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)

PAUL FENN
PHASE II OPENING TESTIMONY

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A. QUALIFICATIONS

Q: Please state your name, address and qualifications.

A: Paul Fenn, P.O. Box 432, Canyon, CA 94611. I have a Master of Arts (AM) from the Social Sciences Division, University of Chicago, 1992. I was the Dean's Fellow, at the New School for Social Research as a PhD candidate, New York, 1989. I have a Bachelor's Degree (BA) from Bates College in Maine, graduating with Highest Honors, and receiving the Muller History Prize in 1988.

Since 1996 I have been Executive Director of Local Power, based in Oakland. Since 2004 I have served as co-chair of the Sierra Club California Energy and Climate Change Committee. In 2005 the San Francisco Board of Supervisors appointed me as a member, San Francisco Community Choice Aggregation Citizens' Advisory Task Force, filling the position of an expert in Community Choice Aggregation. From 1993-5 I was Legislative Director for the Massachusetts Senate Committee on Energy.

I have twelve years of energy law and regulatory experience related to CCA. I am author of the 2002 California Community Choice law (AB117, Migden) and coauthor of the nation's original

such law in Massachusetts (filed 1995, passed in 1997); advisor in drafting of similar laws in Ohio (1999) and New Jersey (2003) - ref: California Board of Equalization Chair Carole Migden, (415) 557-3000. I am author, 2001 San Francisco Solar "H Bond" Authority (City Charter revenue bond authority, Section 9.108.7, Ammiano), voter-approved Proposition H. I am author of San Francisco's "Energy Independence" Ordinance (Ammiano) enabling San Francisco to switch to a new electric service provider and take 1/4 of the community's energy use off grid using Community Choice and the Solar H Bond Authority. Since 2003 I have been an Intervenor representing ratepayers at the California Public Utilities Commission proceedings on Community Choice Aggregation, R.03-10-00. In 2003 and 2004 I was an Intervenor Representative, preparing all filings for Ratepayers for Affordable Clean Energy (R.A.C.E.), in California Public Utilities Commission proceedings on California gas utility procurement and Liquefied Natural Gas (R.04-01-025) and electric procurement R.01-10-024), preparing all filings for the coalition under variable contract with Border Power Plant Working Group. In 2004 I served as an Expert Witness, at the Nuclear Regulatory Commission's Proceeding on the proposal of Louisiana Energy Services to Build a National Uranium Enrichment Facility in New Mexico under contract (*pro bono*) with Public Citizen. In 2003, I served as an expert witness to Womens' Energy Matters in the California Public Utilities Commission's proceeding on Energy Efficiency programs ®.01-08-028).

I also have significant private sector s**ystems integration experience, holding positions of** Radio Frequency Plan Auditor for a national GSM 1800 ("2.5G") Network in Slovenia with Lucent Technologies, in 1999 as Regulatory Affairs and Permitting Site Acquisition Engineer, with Voicestream in 1999, as Mapping and Database Specialist with Motorola ECID Europe, in 1997, and as site acquisition and regulatory specialist with Western Wireless between 1993.

I have appeared as a guest lecturer and speaker on Community Choice and Renewable Energy Development Strategies. In 2005 I was the Special Guest Speaker at a speech of Robert F. Kennedy Jr. On Water and Energy Sustainability, in San Rafael; a speaker at Environmental Forum of Marin's Local Officials Workshop in Novato; a panelist at the League of Women Voters event at the CPUC, *Keeping the Lights On*, in San Francisco; a Speaker at Attorney General Bill Lockyer's forum, *Project California*, in Oakland. In 2004 I was Guest Speaker at "Boiling Point" - *Ross Gelbspan & Paul Fenn on Climate Crisis in* Mill Valley; a speaker & fellow at Law Seminars International's *California's New Energy Market* in San Francisco; a

speaker at California EPA & Resources Agency LNG Workshop in Sacrament. In 2003 I was a speaker at the British Foreign and Commonwealth Office's Renewable Energy & Energy Efficiency Partnership meeting in Washington DC; a speaker at Sonoma public agencies, *Watergy Conference* in Petaluma; a speaker at *Creating Marin's Energy Future Now* in San Rafael; a speaker at the California Planning & Conservation League's n *Annual Event* in Sacramento; a lecturer at UC Berkeley's Energy Resources Group with Professor Daniel Kammen. In 2002 I was a lecturer at Sonoma State University; a guest speaker at the San Francisco Public Utilities Commission's *Solar Industry Workshop.* In 2001 I was a lecturer at Pomona College/Harvey Mudd College Forum, *California's Energy Crisis; a* guest speaker at California Office of Ratepayer Advocate, *Forum on the Energy Crisis.* In 1999 I was a presenter at Cities for Climate Protection's *Climate Solutions Workshop* in Los Angeles.

I have also given testimony on Community Choice and H Bonds in addition to the CPUC, including the California State Senate and Assembly (1999-2002); the Massachusetts Department of Public Utilities, Massachusetts State Senate and Massachusetts Division of Energy Resources (1993-1996); the San Francisco Board of Supervisors and other local, county and state governing boards, agencies, committees and commissions (1995-2005).

I have made numerous media appearances on Community Choice Aggregation and H Bonds, including *Forbes Magazine, San Francisco Chronicle, Fox News* (National TV), *Los Angeles Times*, *The Nation*, *San Francisco Examiner,* East Bay Business Times, Marin Independent Journal, California Energy Markets, Restructuring Today, and multiple appearances on KPFA FM, 1997-2004.

My writings on Community Choice Aggregation have been published in the *San Jose Mercury News*, *San Francisco Bay Guardian,* T*he Free Press, The Sierra Club Yodeler, San Francisco Bay View*, and *The Workbook*,.

B. CREDIT, DELIVERY OR ASSIGNMENT OF DWR AND UTILITY POWER CONTRACTS TO A COMMUNITY CHOICE AGGREGATOR CUSTOMER RESPONSIBILITY SURCHARGE

Q: What are methods of allocating utility and DWR power contract risk to Community Choice Aggregators (CCA) relative to the Customer Responsibility Surcharge (CRS).

A: 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.

The varieties of contracting situations facing an effort to allocate DWR or utility contracts to a CCA may be reduced to three. I have a number of ideas of how this could be done, but will limit its Comments to a basic categorization of Department of Water Resources (DWR) and utility contract assignment or allocation to a CCA, either through simple assignment, contract splitting, CCA bundling, or through a basic take-or-pay offering to CCAs.

The first approach is 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. In this event, the transaction would require only a creditworthiness requirement from the CCA, which would not be difficult considering the volume of revenue in a CCA ESP contract.

If the contracts could be so easily 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. 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.

There could be a true-up of this CRS factor with the assumption of a contract by a CCA,

based on the Conclusion of Law adopted by the Commission in D.04-12-046, that "AB 117 does not permit cost-shifting of CCA CRS liabilities *between utility bundled customers and CCA customers*" (p.66).

Thus, the Commission concluded that cost-shifting onto CCA customers is not permitted by AB117l. For this reason, CCAs should be free to dispose of the contracts they assume in whatever manner they wish, in order to facilitate CCA and as a benefit to the marketplace.

The second approach, in cases where there is no such match between CCA load and contracts, would be to split contracts and allocate components of contracts 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.

DWR or the utility could assign the power but not the contract to a CCA. It is conceivable that the utility or DWR could split a contract into two pieces and assign a part of a contract to a CCA according to its loads. It is also possible that the CCA could negotiate with the seller and split the contracts.

The third approach for 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.

This approach is common in natural gas, in order to ensure a supply, a customer must commit to purchase volume over time; if over time the CCA for any reason did not need the power, the CCA would either have to take it (and dispense with it freely) or pay for it.

Thus, under this third approach, if a DWR or utility contract could not be assigned to a CCA or CCAs for the above reasons, 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.

C. OPEN SEASON GATING PROCESS: LIMITING A COMMUNITY CHOICE AGGREGATOR'S CUSTOMER RESPONSIBILITY SURCHARGE LIABILITY UPON SUBMISSION OF ITS IMPLEMENTATION PLAN

Q: Is there a a process, in accordance with AB117 and existing Commission policy, by which a Community Choice Aggregator's filing of an Implementation Plan (IP) with the Commission limits its Customer Responsibility Surcharge (CRS) liability relative to ongoing New World Procurement and Utility Retained Generation without causing cost-shifting? How would this help form an Open Season process?

A: Yes there is a process, and it is key to a reasonable Open Season process that facilitates CCA implementation. The process is based on the law itself. AB117 states specifically that an Implementation Plan shall be filed with the Commission so that it may determine an Exit Fee, including a CRS:

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

In Workshops, the utilities have suggested that CCAs be required to make a 5-year commitment to resource adequacy, with penalties or fees for mis-forecasting, based on Megawatts or total specified customers, and would have to pay a penalty for modifying

their forecasts in the pre-cutover period. Apart from presuming that a CCA would elect to designate itself the Load-Serving Entity and take on the corresponding responsibilities directly (D.04-12-046 says that a CCA "or" ESP may be the LSE), the fact is that AB117 limits the Commission's jurisdiction to assigning cost recovery, not imposing fees or penalties, because the opt-out process is obviously not entirely under the CCA's control, but is also controlled in party by the utilities, as is all the data on which a CCA would make a forecast. Apart from the fact that the utilities would be as responsible for any forecasting errors as the CCAs that use their data, the fact that the utilities have repeatedly described CCAs as their "competitors," indicates they might have an unlawful incentive to encourage customers, particularly large commercial and industrial customers, to opt-out of a CCA's program, thus distorting the accuracy of their forecasts. Such a system would fail to meet AB117's requirement that the Commission facilitate CCA implementation.

In Workshops, the utilities have also indicated that a CCA's CRS obligation should end on the day that a binding forecast is made. CCAs have indicated that a city ordinance announcing the formation of a CCA should be the cut-off date. While under AB117 the ordinance creating a CCA certainly gives a CCA certain rights (such as access to utility data), that AB117 specifically requires the Commission to base its cost recovery findings on the Implementation Plan. These two elements form the basis for a rational cut off or gating system to avoid creation of stranded costs. A graduated approach is necessary since CCA's won't have all the information they would need in order to make a binding forecast, such as solicitation and opt-out processes.

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

> "After certification of receipt of the implementation plan and any additional information

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

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

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

Any contract costs that are avoidable or not attributable to a CCA customer may not be included in a CRS. This presents the question of the Commission's definition of "net unavoidable electric purchase contract costs attributable to the customer." In D.04-12-046, the Commission established, in Finding of Fact 20, a principle of reasonableness in determining which utility New World Procurement obligations a CRS should include: AB 117 provides that the CRS should include all costs that the utilities reasonably incurred on behalf of ratepayers, which may include costs incurred after the passage of AB 117 but should not include any costs that were "avoidable" or those that are not attributable to the CCA's customers (p.60).

The "reasonableness" criterion is defined by the Commission's adopted electric utility procurement framework, in R.01-10-024, and ongoing procurement authorizations in R.04-04-043. In D.04-12-046, the Commission adopted a similar reasonableness standard in Conclusion of Law #24, requiring that CRS forecasting must be reasonable:

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

"Reasonable" should mean that a utility's procurement forecasts must include any formal CCA actions in a utility's service territory. The reasonableness of a utility's contract, and thus a CCA's CRS obligation, rests on reasonable forecasting, which the Commission should require utilities to fully include and reflect formal CCA activity in their service territories. AB117 requires that electric utilities "shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs"(PUC 366.2(c)(9)).

Full cooperation with a CCA includes, but is not limited to, provision of utility data at a CCA's request, even though AB117 does not require that such a request be made by an ordinance, resolution or Implementation Plan. It follows that the full cooperation requirement must include utility's acknowledgment of any city council's or board of supervisors' formal declarations of intent to implement a CCA program.

The Commission has already determined that utility procurement plans are required to reflect Community Choice Aggregation in their service territories. In Decision 04-01-050 of R.01-10-024, the Commission required that "(i)n the long-term plans that the utilities will prepare, we require each utility to provide a low load forecast that includes Community Choice Aggregation (CCA)" (January 22, 2004, p.4). The Commission specifically included CCA in a table containing a summary of the dimensions of the information that must be presented in the long-term plans of the utilities (D.04-01-050, p.99). In this adopted framework for long-term utility procurement, Finding of Fact 49 provided that "the utilities should also supply a range of forecasts of load in their revised 2004 long-term plans in order to account for potential changes in community choice aggregation and direct access" (p.188). Finally, Conclusion of Law 32 provided that "The utilities should include in their updated long-term plans several forecasting scenarios, including widespread formation of community choice aggregators, as well as a core/noncore scenario" (p.197).

It follows that the utilities' load forecasts should acknowledge and reflect the load

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

First, a utility's procurement Plan should be required to reflect any CCA's Ordinance. The CCA ordinance, which AB117 requires CCAs to formally consider and adopt, provide the utilities with an initial means of reasonably avoiding over-procurement associated with departing load in these jurisdictions.

I would recommended the following process. The Commission should provide that any contracts entered into by a utility that fails, in its procurement plan, to acknowledge and reflect the load forecast impacts associated with any ordinance adopted, adopted pursuant to Public Utilities Code 366.2(c)(10) by any municipality, county or joint powers agency in its service territory, shall be deemed "avoidable," and furthermore shall determine the utility to have entered into such contracts "unreasonably," and shall consider any costs associated with such contracts to be "non-attributable" to the customers of the resulting CCA formed by said municipality, county or joint powers agency.

By going through the process of adopting an ordinance and filing an Implementation Plan, the CCA will incrementally refine the program, narrowing the frame of potential mistakes and associated costs, isolating costs that are either attributable to a CCA and paid by its participating ratepayers, or not that are not attributable to a CCA and paid by all ratepayers, as required by AB117.

Second, CCA Implementation Plans should restrain utility procurement to one year. The second formal action that provides the utilities with a means of reasonably avoiding

over-procurement associated with departing CCA load is the Implementation Plan, which AB117 requires CCAs to consider and adopt at a duly noticed public hearing pursuant to 366.2(c)(3).

The ability of the Commission to coordinate between electric utility procurement and CCA load departures depends in great deal on the information it obtains from the CCA in its Implementation Plan, and the information the Commission may request during the 90-day certification period outlined in AB117.

The Commission should flush out AB117's requirements concerning the content of an IP to contain the following details about a CCA's program. Public Utilities Code Section 366.2(c)(3) requires a list of seven components, lettered "A" through "G", statutory language is bolded.

"An organizational structure of the program, its operations, and its funding" (Subsection A). This outlines who will administer the program and who will implement, particularly separating the role of the ESP from the role of the CCA. It also includes a description of the CCA's administrative entity, how it serves the will of the CCA's governing board, how its activities are funded.

"Ratesetting and other costs to participants" (Subsection B). This outlines the manner in which the CCA governing board will establish a ratesetting mechanism that will determine the prices paid by participating CCA residents, businesses and institutions. It includes an outline of financing mechanisms that will be employed, and identifies costs associated with program components such as energy efficiency programs and renewable energy capacity installations, physical capacity and load reduction rollout requirements, and RPS commitment. It indicates levels of energy efficiency funds available for CCA administration and or energy efficiency program program design and control pursuant to Section 381.1 of the Public Utilities Code. Moreover, this section identifies costs allocated among the ESP or other party (such as a bank or subcontractors), the CCA, and the CCA's ratepayers.

"Provisions for disclosure and due process in setting rates and allocating costs among participants" (Subsection C). This outlines the basic by which the CCA has undertaken a public hearing process in approving an ordinance or resolution declaring itself a CCA, adopting an Implementation Plan. It explains how it will continue to undertake the process, and ultimately to approve an ESP contract, identifying applicable sunshine ordinance and public meeting laws that govern the CCA's local political process as well as the role of the Commission in its process. In this section, the CCA informs its residents, businesses and institutions of the requirements concerning the comparability of the ESP's terms with PG&E's, in terms of both rate schedule and resource portfolio, so that ratepayers can rationally decide whether to opt-out. Finally, it outlines the allocation of costs associated with the program among the ESP and any other party, the CCA, and the CCA customers.

"**The methods for entering and terminating agreements with other entities" (Subsection D).** This section clarifies the functional boundaries of the CCA-ESP agreement, including how the CCA enters into its agreement with the ESP and any other entities that might be signatories to the CCA's agreement. Section D provides details about what would happen if the ESP cannot perform under its agreement, particularly whether the ESP or CCA will cover the costs of a termination of the agreement from ESP nonperformance. It will disclose whether it will require the ESP to post a bond or demonstrate insurance to cover the cost of an involuntary return of CCA ratepayers to electric utility procurement, or whether the CCA wants to carry the ESP's risk by posting the bond or demonstrating the insurance, such that the ramifications of an unexpected termination can be made clear to the Commission.

"The rights and responsibilities of program participants, including, but not limited to, consumer protection procedures, credit issues, and shutoff procedures" (Subsection E). While rules and procedures previously developed for Direct Access are indeed guides for CCA tariffs, customer-related rules and procedures need to address areas such as:

• consumer protection
• application for service
• notifications
• billing
• payment of bills
• establishment of credit
• maintenance of credit
• reestablishment of credit
• deposits
• billing adjustments
• billing disputes
• discontinuance of service
• shut-off
• relocation of service
• restoration of service
• return to IOU service

This addresses the electric utilities' CCA tariffs. Moreover, this section distinguishes clearly between CCA rights and responsibilities, ESP rights and responsibilities, and ratepayer rights and responsibilities. It clarifies whether the CCA or the ESP will accept the responsibilities of a Load Serving Entity, including Resource Adequacy, which the Commission required one of them to do in it's January 22, 2004 electric procurement decision R.01-10-024). It provides an outline of CARE and other applicable restrictions on low-income customer shutoff protections. It clarifies which parties shall "own" any facilities for what periods of time, and which parties shall design the facilities, build or install them, operate them, or maintain them. It clarifies, in particular, which parties will be responsible for what components of the CCA program, and what rights shall be established under the CCA's Request for Proposals or contract offer to ESPs. It clarifies, as does Section D, whether the ESP or CCA will be responsible for meeting AB117's requirement that one of them must post a bond or demonstrate insurance to cover the costs of a potential involuntary return of CCA ratepayers to utility procurement under ESP nonperformance. It clarifies whether the CCA or the ESP is assuming the significantly greater risk of the contract, and what rights each party shall have.

"Termination of the program"(Subsection F). This outlines procedures for termination of the program, whether under normal conditions of a scheduled contract

termination, or under extraordinary conditions of ESP nonperformance. This section also explains what the CCA intends to do following termination, including the intention of submitting a new Implementation Plan and re-initiating CCA negotiation with ESPs, returning customers to electric utility procurement as bundled service customers, or otherwise.

"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" (Subsection G). This provides a list of potential ESP's who might seek to enter into an agreement to become the CCA's chosen provider, including any publicly available financial data about each ESP.

This concludes the seven (7) statutorily required components of a CCA Implementation Plan, which AB117 requires the Commission to base its findings regarding cost recovery:

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

I recommended the following process. The Commission should request adequate information from a CCA that has filed an Implementation Plan so that it may ascertain the potential departing load impacts, as well as a schedule, of a CCA's Implementation Plan, on a utility's ongoing procurement activities. Such information includes, but is not limited to:

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

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

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

Potential costs associated with limiting utility procurement based on a CCA's Implementation Plan would be higher short term contract costs. Or, in the event that a CCA is unsuccessful in negotiating with ESPs and cannot initiate service during the one year period, there could be higher long-term utility procurement costs if the price of power rises during the one-year period.

Incremental utility procurement costs associated with CCA IP Are Implementation Costs, Not CRS Costs. First, at present, short-term power contracts offer commodity electricity at lower rates than long-term contracts, presenting no incrementally higher cost to cover a CCA's load. If, after a Commission-ordered one year contract, a CCA proves unsuccessful in its negotiations with Electric Service Providers, there could potentially be higher costs associated with the utility's renewed long-term procurement for the would-be CCA customers. The utilities have raised the question in Workshops of who should pay the incrementally higher cost of a one-year contract compared to a long-term contract, or of a resumption of long-term procurement following an unsuccessful CCA IP.

This question originates in the passage and signing of AB57 and AB117 on the same day (September 24, 2002), authorizing two separate processes - electric utility procurement and CCA service -which in an imperfect marketplace can result in incremental costs.

However, it is critical that the Commission recognize such costs as non-CRS costs. Maintaining an exit window for CCAs to be able to submit an Implementation Plan for the Commission's cost-recovery finding, as required by AB117, is required in order for CCA to be able to implement. To the extent that such costs are not caused by any negligence of a CCA, but are the result of the marketplace itself, AB117 requires that they be paid by all ratepayers. These are costs of the marketplace, however, and not costs not necessarily associated with a CCA's customers, whose success or failure depends on the market. The difference in price of commodity electricity from one year to the next, or in a short-term contract versus a long-term contract, is determined by market conditions, and is thus not attributable to a CCA's customer. The costs of maintaining an implementation window for a CCA to negotiate with ESPs after receiving the Commission's certification of its Implementation Plan and findings regarding cost recovery are in fact "implementation costs," not CRS costs, because the utility's contracts are not being stranded by the load departure. Rather, the cost of ordering short contracts to "cover" a CCA is the inherent cost of facilitating a load departure while minimizing stranded costs. If the price of long-term power drops from one year to the next, or if short-term power contracts turns out to be lower than long-term contract power (as it is now), then all ratepayers should also share in the benefit; if the price turns out to be higher, than all ratepayers should share in the costs, pursuant to AB117:

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

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

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

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

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

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

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

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

I would recommend the following process. The Commission should treat any incremental costs associated with limiting electric utility procurement to one year contracts for CCAs that have filed an Implementation Plan with the Commission pursuant to Public Utilities

Code Section 366.2(c)(3) and (5), as implementation costs not attributable to the customer of the CCA, unless the Commission determines that these costs were caused by extreme negligence, corruption or incompetence of a CCA subsequent to adoption of its Implementation Plan.

In order to effectively fulfil its commitment to coordinate between CCA load departures and electric utility procurement, the Commission should maximize its familiarity with what a CCA is undertaking, actively engage the CCA during the statutory 90-day certification process to determine the best course of action, and employ its authority to incentivize good behavior by CCAs. AB117 provides the Commission with authority to present its findings regarding cost recovery, and also to delay CCA load departure to avoid annual electric procurement contracts disruptions and associated costs. By refining the definition of an IP to best facilitate coordination between CCA and electric utility procurement, the Commission will meet its obligation to facilitate CCA and its own commitment to prevent cost shifting onto CCA customers. CCAs that provide Implementation Plan ESP bidding requirements regarding minimum renewable capacity and load reductions from energy efficiency and conservation installations will add an additional level of useful information for the Commission to coordinate not only CCA and electric utility procurement, but also distribution and transmission planning, in addition to planning benefits for the Independent System Operator (ISO), California Energy Commission and other agencies. Knowledge of CCA contracted and/or bidding requirement-planned renewable self-generation, conservation and energy efficiency performance by CCA's, such as San Francisco's 360 Megawatt commitment in Ordinance 86-04 (Ammiano, May 27, 2004) will assist the Commissions in RPS implementation in R.04-04-003, will assist with energy efficiency funds planning in R.01-08-028, as well as implementation of the Energy Action Plan, which places energy efficiency and renewables at the top of the energy resource "Loading Order" on a statewide planning basis. By providing a greater depth of analytical knowledge, CCA Implementation Plans will more than offset any costs related to forecasting errors or electric utility procurement coordination CCA implementation costs.

Were the Commission to use this process, the Commission would also have recourse to delaying a CCA's load departure by one year to minimize cost-shifting relative to a utility's annual procurement plan, as provided in AB117, in which the Commission's authorization to assign an Exit Fee to a CCA's IP is conjoined with its authority to determine the earliest date on which a CCA's load can transfer away from the utility, considering the impact on an electric utility's *annual procurement plan*:

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

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

I would recommend the following process. The Commission should have the latitude to delay a CCA load transfer by no longer than a one-year period from the date on which a CCA IP was filed, if a failure to do so would result in a higher CRS.

D. PROBLEMS WITH FILED UTILITY INTERIM TARIFFS TO IMPLEMENT COMMUNITY CHOICE AGGREGATION

Q: By way of compliance with these orders of the Commission in D.04-12-046, PG&E filed with San Diego Gas & Electric (SDG&E) and Southern California Edison (SCE) submitted Interim Tariffs to the Commission for approval on February 14, 2005. Do you believe that the utilities' Interim Tariffs met the requirement of D.04-12-046?

A: No. D./04-12-046 required that the utilities file interim tariffs that would go into effect immediately so that CCAs could commence implementation immediately, and utilities were ordered to allow CCAs to begin service. Instead, the interim tariffs filed by the utilities said that any CCA implementing CCA under the interim tariffs would have to comply with whatever final tariffs the Commission ultimately approves. This both violates orders of D.04-12-046 and threatens the ability of the Commission to report to the legislature on the progress of Community Choice Aggregation on January 1, 2006 as required by 366.2(j) of the Public Utilities Code:

> "The commission shall prepare and submit to the Legislature, on or before January 1, 2006, a report regarding the number of community choices aggregations, the number of customers served by community choice aggregations, third party suppliers to community choice aggregations, compliance with this section, and the overall effectiveness of community choice aggregation programs"

In D.04-12-046, the Commission decided to facilitate CCA implementation commencement immediately rather than waiting for the approval of permanent utility tariffs in Phase II of R.03-10-003:

> "Delaying the implementation of CCA costs until after the resolution of Phase 2 of this proceeding could delay implementation of the CCA program until almost three years after passage of AB117" (Finding of Fact #31, p.62).

Accordingly, the Commission ordered PG&E and the other utilities to file provisional tariffs, outlining the rights and responsibilities of parties in a CCA:

> "PG&E, SDG&E, and SCE shall, within 60 days of the effective date of this decision, file tariffs that are substantively identical to those in effect for direct access customers and which shall apply in the interim to Community Choice Aggregators (CCAs) prior to the Commission's approval of final CCA tariffs" (Order #62, p.9).

Thus, the Commission determined that CCAs are authorized to proceed to implementation based on these interim tariffs. However, the utilities' interim tariffs totally undermine the clear intent of the Commission to facilitate actual immediate implementation by requiring that a CCA will also be required to comply with the

Commission's ultimately adopted tariffs. The Commission's order that "(i)n all respects, utility tariffs and practices shall permit CCAs to initiate service immediately following the filing of tariffs described in Ordering Paragraph 2" (Order #9, p.72) cannot be committed to changes in the tariffs, particularly given the fact that the Commission has no authority to approve or disapprove an IP, only to notify the utility of the program after ten (10) days, request information for ninety days, certify receipt, present findings regarding cost recovery, and set the earliest possible date of load departure.

PG&E introduces its proposed tariffs, in effect, as regulation:

> "Interim Rule 23 is effective on February 14, 2005 and shall immediately terminate on the effective date that the CPUC approves final rules in Rulemaking 03-10-003. On the specified effective date, the final version of Rule 23 shall immediately supersede interim rules in their entirety" (Filed February 22, 2005, Introduction).

Moreover, PG&E indicates that CCAs that execute the interim Service Agreement under the interim tariffs will still have to execute a new Service Agreement when the Commission approves tariffs in Phase II of R.03-10-003:

> "Because the final tariff is to be incorporated by reference into an associated final Service Agreement, a CCAP that has executed the interim Service Agreement will be required to execute the final Service Agreement upon the Commission's approval of the final CCA tariff" (*Ibid*.)

The effect of the utilities' statements regarding CCA compliance with future tariffs is intimidation and discouragement, and is also inconsistent with the requirement of 366.2(c)(9) of the Public Utilities Code. Thus, CCAs that wish to file Implementation Plans based on the interim tariffs are confronted with uncertainty that their time, effort and money in commencing implementation, in direct response to the Commissions invitation in R.04-12-046, could potentially be wasted effort, and might have to be repeated.

Q: Do you have any other concerns about the electric utilities' proposed interim tariffs?

A: Yes. First, the utilities' interim tariffs' nomenclature is misleading, gratuitous and unnecessary. The term"Community Choice Provider" (CCP) is inserted as a new term distinct from CCA or ESP, even though CCA and ESP are statutory and officially recognized terms, and CCP just an invention.

The utilities 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, the utilities' use of the CCP conflates the Community Choice Aggregator (CCA), as defined in great detail under AB117, with the Electric Service Provider (ESP) 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 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.

Were it a useful term, it might be justified. But it is unnecessary, given that the acronymic distinction between Community Choice Aggregator and Community Choice Aggregation may be made by applying appropriate grammar rather than inventing new terms with no basis in law. What is worse, the term CCP results in the conflation of ESP responsibilities with CCA responsibilities in the utilities' interim tariffs. Being neither necessary nor helpful, nor even innocuous, "Community Choice Provider" should be removed from the tariffs, and only statutory nomenclature employed in the tariffs**.**

Second, PG&E Unlawfully Adds Requirements to the Statutory Implementation Plan components. 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).

This is contrary to law. AB117 states very clearly that it is a CCA, not an ESP (which does not legally exist anyway) therefore never a CCP, 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.
> (C) Provisions for disclosure and due process in setting rates and allocating costs among participants.
> (D) The methods for entering and terminating agreements with other entities.
> (E) The rights and responsibilities of program participants, including, but not limited to, consumer protection procedures, credit issues, and shutoff procedures.
> (F) Termination of the program.
> (G) A description of the third parties that will be supplying electricity under the program, including, but not limited to, information about financial, technical, and operational capabilities" *(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.

Third, 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(c)(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(C) (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. 29 (c)(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 confirmed that obtaining customer-specific data is essential for CCAs to be capable of fulfilling AB117's customer notification- related consumer protection requirements:

> "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(c)(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(c)(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(c)(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).

Fourth, PG&E excludes certain classes of customers from the opt-out rule. 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.

Fifth, 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))..

In the March 16 workshop, the utilities proposed the drafting of a letter by the Energy Division at the Commission to go out under the Public Advisor's signature with utility verification of accuracy of details. This is inconsistent with AB117, which defines CCAs as customers combining loads for the purpose of consumer protection:

> "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" (PUC 366.2(c)(1).

The utility proposal for regulation of customer notifications also contravenes the Commission's decision (D.04-12-046) confirming this definition of CCAs as customers, and confirming that local governments are trustworthy even with confidentially protected customer data.

The utilities' proposal to make the Commission and or utilities police CCA notifications reflects the insistence of utilities that CCAs are not customer, but competitors. In their Phase I comments, the utilities were insistent on the statutory interpretation that CCAs are not to be defined as customers: "CCAs are not customers." (PG&E Comments on ALJ Malcolm's Proposed Decision, November 18, 2004). Yet in D.04-12-046, the Commission repeatedly defines 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." (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" (p. 10).

The utilities' proposed tariff also removes the customer from automatic enrollment if mail is returned, which is inconsistent with the statute. Under the statute, this process is the responsibility and right of the CCA, not the utility.

Sixth, the utilities did not adequately address costs, terms and wait time for electric utility data transfer to the CCA. Not only does AB117 require customer billing data to made available to CCAs that investigate, pursue and implement Community Choice Aggregation: the Commission has emphasized that CCAs are local government institutions, which unlike Electric Service Providers are accountable to the public and *may be entrusted* with their welfare. The Commission agreed that the statute is clear with regard to its requirement that utilities provide all relevant information to CCAs that are "investigating, pursuing or implementing" CCA programs and suggests that confidentiality concerns may be addressed by imposing limits on the CCA's use of the information it gets" In particular, the Commission Agreed 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(c)(9) anticipates the needs of CCAs for certain types of customer data and information" (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(c) (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 acknowledged that the CCA customer notification requirements would depend on access to customer-specific information:

> "LA/CV and Local Power also observe that AB 117 requires the CCA to notify utility customers of the CCA's plan to offer service, a requirement the CCA cannot satisfy without customer billing information" (p.49).

The Commission continued:

> "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 confirmed 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." 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 (c)(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 Local Power's suggestion 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)

Finally with respect to the finality of the Commission's commitment to CCA utility data access, 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).

The Commission's Findings of Fact, Conclusions of Law and Orders reflected its key reliance on Local Power's argument 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(c)(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 366.29 (c) (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(c)(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).

These facts being established, it is critical that utility tariffs provide the timing and expense of a transfer of all electric utility data, broadly defined, under a confidentiality agreement and statement of intent adopted by a CCA. As the Commission has determined that the utilities may not determine the meaning of "appropriate" in the statute, the tariff concerns only the process of providing it; there is no need for a process for the utility to

decide what is appropriate, only to provide what is requested by the CCA. Initially, this process should involve a full disclosure of all database fields in possession of the utility, which the Commission should require. With this information, the CCA would make a request for the contents of any and all fields it deems "useful" for its CCA program, without any further review by the Commission of what is useful, as D.04-12-046 made clear. As the same decision also clarified the need for even the most specific data prior to the notification process, any CCA with a nondisclosure agreement and statement of intent concerning protection of ratepayer confidentiality should be immediately accommodated by the electric utility. The tariff should thus consist of a standard, scheduled response of an electric utility to a CCA's request for all data contained within certain fields. The utility should be required to provide the list of all database fields within one week of the CCA's request. The CCA would follow up with an actual data request, listing which fields are desired. The utility should be required to transfer all data from these fields to the CCA within one month of receiving the request. This data would be transferred to the CCA on an aggregate basis, and should be charged on that basis.

The future direction of California energy policy hangs in large part on whether alternative energy initiative such as San Francisco and California's 40% RPS cities, or whether an attempt to return to the regulated past results in greater fossil fuel overdependency, higher price volatility, and more bailouts. Employing the full range of the Commission's authority while developing greater depth of familiarity with innovative green power initiatives, the Judge, Commissioners, staff, utilities, municipalities, counties and joint powers authorities of California have a creative opportunity to improve the physical quality of our electricity systems, and set in place long-term processes that will improve the security and sustainability of California's electricity system.

This concludes Paul Fenn's Opening Phase II Testimony in R.03-10-003.

DATE: April 28, 2005 Respectfully submitted,

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CERTIFICATION OF SERVICE
R.03-10-003

I, Julia Peters, certify that on this day April 28, 2005, I caused copies of the attached PAUL FENN PHASE II OPENING TESTIMONY 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.

Dated: April 28, 2005 at Oakland, California.

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