BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

PHASE II REPLY BRIEF OF LOCAL POWER

Paul Fenn, AM
Local Power
4281 Piedmont Avenue
Oakland, CA 94611
510 451 1727
paulfenn@local.org

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Table of Contents

I. Introduction

Local Power submits its Phase II Reply Brief in the Community Choice Aggregation proceeding R.03-10-003. We are pleased at the quality of work from all parties to this proceeding, and feel that it has led to greater clarity of the essential mechanisms among which the Commission may ensure balanced, successful resource planning process in coming years. Indeed D.04-12-046 summarized that its order should "provide some guidance to the parties about how we envision the CCA energy procurement program in the broadest sense, and the costs that CCAs will have to incur *as customers of and partners with the utilities*" (D.04-12-046, p.4).

The process has brought both utility and CCA parties closer to the table of accountability over New World Procurement and Community Choice Aggregation,; the "partnership" called for by the Commission must be reflected in rules and procedures that bind both CCAs and utilities alike to an integrated Commission process. In order to bind them, the Commission must use its authority to make cost-allocation decisions regarding utility procurement and CCA load departures, as well as to define both utility procurement plans and to determine when a CCA's load may depart. As Local Power showed in its Testimony and July 8 Brief, the Commission's use of its authority in (1) making the Implementation Plan process bind the CCA, (2) circumscribing utility CCA CRS risk by limiting utility procurement in response to an Implementation Plan, and (3) allocating costs that result from this gating process as implementation costs, provides the Commission with the only statutory and reliable basis for enforcing the CCA/Utility "partnership" referred to in the Commission's Phase I Decision above.

AB57 and AB117 were given to the Commission by the legislature and governor on the same day, September 24, 2002, in response to the Energy Crisis. In fact the governor vetoed the first CCA bill in 2001 after the legislature passed it, for the express purpose of making CCA consistent with finalizing the signing of the state's power contracts, and establishing a footing for resumption of multi-year electric utility procurement after four years of being specifically banned by law (AB1890). AB57 and AB117 form two halves of California's "New World" Procurement system that lacks either Monopolies or Direct Access. The Commission has a statutory obligation to facilitate choice for California communities

pursuant to AB117 while also authorizing the utilities to procure on a multi-year basis for the first time since 1998 pursuant to AB57. As the rights and privileges created by A117(Community Choice) and AB57 (Multi-Year Utility Procurement) are coequal under the law, the Commission must prevent either activity to obviate the other, as the Commission stated it would do in its commitment to "minimize cost shifting between CCAs and utilities" in D.04-12-046.

For AB57, this is the Utility Procurement Plan process, in which utility Advice Letters are now arriving at the Commission throughout this Summer, with utility requests to approve contracts expected this December, and for which the Commission has already said CCA CRS liability is limited to "unavoidable" utility contracts that have been "reasonably" entered-into.

Apart from preventing cost-shifting, a critical goal of the Commission is to accelerate the Renewable Portfolio Standard (RPS) rollout, which is now described by CEC IEPR staff to be seriously behind the Commission's adopted RPS schedule. As of last week, the Cumulative shortfall for PG&E between 2003 and 2005 was 1,997 Gigawatt Hours (GWH) behind the Commission's RPS schedule, a load about half the size of San Francisco's CCA PG&E was 884 GWH behind the 2010 RPS schedule in 2004 and an additional 1177 GWH short. Utility RPS compliance failure is no longer just a PG&E problem because Southern California Edison is now 274 GWH behind required 2005 levels, in a disturbing downward shift (CEC Staff Presentation, Pamela Doughman, PhD, IEPR Committee Workshop on California's Loading Order for Electricity Resources, July 25, 2005, p. 17). As the Commission never established any RPS targets for municipal utilities or Direct Access customers, the importance of encouraging an obvious new opportuntiy for renewables development must not be missed.

Local Power has testified in R.03-10-003 (April 14, 2004, etc.) that virtually all leading CCAs representing over 12% of California's Investor-Owned Utilities (IOUs) have already established an RPS of 40% or higher. Given widespread doubts expressed last week regarding IOU RPS compliance, the Commission should activtely facilitate CCA as a means of achieving statewide RPS compliance, at minimum. Beyond its statutory obligation to faciliate CCA, the CEC's CCA Feasibility Study has

convinced many municipalities that a 40% RPS by 2017 is feasible without a rate increase, specifically because they can provide the financing to build renewable energy and conservation facilities as municipalities. The Commission should look to opportunities like CCA to promote renewable energy resource development, as in San Francisco's May 2004 CCA Ordinance (S.F. Ordinance 86-04, May 27, 2004) and Draft CCA Implementation Plan (May 13 Hearing Transcript, p. 1460) to ensure a successful statewide rollout of the 20% RPS whether in 2010 or 2017.

II. Summary

Whereas many parties hoped that utilities could come to a consensus between utilities and CCAs on the main Phase II issues, each side has been more thorough on proposing requirements to be placed on other party while defending itself against any new requirements. Thus, while there is no CCA/Utility consensus in the strict sense of the word, a whole system may be ascertained by combining many of the proposals for CCAs by utilities, and many of the proposals made for utilities by CCAs. In short, CCAs have proposed logical restrictions on utilities, and in turn utilities have proposed some logical restrictions on CCAs, but neither would have any of the other's restrictions placed on itself. The Commission should bind both CCAs and utilities, using the Integrated Resource Calendar "gating" approach proposed by Local Power.

Local Power has proposed binding both CCAs and utilities to a common process under Board oversight, and have demonstrated that the Utilities' Open Season proposal is impossible to implement, and would either blatantly violate AB117's process requirements, or (as admitted by utility witnesses) would require a binding commitment of CCAs before they are technically able to provide one.

The crux of the matter may be found in a fundamental contradiction in the utilities' testimony and brief, because they claim, in the discussion of utility procurement, that Implementation Plans are non-binding, but claim contrarily, in the discussion of CCA Implementation Plan requirements, that such plans *should* in fact *be binding*. In general, the utilities are arguing that CCA Implementation Plans should be binding and that the Commission should exercise authority over them, but say the plans are inherently

non-binding as a basis for limiting utility procurement, and maintain they should not be held responsible for their procurement activities even if they ignore CCA Implementation Plans duly adopted at public hearings of municipal and county governments in their service territories, even CCAs whose Implementation Plans have been certified by the Commission.

Conversely, the CCAs have argued the contrary - that utilities should have their CCA CRS limited by certified receipt of an Implementation Plan by the Commission, but also that CCA Implementation Plans should *not be binding*, nor the Commission exercise any authority over them - even those specifically mentioned in AB117.

The Commission must assume higher ground and make both CCAs and utilities accountable to the AB57/AB117 New World environment. If an Implementation Plan is binding to a CCA, it does in fact fact provide a basis for procurement planning. Conversely, if the CCA CRS is to be limited based on an Commission-certified Implementation Plan, then that Plan must bind the CCA that submitted it.

III. Legal Authority

As I stated in my testimony, the utilities err in proposing that the Commission has the same jurisdiction over CCAs that it has over ESPs:

> "The utilities asserts that the Commission's role with respect to CCAs 'should mirror the role the Commission successfully served in monitoring and registering private Electric Service Providers ("ESPs") for DA' based on the fact that ESPs will perform many of the functions of the service (p. 17, lines 1-5). This both contradicts AB117 and is contrary to adopted Commission policy. First, as the Commission indicated in D.04-12-046, unlike ESPs, CCAs are elected local government entities that may be trusted not only with confidential customer data, but also ratesetting authority as specified by AB117. AB117 also requires an ordinance to award contract to an ESP, and that the implementation plan be duly adopted at a public hearing. Thus, both the ordinance and the implementation plan are subject to Sunshine Ordinance and Public Meeting laws, unlike the decision-making of an ESP or a utility, which are private. While an ESP will indeed implement energy services for a CCA, it will do so under a CCA contract whose terms must conform to the CCA's adopted implementation plan, which the Commission will have 90 days to review and request information on, then present cost recovery findings and establish the earliest possible date for service commencement" (Fenn Reply Testimony, May 12, 2005, p.5, lines 13-27, p. 6, lines 1-2).

The Commission's sole statutory authority to make CCA's accountable lies in its ability to determine the date of CCA implementation and present its findings concerning cost responsibility (CRS, CTC, etc) based on a CCA Implementation Plan's binding contents.

The principle applied by this section of code in AB117 specifies that the 90 day IP certification period is there in order for the Commission to determine cost responsibility. Any essential information the Commission requires from the CCA may be collected by the Commission during this period, making the Implementation Plan complete for purposes of establishing a cost recovery mechanism including the CRS and other surcharges or credits, pursuant to Public Utilities Code Section 366.2(c)(5), as determined by the Commission.

First, Local Power has proposed replacing the utilities' Open Season/Binding Commitment system by adopting an "Integrated Resources Calendar" (IRC) regime to be applied to limit CCA CRS liability by making a CCA IP binding and limiting the CRS for a CCA whose IP has been certified received by the Commission pursuant to Public Utilities Code Section 366.2(c)(7) to one-year utility procurement contracts, and to treat any costs resulting from above-market utility short contracts or delayed utility resumption of above-market long contracts as *implementation costs* so that the Commission's cost allocation may be determined according to the cause of any costs, and may be allocated under this authority to a CCA, utility or other party - but not to CCA customers. If a utility is the cause of the cost, shareholders must pay. If a CCA is the cause, it must pay. If some other event or entity causes the cost, then all ratepayers must pay.

The Commission must mutually bind utilities and CCAs to a common procurement and resource development mission: Resource Adequacy, the RPS and the Loading Order of the IEPR. This is achieved by defining such costs as implementation costs, such that they may be statutorily recovered. The basis of making CCA Implementation Plans binding to CCAs is to create a binding utility process in which errors on either side must pay for them.

The authority to bind CCAs and utilities to an Integrated Resource Planning process cannot be invented. The utilities attempt to assert Commission authority over CCAs based on Section 701 of the Public Utilities Code (Utilities Opening Brief, p.3, etc) and court precedents giving them authority over utility holding companies or utility distribution companies, but CCAs are not allowed to run distribution systems and their holding company is the State of California itself. The use of court precedent authority over local governments the Commission has already deemed trustworthy to manage confidential customer information that they do not entrust to Electric Service Providers or other utility competitors (D.04-12-046, p. 51) would be a contradictory policy, indeed.

First, the utilities claim that "CCA is a novel and untested program in Califoria and the Commission should retain full authority to assert jurisdiction over CCA Providers to address new and possibly unanticipated circumstances" (Joint Utilities Opening Brief, p.3). However, as referenced by several parties (CCSF, Local Power), CCA is not novel or untested in the United States, with active and successful CCA markets serving millions of customers in Ohio and Massachusetts.

Second, the utilities claim that PUC Section 701 and applicable precedent allow the Commission to extend jurisdiction to the activities of non-regulated entities based on their relationship to utility operations" (p.4). As Local Power has pointed out repeatedly in testimony, the utilities use of "Community Choice Provider" repeatedly conflates CCAs with ESPs, ignoring existing laws and Commission rules applied to ESPs and proposing oversight of CCAs as if they were ESPs.

Among these, the utilities claim that "the utility and CCA Provider will share the role of providing energy services to an individual customer" (p.5). In fact, the utility and CCA's chosen ESP will share that role. As Local Power has demonstrated, AB117 defines CCAs as groups of customers negotiating with ESPs through a local-state government process:

> "(1) Customers shall be entitled to aggregate their electric loads as members of their local community with community choice aggregators.
> (2) 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." (Public Utilities Code Section 366.2. (a)).

While the utilities continue to conflate CCAs with ESPs, the Commission has remained clear on the distinction. In its R.03-10-003 Phase I Decision, the Commission defined CCAs as customers, not competitors, of the utilities, and based on that definition makes a number of key policy decisions. In the opening pages of the December 16 decision, the Commission observes broadly,

> "The order should also provide some guidance to the parties about how we envision the CCA energy procurement program in the broadest sense, and the costs that CCAs will have to incur as *customers of and partners with* the utilities." (D.04-12-046, p. 4)

The Commission asserts the same definition of CCAs as customers in its treatment of implementation costs:

> "Where the statute provides the Commission with discretion, we treat CCAs as customers who are buying services from the utilities. With that in mind, we apply ratemaking and cost allocation principles that are comparable to those applied to other utility customers" (D.04-12-046, p. 10).

Finally, the Commission agrees that, as CCAs are utility customers, the utilities should assume some risk for serving them:

> *"To the extent the utilities provide services to CCAs, CCAs would be customers of the utilities* and, consistent with our treatment of the operational costs of serving other customers, *the utilities should assume some risk for serving them* and be able to reap the benefits of cost savings they implement between general rate cases. Moreover, CCAs should not have to assume liabilities for infrastructure development in advance. Such a requirement would be unprecedented in our treatment of utility customers and is unjustified here" (my emphasis, p.22).

The legislature is equally clear on the difference between an ESP and a CCA. As a form of Direct Access, CCA has a structure that is distinct from utilities in that the supplier of energy services and the

CCA, which is defined as a group of ratepayers, have completely different standing under the law. AB117 is clear that ESPs and CCAs are distinct entities with completely different obligations and responsibilities, as well as totally different status under CPUC regulations:

> "218.3. ''Electric service provider'' means an entity that offers electrical service to customers within the service territory of an electrical corporation, as defined in Section 218, but does not include an entity that offers electrical service solely to service customer load consistent with subdivision (b) of Section 218, and does not include an electrical corporation, as defined in Section 218, or 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."

AB117 defines the ESP specifically as the third-party supplier of services to a CCA, which is prohibited from being a utility, whether municipal or investor-owned:

> "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."

The distinction between CCA and ESP is writ large throughout AB117, and is reflected in a careful policing of ESPs as for-profit suppliers, in stark contrast to a clear devolution of public authority and trust to CCAs as non-profit organizations of ratepayers acting through their local government. In Public Utilities Code Section 394(b) the legislature subjected ESPs to reporting requirements appropriate for market participants that might defraud customers or commit other criminal acts. Public Utilies Code Section 394(b) also requires ESPs to demonstrate financial viability to the Commission as risk-bearing entities. Public Utilities Code Section 394(b) requires ESPs to demonstrate

technical and operational ability as suppliers, which it appropriately does not require of CCAs as organizations of ratepayers. Public Utilities Code Section 394.5 also provides for Commission enforcement of ESP rules, Commission revocation of an ESP's registration, and Commission ordering an ESP to refund monies. While specific Commission authority over ESPs was granted by AB117, no such authority was given to the Commission to regulate CCAs. AB created related requirements for CCAs, such as the requirement that they submit Implementation Plans to the Commission, but instead of authorizing the Commission to approve or reject the Plans, it requires the Commission to certify receipt of such Plans within 90 days of submission. CCAs are required to register with the CPUC, but unlike ESPs, no statutory authority is granted to the CPUC to de-register or penalize a CCA.

Thus, the utilities' argument for Commission jurisdiction might be applied to ESPs as the utilities cite (Joint Opening Brief, p.9) in D.04-07-037 and Southern California Edison Co. V. Peevey (2003) 31 Cal4th 781, 796, because ESPs are in fact the competitors whom AB117 allows to "serve" the same CCA customers served by utilities - but the Commission's jurisdiction may not be applied to CCAs any more than it could be applied to individual Direct Access customers aggregating "by positive written declaration," pursuant to Public Utilities Code Section 366(b) .

The same limit applies to the utilities' claim that the jurisdiction asserted in D.02-07-044 to enforce the regulated utilities' unregulated holding company conditions would somehow provide Commission jurisdiction over CCAs. Whereas jurisdiction over a utility holding company is an implied authority to "adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of powers expressly granted" to regulate that holding company's subsidiary ((D.02-01-037, p.10), CCAs do not own utilities, and are therefore not necessary for the Commission to regulate in order to effectively regulate utilities. D.02-07-044 (rehearing of D.02-01-037), which required such Commission authority to be "not contrary to other statutes" and must be "cognate and germane" (D.02-07-044, pp.4-5 and Joint Utilities Opening Testimony, p. 12) to utility regulation, is subject to the same limit - it does not apply to CCAs. As decided by the Court of Appeal in PG&E Corporation ,petitioner, vs. PUC, the court said the Commission could regulate a holding company because it was "cognate and germane" to regulation of its public utility subsidiary" ((2004)118 Cal. App.4th , p. 1198).

The same limit applies to the utilities claim that the Commission's decision that it had jurisdiction to determine inspection and maintenance rules for public utility lines, including those maintained by publicly-owned electric utilities. Based on Section 701's authorization to the Commission to "generally establish rules for safety regarding electric lines. Again, the authority asserted in D.98-10-059 was based on an authority "do all things, whether specifically designed in [the Public Utilities Act] or addition thereto, which are necessary and convenient in the supervision and regulation of every public utility in California" (D.98-10-059, p.3 and Joint Utility Opening Brief, p.12).

The utilities claim the Commission has already asserted jurisdiction over CCAs in matters involving Resource Adequacy (Utilities Opening Brief, p.14). However, as admitted by PG&E witness Sandra Burns under cross-examination by Local Power counsel:

> Q So do you believe that the Commission's resource-adequacy requirements for LSEs does not provide the option for a -- an ESP to assume those obligations?
> A I think that would be between the CCA Provider and the ESP that it contracts for." (p.1136, lines 1-22).

Nothing in Commission rules prohibits a CCA from electing to require its ESP to accept Load Serving Entity obligations under the Commission's Resource Adequacy Requirements. Because these specify that a CCA *or* ESP must provide for Resource Adequacy, there is no automatic jurisdiction over CCA's only a jurisdiction upon the entity accepting those obligations.

Even in the ruling quoted by the utilities on this subject, the judge clearly demurred on saying that CCAs will be subject to Commission jurisdiction, saying it would depend on a future ruling:

> **"3.4 CCAs**
> At this time there are no registered CCAs. Any CCA that becomes registered after the issuance of this ruling may, at that time, and subject to further ruling, be subject to the requirements of the RAR program. I anticipate that the obligations of a newly-registered CCA

> could include the requirement to submit load forecasts and supporting data for review by the CEC as provided in this ruling." *(* "Administrative Law Judge's Ruling Directing Load-serving Entities to Submit Load Data and Adopting Protective Order," dated June 24, 2005, in R.04-04-003 ("RAR Ruling")., p. 7-8, and Joint Utilities Reply Brief, pp.28-28).

Thus, the Commission has only decided to regulate entities that have assumed Load Serving Entity Resource Adequacy obligations., not CCAs per se. This distinction must be observed in order to follow the "cognate and germane" rule in court precedent, and "necessary and convenient in the supervision of every public utility" in Commission policy, cited above.

Thus, the utilities are mistaken to provoke the Commission to "boldly assert that it has broad authority over both the CCA program generally as well as CCA participants" (Joint Utility Opening Brief, p. 15) as this is neither cognate and germane to utility regulation, nor necessary and convenient to the the supervision of the utilities.

Finally, AB117 Provides Express Commission Authority to determine when a CCA may receive customers, and to allocate costs, but it must use this authority as the legislature plainly required it - based on a CCA's Implementation Plan. As Local Power showed in its July 8, 2005 Brief, whereas CRS costs are recoverable only from CCA customers, they are not recoverable if there is no CCA customer after a CCA has failed to implement a CCA IP. Thus, the only means of preventing shareholders from having to pay is for such costs to be defined as implementation costs as per 366.2(c)(17).they can only be defined as implementation costs if Local Power's CCA CRS Limitation proposal is adopted by the Commission, under which CRS costs would be circumscribed by limiting utility procurement to one-year contracts for the load associated with a CCA whose Implementation Plan has been certified received by the Commission. As CRS procurement would cease, incremental costs associated with limiting procurement conform to the definition of implementation costs in AB117.

Second, Local Power has presented a means by which the Commission may incent self-generation, renewable resource development by CCAs, and has also provided and the utilities neglected to

contradict, an adequate public record to monetize benefits to utility shareholders and customers for specific renewable resource, conservation and energy efficiency commitments by CCAs. Furthermore, Local Power has proposed a methodology by which to monetize these benefits, based on the binding portfolio commitments in a CCA's Implementation Plan, and to create a monthly electric bill credit for CCA customers based on their binding Implementation Plan commitment. As this per kilowatt hour credit proposed in Local Power's methodology would only accrue based on CCA service kilowatt hours sold, no funds would pass unless a CCA had actually initiated service under a binding Implementation Plan. The manner for the Commission to achieve a truly balanced, integrated and successful coordination of utility procurement is to bind each entity in a balanced, incremental manner.

Third, Local Power has proposed a process by which the Commission may mitigate New World Procurement CCA CRS liabilities that have resulted from failed coordination. Specifically, we have proposed a three-tier procedure by which CCA CRS liabilities could be mitigated by allowing a CCA or several CCAs to take power or rights to power from a utility's New World Procurement contract, rather than merely paying the above market costs associated with this power in the CRS.

Simply, put, the Commission's cornerstone authority rests on making a CCA's Implementation binding to the CCA by basing its cost-recovery mechanism on the Implementation Plan, as plainly required by 366.2(c)(5) and (7). This is achieved by vintaging the CCA CRS at the date on which the Commission presents its findings regarding cost recovery, and treating incremental costs for the bargaining period as implementation cost. This approach protects utility procurement against cost-shifting and binds the CCA to its Implementation Plan by making the cost-recovery mechanism dependent upon it specifically. If you Commission formulates the Open Season under the Integrated Resource Calendar approach proposed by Local Power, the Commission will have sufficient authority to bind the CCA to its Implementation Plan as an implementation cost issue, firewall utility procurement risk where an Implementation Plan has been certified as received by the Commission, and ensure that both parties cooperate in good faith during the one year period, or face the consequences. By doing this, the Commission can rationally limit CCA CRS obligations, assuring specific statutory authority to not only control CCA load departure timing but also to determine the cause of the costs and allocate them to the

appropriate party as implementation costs. In short, the Commission will have adequate authority to conduct resource planning under AB57 and AB117 while also protecting against cost-shifting between bundled service customers and CCA customers, consistent with D.04-12-046.

If the Commission is to allocate costs according to their cause, then the costs must be specific dollar figure translated into a specific non-bypassable per kilowatt hour charge. Local Power has provided an adequate public record to provide the Commission with the basis of measuring such benefits and has proposed a methodology for the Commission to allocate a per kilowatt hour CCA customer Credit on CCA customers' electric bills for a specific period of time. Unchallenged by the utilities, this methodology allows the Commission measure any benefits to utility shareholders or bundled services customers resulting from a CCA's resource portfolio, based on a CCA's Implementation Plan commitments.

IV. Credit, Delivery or Assignment of Utility Power Contracts to a Community Choice Aggregator Customer Responsibility Surcharge

The CCA and Friends supported Local Power's proposed "Credit, Delivery or Assignment of Utility Power Contracts to a CCA CRS" in its Opening Testimony (Fenn, April 28, 2005, pp.5-7) but indicated that it should be left up to negotiation between utilities and CCAs.

> "However, the concept amply demonstrates that if utilities cooperated with CCA development, numerous potential approaches could be jointly developed that would reduce CCA entry costs and the current cost burden of bundled customers" (Joint Opening Brief of CCA Community and Supporters, July 8, 2005, pp.46-47) .

Starting with Comments (Filed March 11, 2005) during the Workshop and following with Opening Testimony, Local Power proposed and refined its proposed rule for Commission allocations of utility contracts to CCAs. This proposal was never disputed by the utilities or any party, and should be accepted by the Commission as a tariffed rule and procedure, where feasible, to credit, deliver or assign utility contracts to CCAs or groups of CCAs for contracts, parts of contracts or attributes of

contracts to mitigate any above-market CRS obligations that they can assume. The full process of refining this tariff appears below in refined form. As the utilities did not contest the proposal in their Phase II Opening Briefs, Local Power cannot reply to the utilities, but must instead reply to CCAs and Supporters and their proposal for a voluntary system rather than the procedure I have proposed.

Thus, it is not enough to assert that utility cooperation should include a willingness to negotiate with CCAs wishing to undertake sugn a credit, delivery or assignment; rules and procedures are needed: a tariff. The CCA and Supporters proposal in their Phase II Brief must therefore be supplemented with the rules and procedures proposed by Local Power; otherwise a decision that leaves the issue to negotiation or cooperation amounts to a non-decision by the Commission, particularly for CCAs now preparing Implementation Plans, such as San Francisco-Marin, Chula Vista or East Bay Cities - that will have no assurance that they can have this recourse with ongoing Electric Service Provider negotiations pursuant to the invitation of the Commission inviting CCAs to "commence implementing" CCA rather than waiting for the phase II decision which the Commission described as "unacceptable."

> "Although we state our support for an open season here, we agree with the parties who suggest this is a matter that requires further exploration in Phase II of this proceeding. For that reason, we include the matter in Phase II and expect to develop and adopt the details of an open season in a subsequent order. However, we do not intend to delay the initiation of service by CCAs while we are considering this matter. In the interim, the utilities must accommodate CCAs that wish to begin delivering power." (D.04-12-046, December 16, 2005, p.35).

Otherwise we have to depend upon AB117's utility cooperation requirement, when a tariff approach is available and necessary for a smooth process of allocating contracts as part of the cost recovery mechanism process based on a CCA's duly adopted Implementation Plan. As the tariff is an allocation made by the Commission based on a CCA's request, it would be performed as a component of the Commission's cost-recovery mechanism.

Utility contracts will be a growing component the costs that make up the Customer Responsibility Surcharge (CRS). As Local Power pointed out before in R.03-10-003, AB117 requires that the CCA CRS be based on actual costs attributable to a customer resulting from a CCA load departure and

Implementation Plan. CRS Obligations from 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 commissio*n, 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)).

Local Power's proposed rules and procedures for credit, delivery or assignment of utility power contracts to a CCA CRS would merely require that any cost a CCA may seek to eliminate through a transfer of contract liabilities should be included in its presentation of findings regarding cost recovery in response to a CCA Implementation Plan as per AB117. It reflects a right to mitigate costs in a flexible manner.

This is plainly explained in AB117 by the California Legislative Counsel:

> "The bill (AB117) would require a community choice aggregator to file an implementation plan with the Public Utilities Commission in order for the commission to determine a cost-recovery mechanism to be imposed on the community choice aggregator to prevent a shifting of costs to an electrical corporation's bundled Customers" (AB117, Legislative Counsel's Digest, Section (1)).

The Commission's use of the Implementation Plan process to prevent cost-shifting is plainly stated in AB117:

> "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, Public Utilities Code Section 366.2(c)(5)).

If there is any place in AB117 where basic black-letter law would require the statute to be interpreted according to its plain meaning where, as here, that meaning is clear on its, face, it is here (See. E.g., People v. Gonzales (2004) 116 Cal.App.4th 1405, 1413-14). Clearly a CCA's Implementation Plan is intended as *the basis* on which the Commission must determine a cost-recovery mechanism for a CCA. No less clearly, AB117 requires the Commission to present its findings on cost recovery to the CCA based on its certified Implementation Plan:

"Within 90 days after the 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. 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)" (Public Utilities Code Section 366.2 (c)(7)).

The section of AB117 applied to utility contracts is subsection (f):

"(f) A retail end-use customer purchasing electricity from a community choice aggregator pursuant to this section shall reimburse the electrical corporation that previously served the customer for all of the following:
(1) The electrical corporation's unrecovered past undercollections for electricity purchases, including any financing costs, attributable to that customer, that the commission lawfully determines may be recovered in rates.
(2) 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, Public Utilities Code Section 366.2(f)(1) and (2)).

Thus, the Legislature put in place a system under which the Commission could estimate the net unavoidable electricity purchase contract cost attributable to a CCA customer based on information in its Implementation Plan. As Local Power witness Paul Fenn pointed out in his Opening Testimony, the Commission has already decided that CCA customers should not be subject to cost-shifting:

"Conclusion of Law #21 adopted by the Commission in D.04-12-046, stated that that "AB117 does not permit cost-shifting of CCA CRS liabilities *between utility bundled customers and CCA customer*s" (p.66). Thus, the Commission concluded that cost-shifting onto CCA customers is not permitted by AB117. Local Power's proposed three stage procedures allowing CCAs to assume utility contract liabilities according to Commission's existing cost allocation, is merely a method of mitigating costs to avoid cost shifting to CCA customers without causing harm to bundled service customers. For this reason, CCAs should be free to assume and then dispose of the contracts they assume in whatever manner they may under the law, in order to facilitate CCA and as a benefit to the marketplace. As the Commission would require criteria upon which to value any utility contract chosen by a CCA, CCA contract assumption must be conducted according to the rules and procedures proposed for such a tariff.

Local Power's testimony in Phase II proposed three sets of rules and procedures for CCAs and utilities to mitigate CCA CRS related to DWR and utility contracts:

In my Opening Testimony, I testified on methods of allocating utility and DWR power contract risk to Community Choice Aggregators (CCA) relative to the Customer Responsibility Surcharge (CRS). First, I indicated that while DWR contracts face assignment limitations, utility contracts do not:

> "While DWR contracts face certain constraints, CCAS should be able to take power or elements of power from utility new world procurement contracts rather than merely paying a CRS for power they will not receive."

I proposed that if the contracts could assumed by a CCA or CCAs, the question is, how far above market price is the power? The Commission would look at the average above market net cost associated with the contract, to determine a CRS surcharge to accompany the contract. The Commission could shift a *pro rata* share of risk for the contracts (on a voluntary basis) to the CCA, because the CCA would commit to take or pay for the power over the duration of the contract. Thus a CCA would accept responsibility for its part of a contract, and with compliance ensured, cost-shifting from CCA customers to bundled service customers would not take place. If their contract is the same as the average utility or DWR contract, then there would be no CRS for that contract assignment. If it is above average over market, then the CCA would want to be compensated in a CRS Credit, the basic idea of which has been raised by several parties in R.03-10-003."

I proposed a three-step process:

- First, was "to match contracts to CCAs or groups of CCAs. CCAs would take charge of DWR and utility contracts that "fit" some part of the CCA's portfolio requirement, or that fit the requirements of several CCAs combined;
- Second, in cases where there is no such match between CCA load and contracts, I proposed that the utility contract be split with components of contracts allocated to CCAs. If there were no match between a CCA or several CCAs' resource requirements and DWR or utility power contracts, and some other method were needed to facilitate an allocation that protects against cost-shifting between utility bundled customers and CCA customers, then the utility or DWR could divide its responsibilities into 2 contracts;
- Third, In a worst case scenario in which there is no "fit" between a CCA load and utility or DWR contract, and a contract cannot be split, a "take or pay" method could be employed under which the DWR or utility would make available the power to the CCA and charge the CCA for costs associated with the power. Under this scenario, the CCA would have to commit to take the power on a multi-year basis" (Paul Fenn Phase II Opening Testimony, May 12, 2005, pp.4-7).

Under cross-examination by PG&E counsel Craig Buchsbaum on the third day of Evidentiary Hearings on May 31, 2005, Local Power witness Paul Fenn stated that while DWR contracts may be too complex to fall under such a tariff, utility contracts are not too complex

> "Q Are you aware that many if not all DWR contracts preclude assignment?
> A I'm aware that utility contracts don't and that there are more difficulties facing DWR contracts, Yes" (May 31, 2005 Evidentiary Hearing Transcript, p. 1449, lines 12-15).

Under cross examination of SDG&E counsel Symanski, witness Fenn provided further details on the Commission's authority to charge CCAs for implementation costs and set the date of customer transfer (May 13 Hearing Transcript, p. 1458-9). When asked how are those specific authorities used to incentivize good behavior by a CCA, witness Fenn responded,

> "Well, number one, having your departure date delayed is one incentive or threat which could influence a CCA's behavior. And then clearly having the prospect of a higher exit fee attached to an implementation plan would provide another incentive to the CCA" (May 31, 2005 Hearing Transcript, pp.1460, lines 4-13).

As the utilities did not challenge this statement in their Joint Opening Brief, the tariff should still apply to utility contracts if a CCA either can assume the whole liability of a utility contract, share the whole liability of a utility contract with other CCAs, or assume certain benefits/liabilities of a utility contract, voluntarily, with the cost-allocation made by the Commission as part of its cost-recovery mechanism determination based on a CCA Implementation Plan. The Commission should accept the three step tariff as proposed in my Testimony and sworn testimony under cross examination:

- The methods of allocating utility power contract risk to Community Choice Aggregators (CCA) relative to the Customer Responsibility Surcharge (CRS) proposed by Local Power. While DWR contracts face certain constraints, CCAs shall be authorized to take power or elements of power from utility (New World) procurement contracts rather than merely paying a CRS for power they will not receive, as part of the Commission's 90 day information request, certification process and cost recovery findings presentation to CCAs duly adopting such plans.

- CCAs shall be entitled to seek to of rules and procedures for a tariff allowing a CCA to assume contracts, parts of contracts or aspects of contracts. The Commission shall make the

determination of contract assignment and cost allocation as part of its cost recovery findings based on a CPUC certified CCA Implementation Plan. Thus, if a CCA elects to do so, the Commission will determine how far above market price the utility's contract power costs.

- Specifically, the Commission will measure the average above-market net cost associated with the particular utility's contract, to determine a CRS surcharge to accompany the contract obligations should the CCA elect to assume such obligations. If a CCA's contract is the same cost as the utility's average contract (the Market Price Referent), then there would be no CRS for that contract assignment. However, if it is above the utility's Market Price Referent, then the CCA would be compensated by the proposed CRS Credit. Local Power also proposed that there could be a true-up of this CRS factor with the assumption of a contract by a CCA to prevent cost shifting between customers.

- The varieties of contracting situations facing an effort to allocate DWR or utility contracts to a CCA may be reduced to three categories of utility contract assignment or allocation to a CCA:

  Rule 1. Simple Assignment Rule and Procedure. CCAs shall be allowed to match contracts to CCAs or groups of CCAs. CCAs are entitled to take charge of utility contracts that "fit" some part of the CCA's portfolio requirement, or that fit the requirements of several CCAs combined. As part of its request to the Commission, the CCA must provide a demonstration of creditworthiness.

  Rule 2. Contract Splitting. If there is no match between a CCA or several CCAs' resource requirements and utility power contracts pursuant to Rule 1, and a negotiated method is available to facilitate an allocation of utility contracts that protects against cost-shifting between utility bundled customers and CCA customers, a CCA or group of CCAs shall be entitled to negotiate with the utility or its wholesale power entity to split one or more utility contracts and allocate components of such contracts to CCAs. The utility shall be negotiate with the CCA to divide its responsibilities from a contract into 2 or more contracts, and assign the power but not the contract to a CCA, and submit the agreed upon split to the Commission. At the request of a CCA or group of CCAs,, the Commission shall order the utility to negotiate in good faith with the CCA to split one or more utility contracts and allocate components of such contracts

to CCAs. A utility shall fully cooperate and negotiate in good faith with the CCA to split one or more of its contract into two pieces and assign a part of a contract to a CCA according to its loads. The CCA shall be entitled to negotiate with the utility's contractor to split the contracts, and may submit proposed splits to the Commission.

Rule 3: Take-or-Pay. If there is neither a "fit" between a CCA load pursuant to Rule 1, nor the ability to split a contract pursuant to Rule 2, a "take or pay" method shall be employed , as it now undertakes in the natural gas industry, under which the CCA would commit to take the power on a multi-year basis and request the Commission to order the utility to make power available to the CCA and charge the CCA for costs associated with the power; if over time the CCA for any reason does not need the power for its customers, the CCA would either have to take the power (and resell it) or else it must nevertheless pay for it. Under this rule, if a utility contract cannot not be assigned to a CCA or CCAs for the above reasons, the Commission shall shift a *pro rata* share of risk for the contracts to the CCA, because the CCA shall voluntarily commit to take the power or pay for the power over the duration of the contract. Thus a CCA using this tariff shall voluntarily accept responsibility for its part of a contract, and with compliance ensured, cost-shifting between CCA customers and bundled service customers will be avoided.

V. Open Season and Use of CCA Implementation Plans to Limit the CCA CRS

In their Joint Opening Briefs, the utilities urge the Commission to reject the proposal of Local Power, the Local Government Commission Coalition and other CCA Parties that an Implementation Plan is sufficient notice for the utility to adjust its procurement planning:

> "However, as admitted by several CCA Parties' witnesses during the Phase 2 hearings, the adoption of an ordinance or implementation plan provides no assurance that any load will ultimately depart to that particular CCA Provider's program. In addition, D.04-12-048, cited above, already found that these activities are not sufficient for the Utilities to exclude the CCA Providers' load from their planning process, and that a binding notice of intent is required of the CCA Providers" (p. 27).

The utilities referred to Local Power witness Paul Fenn (Transcript p.1465, p.1469) and CCSF witness Michael Hyams (Hearing Transcript p. 1512, lines 17-27) as the abovementioned "admission" by CCA parties that Implementation Plans provide "no assurance that any load will ultimately depart." This is misleading, because the SDG&E counsel 's questions regarded a Draft Implementation Plan that has not yet been adopted by CCSF: because it has not been "adopted at a duly noticed public hearing" as per Public Utilities Code Section 366.2(c)(3), it cannot legally provide assurance, because it is not technically an adopted IP. However, as Local Power has argued, once the Commission certifies receipt of the Implementation Plan, presents findings regarding cost recovery based on the IP and sets an earliest possible date for transfer of customers for the CCA submitting the IP, the Implementation Plan provides significant assurance that the load will depart.

The utilities claim that defining costs associated with costs related to the one-year limit proposal as "implementation costs" would itself be a form of cost shifting: "This will result in cost being shifted to bundled service customers in violation of AB117" (p.27). Oddly, the utilities then quote the requirement in Public Utilities Code Section 366.2(c)(17) that "cost not reasonably attributable to a community choice aggregator shall be recovered from ratepayers, as determined by the Commission." The utilities appear to miss the actual meaning: if a cost is not attributable to a CCA, then charging it to all ratepayers is not defined as cost shifting under this section of statute. Therefore the utilities' objection must be rejected.

The utilities object to Local Power's and CCSF's proposal to limit procurement to a one-year basis for Commission-certified Implementation Plans based on the argument that it "could result in higher procurement costs to bundled service customers" (Joint Utility Opening Brief, pp.27-28). First, we have proposed that such costs would be implementation costs, not procurement costs. As implementation costs, they are prevented from causing cost-shifting by Public Utilities Code Section 366.2 (c)(17), which states that any costs attributable to a CCA may be charged to that CCA.

The utilities' claim that witnesses admitted that the proposed shorter contracts "will undermine the need to incent new generation for the state would undermine the need to incent new generation for the state." This claim rests on using similarly misleading narrowly constructed questions to misrepresent the statements of ORA witness Irwin and CCSF witness Hyams. Clearly, as Local Power has amply documented in this proceeding (April 15, 2004 Comments, Attachment 1, etc.), CCAs are aggressively seeking to self-generate with a clear emphasis on renewables, meaning that Local Power's proposed one year IRC window would provide *new incentives for new generation in the state.* The utilities statement applies only to utility- procurement-based new generation, not generation *per se*.

Adoption and Commission certification of a CCA IP does not, admittedly, guarantee that the load will depart, but it provides the greatest possible assurance that is legally consistent with AB117 - short of a binding commitment, which as demonstrated requires a contract that cannot legally be signed more than 30 days prior to customer transfer (Public Utilities Code Section 366.2(c)(13)).

The utilities characterize CCAs as proposing that "the Commission has an extremely limited role with respect to...CCA implementation plans" (Joint Utility Reply Brief, p. 25, also p. 31). This is totally contrary to Local Power's consistent proposal, indeed, that the CCA Implementation Plan be the *very basis* of the Commission's authority over CCAs, and even criticized the utilities for trivializing the Implementation Plan process

> "The utilities say the principal goal of the Implementation Plan "should be to enable consumers to make informed decisions about their energy supplier and to seek recourse in the event they are harmed" (p.16, line 14). This confuses the role of the implementation plan with the opt-out notification requirements and registration process to ensure basic consumer protection. Worse, the utility statement is contrary to AB117, which provides that "(i)n 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 cost*s, 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)." (Public Utilities Code Section 366.2 (c) (5)). In other words, the principal statutory purpose of the implementation plan is to establish the cost-recovery mechanism that CCA customers shall pay to prevent cost-shifting. Thus, the purpose of the implementation *is to establish "net" costs associated with the CCA Program."* (Fenn Reply Testimony, May 12, 2005, p. 2, lines 24-28, p.3, lines 1-24).

Witness Fenn's Reply Testimony specifically responded to the utilities' misinterpretation of the role of the Implementation Plan required by AB117, when they cited D.04-12-048 as somehow indicating the Commission has foreclosed use of the Implementation Plan as a means of cost allocation as required by Public Utilities Code Section 366.2(c)(3):

> "Submitting an Implementation Plan to the Commission (does) not constitute a binding commitment....(does) not sufficiently inform the utility or provide a sound basis for resource planning and should not be used as the basis for "locking in" a particular CRS vintage" (Utilities Opening Testimony, p.12, lines 1-6).

There is an odd contradiction in the utilities' position .On the one hand they claim Commission jurisdiction over CCAs based on dubious court precedents relating to Commission jurisdiction over holding companies and utility transmission systems. They attempt to place greater importance on the CCA registration requirement even though it starkly contrasts with AB117's much more stringent ESP registration requirements, and lacks its clearly stated enforcement authority. On the other hand, the utilities deny and minimize the actual jurisdiction over CCAs given to the Commission expressly and plainly by AB117, including the Commission's ability to determine a cost-recovery mechanism for a CCA based on its duly adopted Implementation Plan (Public Utilities Code 366.2(c)(5) and (7)), the Commission's statutory authority to determine the earliest possible date that customers may be transferred for a CCA that has submitted a Plan (366.2(c)(8)), and the Commission's authority to collect implementation costs from CCAs, (Public Utilities Code Section 366.2(c)(17)).

While the utilities ignore these most obvious authorities and deny that an Implementation Plan provides an adequate basis for limiting their procurement absent a CCA's binding commitment to take customers on a certain date, the utilities have nevertheless repeatedly claimed that CCA Implementation Plans *should be* legally binding on CCAs and that the Commission should exercise plenary authority over

them irrespective of limits established by AB117, including authority to refuse to certify receipt of them, authority to approve or reject an IP, to de-register or decertify a CCA and to discontinue a CCA's programs, potentially in violation of its contracts.

The utilities' approach would take the Commission into a legal trap. As Local Power has pointed out in this proceeding, AB117 provides CCA's with the "authority" to aggregate, and customers are "entitled" (Public Utilities Code Section 366(a)) to receive service from Electric Service Providers. Of the Direct Access language in the Public Utilities Code concerning the ability of electricity customers to aggregate individually, AB117 first added Community Choice Aggregation:

> "SEC. 3. Section 366 of the Public Utilities Code is amended to read:
> 366. (a) The commission shall take actions as needed to facilitate direct transactions between electricity suppliers and end-use customers. Customers shall be entitled to aggregate their electrical loads on a voluntary basis, provided that each customer does so by a positive written declaration. If no positive declaration is made by a customer, that customer shall continue to be served by the existing electrical corporation or its successor in interest, except aggregation by community choice aggregators, accomplished pursuant to Section 366.2.
> (b) Aggregation of customer electrical load shall be authorized by the commission for all customer classes, including, but not limited, to small commercial or residential customers. Aggregation may be accomplished by private market aggregators, special districts, or on any other basis made available by market opportunities and agreeable by positive written declaration by individual consumers, except aggregation by community choice aggregators, which shall be accomplished pursuant to Section 366.2."

Then AB117 declared that, notwithstanding these two paragraphs, California municipalities and counties are authorized to aggregate on behalf of their communities and negotiate with Electric Service Providers:

> "Notwithstanding Section 366, a community choice aggregator is hereby authorized to aggregate the electrical load of interested electricity consumers within its boundaries to reduce transaction costs to consumers, provide consumer protections, and leverage the negotiation of contracts" (Public Utilities Code Section 366.2(c)(1)).

AB117 did give the Commission the ability to delay until January 1, 2006 to issue a Decision, but after that date the right of California municipalities and counties to aggregate is limited to procedural Commission authority related to cost-shifting. AB117 conferred an entitlement on California ratepayers: an entitlement to aggregate:

> "Customers shall be entitled to aggregate their electric loads as members of their local community with community choice aggregators" (Public Utilities Code Section 366.2. (a) (1)).

When the utilities charge that CCA Implementation Plans should disclose the new power provider even though AB117 requires a maximum 30 day period between a CCA contract and a transfer of customers, the Commission must take note of a clear statutory schedule prohibiting any Open Season or other CCA gating process that does not conform to the schedule. It is a simple fact that AB117 statutorily limits the Commission up to 90 days to certify a CCA IP, which obviously exceeds 30 days, not including the months it takes to draft, holding hearings for Draft Plans and (having written one) duly adopt it at a California city council, county board of supervisors or joint powers agency. It follows that AB117 requires an Implementation Plan to precede the signing of any contract by a CCA, and a contract precede the notification of customers - therefore it is impossible for a CCA Implementation Plan to disclose any chosen Electric Service Provider or disclose terms of service, contrary to the utilities' confusion of the IP with the extensive customer notification process required of CCAs in Public Utilities Code Sections 366.2(c)(11), (12), and (13).

As I pointed out in my Initial Phase II Brief, the utilities propose making the Implementation Plan binding, while also imposing requirements on Implementation Plan contents, such as outlining the terms of a CCA's service or providing the name of a chosen provider, which it could not bind itself to do without a contract. Again, if adopted, this erroneous interpretation of Public Utilities Code Section 366.2(c)(3)(G) would force a CCA to adopt its Implementation Plan AFTER it signs a contract with an ESP. This is not the end of the utilities' confusion, as they continue to propose an Open Season tariff that would either require a CCA to make a binding commitment to take customers without any basis (as

admitted by Dr. Jaziyeri) or be statutorily limited to the 30-day period AB117 specifically mandates between the CCA's signing of a contract and the transfer of customers. (Initial Phase II Brief of Local Power, July 8, 2005, Section III(A)(2) and (B)).

In my Reply Testimony I accused the utilities of trivializing the IP in relation to utility procurement:

> "confusing the implementation plan with the basic consumer protection measures involved in CCA registration, the utilities underrate the role of the implementation plan in limiting a CCA CRS liabilities and coordinating between utility procurement and CCA load departures to minimize overprocurement and the shifting of costs between customers as required by AB117 and D.04-12-046"

While the utilities say that Implementation Plans are non-binding in relation to their procurement process, they also charge that Implementation Plans *should bind CCAs legally*. In particular, the utilities propose that the Commission Should (1) Develop Meaningful Criteria for Consistent, Statutorily Compliant Implementation Plans, (2) Establish Meaningful Procedures to Ensure that Statutory and Regulatory Requirements are Met on an Ongoing Basis, (3) Adopt an Advice Letter Process for Initial Approval of a Filed Implementation Plan, and (4) Reserve the Right to Decertify an Implementation Plan. (p.34). The utilities quote utility witness Middleburg as "framing" the utilities' view of the CCA Implementation Plans:

> "The Utilities envision that Implementation Plans will serve to notify the Commission, affected utilities, and affected consumers about many aspects of a CCA Provider's particular operations and service offerings. Each Implementation Plan should not be a "boilerplate" document, but instead, a document that is detailed and specific to each CCA Provider; it must conform to the requirements of AB 117 and any other applicable laws or Commission directives; and it must enable the Commission and utilities to assess whether or not bundled customers would be harmed by the CCA Provider's services before the CCA Provider commences service" (p. 34, also Exh. 1A (Utilities Opening), p.16).

What is so astonishing about the utilities' recommendations for Implementation Plans is that after claiming that an Implementation Plan will provide no basis for procurement planning, they propose detailed Implementation Plan requirements that would indeed ensure resulting Plans do provide a basis

for procurement planning, such as (the good idea that) CCAs be required to maintain compliance with their Implementation Plan and report any changes to its program inconsistent with its certified IP:

> "All the statutory requirements associated with a CCA Provider's Implementation Plan, as well as the Commission's certification, would be rendered, in effect, null and void, if a CCA Provider's Implementation Plan did not reflect and correspond, on an ongoing basis, with the CCA Provider's actual operations, terms and conditions of service, or other information required by the statute or Commission. Therefore, Commission should establish in its Phase 2 Order that a CCA Provider must keep current all factual representations made in its Implementation by filing an update notifying the Commission and affected utilities of the changes" (Utilities Reply Brief, p. 39).

While proposing policies for a binding IP that would make sense if they were part of Local Power's proposed IRC process (e.g. The de-certification of CCA Implementation Plans that do not match a CCA's program, p.44), the utilities go overboard to propose onerous restrictions on an IP that glaringly violate AB117, in particular that a CCA *must identify its chosen new Electric Service Provider in its Implementation Plan:*

> "• Requirement. 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 (Section 366.2(c)(3)(G)).
> • Additional guidance. CCA customers should also be able to review the power sources (portfolio mix) of the energy supply (including length of contracts) in the third party portfolio and resource mix (renewable, gas, coal)" (Id, p.38).

The absurdity resulting from this proposal is overwhelming. In order to offer this information in its Implementation Plan, a CCA would have to have signed a contract with an ESP prior to adopting its IP. If that is the case, then two legal facts follow. First, a signed contract would obviously make IP provide a basis for utility procurement planning, because it would constitute a binding commitment. Second, if the CCA had signed such a contract, the utility would be legally bound to transfer customers from the utility to the CCA's ESP in no more than 30 days after the adoption of the Implementation Plan. Third, the CCA would have to have signed a contract with an ESP without foreknowledge of the Commission's findings regarding cost-recovery, meaning that these findings could arbitrarily make the

CCA's contracted rates higher than the utility's rates, making the customer opt-out rate totally unpredictable, and any forecasting impossible. It is indeed a Catch-22 being proposed by the utilities. They achieve it by conflating CCA with ESP, and IP with the consumer protections contained in the required CCA opt-out notification requirement (Public Utilities Code Section 366.2(c)(13)), the statement of intent (Public Utilities Code Section 366.2(c)(4), and the registration process (Public Utilities Code Section 366.2(c)(14)).

In addition the utilities propose an Advice Letter process for Commission approval of CCA Implementation Plans that is obviously inconsistent with the clearly stated requirement that the Commission "shall certify receipt of the plan" (p.39, p.41, p.42). AB117 reads:

> "Within 90 days after the 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." (Public Utilities Code Section 366.2(c)(7)).

The 90 day limit reflects the legislature's requirement that the Commission facilitate negotiation of customers with ESPs. Again, this "shall certify" language states plainly what the Commission is not at liberty to ignore: the CCA is authorized to aggregate, and the CCA customers entitled to depart.

It is critical that the Commission build the cornerstone of its authority on the firm ground of AB117, rather than the murky waters offered by the utilities. As AB117 gives CCAs ratesetting and cost allocation authority (Public Utilities Code Section 366.2(c)(3)(B)), and the Commission has already deemed CCAs "trustworthy" local government entities, there is no basis for the Commission to approve or disapprove Implementation Plans.

In contrast, Local Power witness Paul Fenn proposed a detailed use of the Implementation Plan, and even supports many utility proposals for binding a CCA to its Implementation Plan - but this is only appropriate if the utilities accept being bound to the requirements of the IRC as proposed by Local Power.

In my Reply Testimony I proposed that the IP bind the CCA to its policy:

Implementation Plans should include program implementation details including start-up questions such as the Mission of the CCA, division of responsibilities among city agencies and governing boards, and the organizational structure of the implementing entity. Program development details include rate design, ratesetting and other costs, disclosure and due process in setting rates and allocating costs among participants, a program basis report, an outline of property and siting issues for renewable energy and conservation development, associated governmental processes, and a description of the Request for Proposals (RFP) to be prepared in accordance with the implementation plan. Implementation details include program management, outreach, facilities design, testing, inspection and quality assurance, installation, training, changes and claims, intergovernmental coordination, and performance measurement and feedback from stakeholders and customers. Operations and Maintenance details include an outline of operating entity responsibilities and termination. In particular, Implementation Plans offer the following information that aids in resource planning under each statutorily required component:

1. Process of a CCA includes an outline of the public hearing process, applicable authorities and adopted ordinances, resolutions or other officially adopted documents that bear on the CCA program. It includes an outline of planned actions and corresponding requests to the utility and the Commission in order to facilitate cooperation, and an outline of the CCA's Request for Proposals (RFP) or bidding process, including a schedule from adoption of the implementation plan to the end of the opt-out period;

2. Consequences of a CCA includes an assessment of impacts on ongoing utility procurement contract negotiations and Commission review, consequences for the Commission's energy efficiency programs, consequences for physical reliability within the CCA jurisdiction, transmission grid impacts from planned new renewable generation, consequences for ratepayer risk, and consequences for ISO reliability.

3. Program Scope includes an overall program schedule and a qualitative program expenditure profile, including potential expenditures for new renewable generation, conservation and energy efficiency programs.

4. Program Funding and Budget includes the use of Public Goods Charge funds, municipal revenue bonds and other funding to support the program; CCA program implementation funding, and outlines any available rollout schedule for renewable energy, conservation and energy efficiency program components of the CCA program.

5. Rights and Responsibilities include an outline of tariffs and outlines a structure of roles between the CCA, the ESP, and the customer.

As Local Power has proposed, the Commission has authority to bind a CCA to its Implementation Plan by making its findings regarding cost recovery, including not only the CRS assignment but also our proposed credits for renewable energy and conservation commitments and charges related to our proposed utility contract assignments, and any other surcharges and credits, contingent upon a CCA's compliance with its Implementation Plan. In addition, Local Power has proposed that CCAs may be charged for implementation costs caused by a CCA failing to abide by its Implementation Plan.

VI. Methodology for a CCA Customer Credit for Renewable Generation, Conservation and Energy Efficiency Measures

Local Power made its full case on this subject in its Initial Phase II Brief. As the utilities did not refute any point made by Local Power on this subject, our proposal should be adopted by the Commission.

VII. Two Tier vs. 5 Tier Rate Structure

Local Power supported CCSF witness Casey's proposal for utilities to offer five tiers of rates, rather than the two tiers currently offered, to offer customers complete rate comparability. PG&E indicated that it is willing to accommodate this request, but at CCSF's expense:

> "Significant reprogramming is required which should not be treated as a "free good" to CCSF. Mr. Yee testified that PG&E has numerous rate changes making it unlikely that true (and continuing) rate matching was unlikely. Therefore, the purpose of CCSFs potentially costly reprogramming request appears to be aimed at marketing during a specific point of time during the mass transfer period.. The programming costs associated with such marketing driven requests should rightfully be paid by CCSF, not PG&E's bundled customers" (p.107).

The utilities themselves have argued for the need for transparency in the customer opt-out process, and indeed it will be impossible for any CCA customer to compare its proposed CCA service with an existing utility's service unless all three utilities are required to conform to CCSF's proposal. As this information system upgrade would be needed by all CCA customers in California, costs associated with this upgrade must be born by all ratepayers, not by any specific CCA.

VII. Conclusion

Local Power looks forward to working with the Commission in this matter.

Respectfully Submitted,

_____

Paul Fenn, AM
Executive Director
Local Power
4281 Piedmont Avenue
Oakland, CA 94611
510 451 1727
paulfenn@local.org

CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On August 1, 2005, I caused to be served an electronic copy of the attached:

PHASE II REPLY BRIEF OF LOCAL POWER

on all known parties to R.03-10-003, or their attorneys of record, for whom a address has been provided.

Executed this 1st day of August, 2005, at Oakland, California. Th

_____

Local Power
4281 Piedmont Avenue
Oakland, CA 94611
(510) 451-1727

R.03-10-003
Service List

Appearance

RICHARD ESTEVES
SESCO, INC.
77 YACHT CLUB DRIVE, SUITE 1000
LAKE HOPATCONG, NJ 07849-1313

DAVID M. NORRIS
ATTORNEY AT LAW
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520

DAVID L. HUARD
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BOULEVARD
LOS ANGELES, CA 90064

RANDALL W. KEEN
ATTORNEY AT LAW
MANATT PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064

ROGER BERLINER
MANATT, PHELPS & PHILLIPS
11355 W. OLYMPIC BLVD.
LOS ANGELES, CA 90064

SUSAN MUNVES
CITY OF SANTA MONICA
1918 MAIN STREET
SANTA MONICA, CA 90405

MIKE BURKE
ENERGY CHOICE, INC.
8714 LINDANTE DRIVE
WHITTIER, CA 90603

COLIN M. LONG
A PROFESSIONAL CORPORATION
201 SOUTH LAKE AVENUE, SUITE 400
PASADENA, CA 91101

COLIN M. LONG
PACIFIC ECONOMICS GROUP
201 SOUTH LAKE AVENUE, SUITE 400
PASADENA, CA 91101

MATTHEW GORMAN
CITY ATTORNEY'S OFFICE
CITY OF POMONA
500 S. GAREY AVE. BOX 660
POMONA, CA 91769

MATTHEW GORMAN
DEPUTY CITY ATTORNEY
POMONA CITY ATTORNEY'S OFFICE
505 S. GAREY AVE.
POMONA, CA 91769

JENNIFER SHIGEKAWA
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

MICHAEL D. MONTOYA
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

RONALD MOORE
SOUTHERN CALIFORNIA WATER CO.
630 EAST FOOTHILL BOULEVARD
SAN DIMAS, CA 91773

MATTHEW GORMAN
ALVAREZ-GLASMAN & COLVIN
100 N. BARRANCA AVE., SUITE 1050
WEST COVINA, CA 91791

MICHAEL T. MEACHAM
CITY OF CHULA VISTA
276 FOURTH AVENUE
CHULA VISTA, CA 91910

PAUL SZYMANSKI
ATTORNEY AT LAW
SEMPRA ENERGY
101 ASH STREET
SAN DIEGO, CA 92101

DAVID J. COYLE
ANZA ELECTRIC COOPERATIVE, INC
PO BOX 391090
ANZA, CA 92539-1909

TAMLYN M. HUNT
COMMUNITY ENVIRONMENTAL COUNCIL
930 MIRAMONTE DR.
SANTA BARBARA, CA 93109

DAVID ORTH
GENERAL MANAGER
KINGS RVIER CONSERVATION DISTRICT
4886 EAST JENSEN AVENUE
FRESNO, CA 93725

JOSEPH PETER COMO
CITY AND COUNTY OF SAN FRANCISCO
CITY HALL, ROOM 234
1 DR. CARLTON B. GOODLETT PLACE, RM. 234
SAN FRANCISCO, CA 94102

MATTHEW FREEDMAN
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

MIKE FLORIO
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

JONATHAN J REIGER
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5130
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

FRASER D. SMITH
CITY AND COUNTY OF SAN FRANCISCO
COMMISSIO

SEAN CASEY
SAN FRANCISCO PUBLIC UTILITIES

SAN FRANCISCO PUBLIC UTILITIES COMM
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

SHERYL CARTER
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

JAMES TOBIN
MORRISON AND FOERSTER LLP
425 MARKET STREET
SAN FRANCISCO, CA 94105

JUDI K. MOSLEY
PACIFIC GAS AND ELECTRIC CO
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105

LUCY FUKUI
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B9A
77 BEALE ST.
SAN FRANCISCO, CA 94105

STEVEN MOSS
SAN FRANCISCO COMMUNITY POWER COOP
2325 3RD STREET, SUITE 344
SAN FRANCISCO, CA 94107-4303

EDWARD G. POOLE
ATTORNEY AT LAW
ANDERSON & POOLE
601 CALIFORNIA STREET, SUITE 1300
SAN FRANCISCO, CA 94108-2818

CRAIG M. BUCHSBAUM
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120

PETER OUBORG
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442 MAIL CODE B30A
SAN FRANCISCO, CA 94120

STACY WALTER
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120-7442

JENNY GLUZGOLD
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

JACK PIGOTT
CALPINE CORPORATION
4160 DUBLIN BLVD.
DUBLIN, CA 94568

PETER W. HANSCHEN
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596-8130

GERALD LAHR
ASSOCIATION OF BAY AREA GOVERNMENTS
PO BOX 2050
OAKLAND, CA 94604-2050

PAUL FENN
LOCAL POWER
4281 PIEDMONT AVE.
OAKLAND, CA 94611

SCOTT WENTWORTH, P.E.
ENERGY ENGINEER
CITY OF OAKLAND
7101 EDGEWATER DRIVE
OAKLAND, CA 94621

CYNTHIA WOOTEN
NAVIGANT CONSULTING, INC.
1126 DELAWARE STREET
BERKELEY, CA 94702

REED V. SCHMIDT
BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY, CA 94703

CLYDE MURLEY
CONSULTING ON ENERGY AND ENVIRONMENT
600 SAN CARLOS AVENUE
ALBANY, CA 94706

C. SUSIE BERLIN
ATTORNEY AT LAW
WOR
MC CARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

JIM STONE
CITY OF MANTECA DEPARTMENT OF PUBLIC
1001 WEST CENTER STREET
MANTECA, CA 95337

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

RAYMOND LEE
CHIEF EXECUTIVE OFFICER
MOUNTAIN UTILITIES
PO BOX. 205
KIRKWOOD, CA 95646

JOHN DALESSI
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

G. PATRICK STONER
LOCAL GOVERNMENT COMMISSION
1414 K STREET, SUITE 600
SACRAMENTO, CA 95814

KEVIN SMITH
BRAUN & BLAISING, P.C.
915 L ST STE. 1460
SACRAMENTO, CA 95814

LYNN HAUG
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814

SCOTT BLAISING
ATTORNEY AT LAW
BRAUN & BLAISING, P.C.
915 L. STREET, SUITE 1420
SACRAMENTO, CA 95814

ANDREW B. BROWN
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814-3109

EDWARD J. TIEDEMANN
ATTORNEY AT LAW
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416

DAVID R. HAMMER
COUTY COUNSEL
COUNTY OF TRINITY
PO BOX 1428
WEAVERVILLE, CA 96093-1426

ROBERT W. MARSHALL
GENERAL MANAGER
PLUMAS-SIERRA RURAL ELECTRIC CO-OP
PO BOX 2000
PORTOLA, CA 96122-2000

DANIEL W. MEEK
ATTORNEY AT LAW
RESCUE
10949 S.W. 4TH AVENUE
PORTLAND, OR 97219

Information Only

BRIAN M. JONES
M.J. BRADLEY & ASSOCIATES, INC.
47 JUNCTION SQUARE DRIVE
CONCORD, MA 01742

STEVE HASTIE
NAVIGANT CONSULTING, INC.
1717 ARCH STREET
PHILADELPHIA, PA 19103

RALPH E. DENNIS
DIRECTOR, REGULATORY AFFAIRS
FELLON-MCCORD & ASSOCIATES
9960 CORPORATE CAMPUS DRIVE, STE 2000
LOUISVILLE, KY 40223

TAFF TSCHAMLER
KEMA, INC.
OFFICE PLAZA ONE
10333 EAST DRY CREEK, SUITE 200
ENGLEWOOD, CO 80112

STACY AGUAYO
MANAGER OF REGUALTORY AFFAIRS
APS ENERGY SERVICES
400 E. VAN BUREN STREET, SUITE 750
PHOENIX, AZ 85004

DAVID SAUL
SOLEL, INC.
439 PELICAN BAY COURT
HENDERSON, NV 89012

JOHN NIELSEN
PROMETHEUS ENERGY SERVICES, INC.
5657 WILSHIRE BLVD., SUITE 330
LOS ANGELES, CA 90036

CURTIS KEBLER
GOLDMAN, SACHS & CO.
2121 AVENUE OF THE STARS
LOS ANGELES, CA 90067

GREGORY S.G. KLATT
ATTORNEY AT LAW
DOUGLASS & LIDDELL
411 E. HUNTINGTON DRIVE, SUITE 107-356
ARCADIA, CA 91006

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367-8102

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE, RM 370
ROSEMEAD, CA 91770

AKBAR JAZAYERI
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE., RM 370
ROSEMEAD, CA 91770

ELIZABETH HULL
DEPUTY CITY ATTORNEY
CITY OF CHULA VISTA
276 FOURTH AVENUE
CHULA VISTA, CA 91910

WILLIE M. GATERS
ENVIRONMENTAL RESOURCE MANAGER
CITY OF CHULA VISTA
CITY MANAGER'S OFFICE
276 FOURTH AVENUE
CHULA VISTA, CA 91910

DON WOOD
PACIFIC ENERGY POLICY CENTER
4539 LEE AVENUE
LA MESA, CA 91941

LAURA HUNTER
CLEAN BAY CAMPAIGN DIRECTOR
ENVIRONMENTAL HEALTH COALITION
401 MILE OF CARS WAY, SUITE 310
NATIONAL CITY, CA 91950

MELANIE MCCUTCHAN
RESEARCH ASSOCIATE
ENVIRONMENTAL HEALTH COALITION
401 MILE OF CARS WAY, SUITE 310
NATIONAL CITY, CA 91950

DONALD C. LIDDELL P. C.
DOUGLASS & LIDDELL
2928 2ND AVENUE

MICHAEL SHAMES
ATTORNEY AT LAW
UTILITY CONSUMERS' ACTION NETWORK

SAN DIEGO, CA 92103

3100 FIFTH AVENUE, SUITE B
SAN DIEGO, CA 92103

SCOTT J. ANDERS
DIRECTOR OF POLICY AND PLANNING
SAN DIEGO REGIONAL ENERGY OFFICE
8520 TECH WAY - SUITE 110
SAN DIEGO, CA 92123

WENDY KEILANI
SAN DIEGO GAS & ELECTRIC
8330 CENTURY PARK COURT, CP32D
SAN DIEGO, CA 92123

CENTRAL FILES
SAN DIEGO GAS & ELECTRIC
CP31-E
8330 CENTURY PARK COURT
SAN DIEGO, CA 92123-1530

JOHN W. LESLIE
ATTORNEY AT LAW
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP
11988 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130

KURT J. KAMMERER
K.J. KAMMERER & ASSOCIATES
PO BOX 60738
SAN DIEGO, CA 92166-8738

MICHAEL NELSON
4031 RIVOLI
NEWPORT BEACH, CA 92660

JUNE M. SKILLMAN
CONSULTANT
2010 GREENLEAF STREET
SANTA ANA, CA 92706

SCOTT REDELFS
KINGS RIVER CONSERVATION DISTRICT
4886 E. JENSEN AVE.
FRESNO, CA 93725

NORMAN J. FURUTA
ATTORNEY AT LAW
DEPARTMENT OF THE NAVY
2001 JUNIPERO SERRA BLVD., SUITE 600
DALY CITY, CA 94014-3890

CHRIS KING
EMETER CORPORATION
CALIFORNIA CONSUMER EMPOWERMENT ALLIANCE
ONE TWIN DOLPHIN DRIVE
REDWOOD CITY, CA 94065

DIANE I. FELLMAN
ATTORNEY AT LAW
LAW OFFICES OF DIANE I. FELLMAN
234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

JOHN P. HUGHES
MANAGER, REGULATORY AFFAIRS
SOUTHERN CALIFORNIA EDISON COMPANY
601 VAN NESS AVENUE, STE. 2040
SAN FRANCISCO, CA 94102

MICHAEL HYAMS
SAN FRANCISCO PUBLIC UTILITIES COMM
1155 MARKET ST., 4/F
SAN FRANCISCO, CA 94103

DEVRA BACHRACH
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

JEANNE MCKINNEY
ATTORNEY AT LAW
THELEN REID & PRIEST
101 SECOND STREET, 1800
SAN FRANCISCO, CA 94105

CHRIS RAPHAEL
CALIFORNIA ENERGY MARKETS
517-B POTRERO AVENUE
SAN FRANCISCO, CA 94110

CALIFORNIA ENERGY MARKETS
517-B POTRERO AVE.
SAN FRANCISCO, CA 94110-1431

CHRISTOPHER A. HILEN
DAVIS WRIGHT TERMAINE, LLP
ONE EMBARCADERO CENTER, SUITE 600
SAN FRANCISCO, CA 94111

JEANNE ARMSTRONG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI RITCHIE & DAY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

MATT SULLIVAN
PROGRAM MANAGER
NEWCOMB ANDERSON ASSOCIATES/EMCOR ENERGY
505 SANSOME ST., 16/F
SAN FRANCISCO, CA 94111

IRENE K. MOOSEN
ATTORNEY AT LAW
REGENTS OF UNIVERSITY OF CALIFORNIA
53 SANTA YNEZ AVENUE
SAN FRANCISCO, CA 94112

MARVIN FELDMAN
ECONOMIST
RESOURCE DECISIONS
934 DIAMOND STREET
SAN FRANCISCO, CA 94114

MEG MEAL
120 JERSEY STREET
SAN FRANCISCO, CA 94114

LAW DEPARTMENT FILE ROOM
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120-7442

JIM BURKE
BURKE TECH SERVICES
125 WAWONA STREET
SAN FRANCISCO, CA 94127

ROGER RUSSELL
PACIFIC GAS AND ELECTRIC COMPANY
RM. 902, MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

PAUL V. HOLTON
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177-0001

GEORGE
WOMEN'S ENERGY MATTERS
PO BOX 883723
SAN FRANCISCO, CA 94188-3723

ED CHANG
FLYNN RESOURCE CONSULTANTS INC.
5440 EDGEVIEW DRIVE
DISCOVERY BAY, CA 94514

PETER DRAGOVICH
ASSISTANT TO THE CITY MANAGER
CITY OF CONCORD
1950 PARKSIDE DRIVE, MS 01/A
CONCORD, CA 94519

MICHAEL ROCHMAN
SCHOOL PROJECT UTILITY RATE REDUCTION
1430 WILLOW PASS ROAD, SUITE 240
CONCORD, CA 94520

MICHAEL ROUSH
CITY ATTORNEY
CITY OF PLEASANTON
123 MAIN STREET
PLEASANTON, CA 94566

MANAGER, MARKET & REGULATORY AFFAIRS
MIRANT CORPORATION
1350 TREAT BLVD., SUITE 500
WALNUT CREEK, CA 94597

RAMONA GONZALEZ
EAST BAY MUNICIPAL UTILITY DISTRICT
375 ELEVENTH STREET, M/S NO. 205
OAKLAND, CA 94607

SAJI THOMAS PIERCE
EAST BAY MUNICIPAL UTILITY DISTRICT
375 11TH STREET
OAKLAND, CA 94607-4240

JODY S. LONDON
JODY LONDON CONSULTING
PO BOX 3629
OAKLAND, CA 94609

MRW & ASSOCIATES, INC.
1999 HARRISON ST. SUITE 1440
OAKLAND, CA 94612

CAROL MISSELDINE
MAYOR'S OFFICE
CITY OF OAKLAND
1 FRANK OGAWA PLAZA, 3/F
OAKLAND, CA 94612

JOHN GALLOWAY
UNION OF CONCERNED SCIENTISTS

NEAL DE SNOO
CITY OF BERKELEY

2397 SHATTUCK AVENUE, SUITE 203
BERKELEY, CA 94704

ENERGY OFFICER
2180 MILVIA STREET
BERKELEY, CA 94704

SAM RUARK
COUNTY OF MARIN CDA
3501 CIVIC CENTER DRIVE, ROOM 308
SAN RAFAEL, CA 94903

TIM ROSENFELD
HMW INTERNATIONAL, INC.
359 MOLINO AVENUE
MILL VALLEY, CA 94941

RITA NORTON
RITA NORTON AND ASSOCIATES, LLC
18700 BLYTHSWOOD DRIVE,
LOS GATOS, CA 95030

MAHLON ALDRIDGE
ECOLOGY ACTION, INC.
PO BOX 1188
SANTA CRUZ, CA 95061

JIAB TONGSOPIT
ENVIRONMENTAL STUDIES DEPARTMENT
UNIVERSITY OF CALIFORNIA, SANTA CRUZ
1156 HIGH STREET
SANTA CRUZ, CA 95064

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

CHRISTOPHER J. MAYER
MODESTO IRRIGATION DISTRICT
PO BOX 4060
MODESTO, CA 95352-4060

CHRIS L. KIRIAKOU
CORNERSTONE CONSULTING, INC.
1565 E. TUOLUMNE RD.
TURLOCK, CA 95382

MICHAEL R. WOODS
A PROFESSIONAL CORPORATION
18880 CARRIGER ROAD
SONOMA, CA 95476-6246

RICHARD MCCANN
M.CUBED
2655 PORTAGE BAY ROAD, SUITE 3
DAVIS, CA 95616

CAROLYN M. KEHREIN
ENERGY MANAGEMENT SERVICES
1505 DUNLAP COURT
DIXON, CA 95620-4208

JAMES MCMAHON
SENIOR ENGAGEMENT MANAGER
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

KRYSTY EMERY
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

STEVE PINKERTON
NAVIGANT CONSULTING, INC.
3100 ZANFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

VICTORIA P. FLEMING
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

STEVEN A GREENBERG
REALENERGY
4100 ORCHARD CANYON LANE
VACAVILLE, CA 95688

JIM DOOLITTLE
ORADO MANAGEMENT GROUP
2600 FRUITRIDGE ROAD
CAMINO, CA 95798

BRUCE MCLAUGHLIN
BRAUN & BLAISING, P.C.
915 L STREET, SUITE 1420
SACRAMENTO, CA 95814

DAN GEIS
AGRICULTURAL ENERGY CONSUMERS ASSO.
925 L STREET, SUITE 800
SACRAMENTO, CA 95814

KELLY SHEA
THE DOLPHIN GROUP
925 L STREET, SUITE 800
SACRAMENTO, CA 95814

KEVIN WOODRUFF
WOODRUFF EXPERT SERVICES
1100 K STREET, SUITE 204
SACRAMENTO, CA 95814

KAREN LINDH
LINDH & ASSOCIATES
PMB 119
7909 WALERGA ROAD, NO. 112
ANTELOPE, CA 95843

ANNE FALCON
EES CONSULTING, INC.
570 KIRKLAND AVE
KIRLAND, WA 98033

State Service

LOS ANGELES DOCKET OFFICE
CALIFORNIA PUBLIC UTILITIES COMMISSION
320 W. 4TH STREET, SUITE 500
LOS ANGELES, CA 90013

CHERYL COX
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING
BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CHRISTOPHER DANFORTH
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DAN ADLER
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DIANA L. LEE
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOEL TOLBERT
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JULIE A FITCH
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5203
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KIM MALCOLM
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5005
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LAINIE MOTAMEDI
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LOUIS M IRWIN
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PHILIPPE AUCLAIR
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5218
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

REGINA DEANGELIS
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4107
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVE ROSCOW
CALIF PUBLIC UTILITIES COMMISSION
ELECTRIC INDUSTRY & FINANCE BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVEN C ROSS
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TRUMAN L. BURNS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4102

MARGARET L. TOBIAS
ATTORNEY AT LAW
TOBIAS LAW OFFICE
460 PENNSYLVANIA AVENUE

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SAN FRANCISCO, CA 94107

ANDREW ULMER
ATTORNEY AT LAW
SIMPSON PARTNERS, LLP
900 FRONT STREET, SUITE 300
SAN FRANCISCO, CA 94111

CRAIG MCDONALD
NAVIGANT CONSULTING
3100 ZINFANDEL DR., SUITE 600
RANCHO CORDOVA, CA 95670-6078

HASSAN MOHAMMED
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS43
SACRAMENTO, CA 95814

JENNIFER TACHERA
ATTORNEY AT LAW
CALIFORNIA ENERGY COMMISSION
1516 - 9TH STREET MS-14
SACRAMENTO, CA 95814

JANEE MARLAN
CALIFORNIA DEPARTMENT OF WATER RESOURCES
SCHEDULING
3310 EL CAMINO AVENUE, SUITE 120
RESOURCES
SACRAMENTO, CA 95821

JOHN PACHECO
CALIFORNIA ENERGY RESOURCES
CALIFORNIA DEPARTMENT OF WATER
3310 EL CAMINO AVENUE
SACRAMENTO, CA 95821