of Law #31: “Section 366.2(c)(13)(A) requires CCAs to provide customer notice of their intent to provide service, a requirement a CCA cannot satisfy without relevant customer information. Read in conjunction with Section 366.2©)(9), this requirement presumes that the CCA will have access to certain customer information held by the utility”(pp.67-8).

Conclusion of Law #32: “Section 366.2©)(9) requires the provision of detailed billing and load data to CCAs that are investigating, pursuing or implementing CCA programs” (p.68).

Conclusion of Law #33: “The utilities should require CCAs to sign nondisclosure agreements when they share confidential information about customers or electricity load and should require a county or city’s chief administrative officer to attest that it is “investigating” or “pursuing” status as a CCA as a precondition to receiving confidential customer information” (p.68).

Conclusion of Law #34: “Notices to prospective CCA customers should inform customers that the utility may share customer information with the CCA and that the information may not be used for any purpose other than to facilitate the provision of energy services to the customer by the CCA” (p.68).

Conclusion of Law #35: “Utility tariffs should provide that the CCA must indemnify utilities from liability for the disclosure of confidential customer

information in cases where the utility has take all reasonable precautions to prevent that disclosure” (p.68).

Commission Order #5: “PG&E, SDG&E, and SCE’s proposed tariffs shall include... (12) the offer to provide access to all relevant customer information, billing information, usage and load information, consistent with this order and which shall be provided to the CCA at cost except that those information services already approved in D.03-07-034 shall be provided at no cost to the CCA; (13) a requirement that all confidential utility information shall be provided subject to nondisclosure agreement and a requirement that the chief administrative officer of a city or county attest that the city or county is investigating or pursuing status as a CCA as a precondition of receiving confidential customer information; (14) a requirement that customer notifications about prospective CCA operations inform the customer that customer information may be provided to the CCA subject to nondisclosure for any purpose other than those related to facilitating the CCA’s services; (15) a provision for CCAs to indemnify the utilities from liabilities associated with the CCA’s disclosure of confidential customer information where the utility has taken all reasonable steps to prevent such disclosure” (pp.70-71).

D. PG&E Excludes Customers from Opt-Out

PG&E indicates that certain customers should be excluded from the basic opt-out mechanism of AB117, and be required to opt-in:

Customers taking service under an optional PG&E commodity rate schedule such as Net Energy Metering (without a contract term) shall not be included in an Automatic Enrollment process. These customers are eligible for CCA Service participation through the customer’s positive election” (PG&E, February 22, 2005, Section E, Subsection 2).

This is also contrary to AB117, which states that every utility customer, irrespective of rate schedule, shall participate on an opt-out basis:

“Customers may aggregate their loads through a public process with community choice aggregators, if each customer is given an opportunity to opt out of their community’s aggregation program” (PUC 366.2(a)(2)).

Indeed, AB117 prohibits the use of a positive written declaration by any customer:

“Under community choice aggregation, *customer participation may not require* a positive written declaration, but all customers shall be informed of their right to opt out of the community choice aggregation program. If no negative declaration is made by a customer, *that customer shall be served* through the community choice aggregation program” (PUC 366.2(c)(2)).

Furthermore, AB117 actually requires CCAs to offer universal access (PUC366.2(c)(4)(A), and to offer service to all residential customers in its jurisdiction:

“If a public agency seeks to serve as a community choice aggregator, it shall offer the opportunity to purchase electricity to all residential customers within its jurisdiction” (PUC 366.2(b)).

Thus, the Commission should adopt different rules to deal with customers under optional utility rate schedules - or Direct Access - that do not conflict with state law, or interfere with the ability of any ratepayer to participate in the manner clearly intended by law. We recommend that such customers be informed by a comparison of the terms and conditions under which they are now receiving service from the electric utility under said optional rate schedule, alongside the terms and conditions under which they would receive service from the CCA.

E. PG&E Fails to Make Monthly PG&E Electric Bills Available for CCA Customer Notification

PG&E’s proposed terms for CCA notification of customers fails to mention the opportunity for a CCA to insert these notifications into regularly scheduled monthly electric bills, in order to minimize the costs associated with notification:

“A CCP shall be solely responsible for all obligations associated with CCA required customer notifications...and performing those obligations consistent with PU Code 366.2..PG&E shall not be responsible for monitoring, reviewing or enforcing such obligations” (Section F, Subsection 1).

Yet AB117 specifically authorizes CCAs to ask the Commission to order utilities to make the monthly bill envelope available for this purpose:

“The community choice aggregator may request the commission to approve and order the electrical corporation to provide the notification required in subparagraph (A). If the commission orders the electrical corporation to send one or more of the notifications required pursuant to subparagraph (A) in the electrical corporation’s normally scheduled monthly billing process, the electrical corporation shall be entitled to recover from the community choice aggregator all reasonable incremental costs it incurs related to the notification or notifications. The electrical corporation shall fully cooperate with the community choice aggregator in determining the feasibility and costs associated with using the electrical corporation’s normally scheduled monthly billing process to provide one or more of the notifications required pursuant to subparagraph (A)” (PUC 366.2(c)(13)(B)).

Furthermore, as the customers being aggregated by a CCA are utility customers who are actually paying for the electric bill they receive, they are entitled under CPUC policy to have access to the envelope.

While unwilling to make the envelope available to CCAs, PG&E wishes to add cost to the notifications by requiring a certain kind of postage:

“All mailed notifications must meet a postage requirement which will ensure the customer receives the notification within three (3) business days” (Subsection 5).

As this requirement is not to be found in statute, and serves no apparent purpose, it must be disallowed.

And PG&E wishes to exercise control over the content of the notifications:

“Notifications required by AB117 or any CPUC decision or resolution must be reviewed by PG&E to ensure accuracy of any PG&E information” (Subsection 6).

Again, there is not basis for a PG&E approval of a CCAs notification under AB117, which grants control only to the CCA and the Commission:

“The community choice aggregator shall fully inform participating customers at least twice within two calendar months, or 60 days, in advance of the date of commencing automatic enrollment. Notifications may occur concurrently with billing cycles. Following enrollment, the aggregated entity shall fully inform participating customers for not less than two consecutive billing cycles”
(PUC 366.2(c)(13)(A)).

F. Conclusion

We look forward to submitting more detailed reply comments, and look forward to working with the Commission on this matter.

DATE: February 28, 2005

Respectfully submitted,

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**CERTIFICATION OF SERVICE
R.03-10-003**

I, Paul Fenn, certify that on this day February 28, 2005, I caused copies of the attached LOCAL POWER COMMENTS ON UTILITY INTERIM TARIFFS TO IMPLEMENT COMMUNITY CHOICE AGGREGATION 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, and also by delivering an original and six copies to the Docket office and a copy to Administrative Law Judge Kim Malcolm and Presiding Commissioner Michael Peevey.

Dated: February 28, 2005 at Oakland, California.

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