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)

REPLY COMMENTS OF LOCAL POWER ON PROPOSED DECISION RESOLVING PHASE 1 ISSUES ON PRICING AND COSTS ATTRIBUTABLE TO COMMUNITY CHOICE AGGREGATORS AND RELATED MATTERS

November 23, 2004

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Order Instituting Rulemaking to Implement Portions of AB117 Concerning Community Choice Aggregation

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In accordance with Rule 77 of the Commission's Rules of Practice and Procedure, Local Power hereby submits these reply comments in response to November 18, 2004 comments submitted by parties on the Draft Proposed Decision Resolving Phase 1 Issues On Pricing And Costs Attributable To Community Choice Aggregators And Related Matters filed October 29, 2004 in the Order Instituting Rulemaking 03-10-003 issued in the above-captioned proceeding on October 2, 2003 ("DPD").

I. OPEN SEASON COORDINATION COSTS ARE IMPLEMENTATION COSTS THAT SHOULD BE BORN BY ALL RATEPAYERS, WITH PENALTIES FOR CCAS OR UTILITIES ADMINISTERED BY THE COMMISSION

Edison repeats its position that the CCA should pay for all utility procurement costs incurred up to the date that the CCA makes its "binding commitment" to leave during the applicable open season window, and leaves the definition of the commitment to Phase II.

Similarly, SDG&E supports the DPD's "open season" to coordinate CCA with electric utility procurement, but asks that the DPD be changed *to place the burden on CCAs* to commit far in advance of implementation while removing any onus from the utility, imposing the following requirements on CCAs:

> (1) ample, formal notice to the affected utility from the CCA *timed to provide for coordination* in the Commission's resource and procurement planning proceedings for each utility, and (2) a *binding commitment* from the CCA as to the load it will commit to serving at a particular point in time"" (SDG&E, p.4).

Thus SDG&E asks that the Commission remove language in the DPD's statements that "utilities must recognize CCA load in their resource planning and should not sign contracts that might create new liabilities for CCA customers and utility customers where *available information suggests that power might not be needed*" (DPD at 26-27) because SDG&E considers it too ambiguous. Thus SDG&E complains, "the language 'available information suggesting that power might not be needed' does not contemplate clear, specific and formal notice or any commitment on the part of the CCA provider to plan for load."

Local Power itself proposed an "Integrated Resources Calendar" in this proceeding, which was supported by TURN, that would provide for a move even sharing of responsibility between utilities and CCAs for effective coordination of utility procurement and CCA load departures. The ambiguity pointed out by SDG&E is not a flaw of the DPD but is an inherent ambiguity that exists between two separately authorized and essentially different processes. One the one side, a utility procurement process pursuant to AB57 pre-authorizes utility procurement and locks customers into New World Procurement obligations several years going forward. On the other, AB117 requires the Commission to coordinate CCA load departures based on *annual* utility procurement plans [PUC 366.2(c)(8)].

Much of the controversy around the coordination of utility procurement with CCA concerns the next few years. With the utilities aggressively seeking to procurement and develop new generation at the same time that some forty-eight (48) cities and counties representing some 17% of the investor-owned utilities customer load now investigating, pursuing or implementing CCA, the Commission's policy on CCA CRS obligations for the utilities procurement plans could have an immediate, multi-year adverse impact on these communities. While in a vacuum Edison and SDG&E claim they are unable to plan around these communities, clearly AB117 would intend

for them not to be blocked.

Furthermore, the Commission is required to facilitate transactions between CCA customers and Electric Service Providers (ESPs), which requires a CCA to know what its Customer Responsibility Surcharge (CRS) before it can be capable of making the commitments with ESPs that SDG&E and Edison want to see. Thus, there is an inherent difficulty coordinating between AB1117 and AB57 procurement processes.

The difficulty in coordinating between these two processes is not attributable to Community Choice Aggregators any more than it is to investor owned utilities. The resources planning difficulty that arises is intrinsic to the coexistence of AB57 and AB117, which became law on the same day (September 24, 2002).

Therefore, as Local Power has proposed, costs associated with imperfect coordination of CCA load departures and electric utility procurement are *implementation costs* (not CRS costs) that *should be born by all ratepayers pursuant to PUC Section 366.2(c)(17).* This is the only lawful treatment of an admittedly difficult challenge facing the Commission, and the only one that can assure a good-faith effort by both CCAs and utilities to minimize over-procurement and protect all ratepayers.

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Within the framework of shared responsibility, an open season or Integrated Resources Calendar could more effectively and lawfully administer and penalize either CCAs or utilities for failing to comply with a rational and orderly resources planning schedule. Moreover, any solution short of *sharing of the costs associated with an AB57/AB117 world* will only provide a destructure incentive for one party or the other to conduct itself in a neglectful, incompetent or malicious manner.

II. CREDITS OR LIABILITIES FOR IN-KIND DWR POWER WAS PROPOSED BY SEVERAL PARTIES AND IS JUSTIFIED

PG&E argues that DPD's proposal for credits or liabilities for in-kind DWR power is based on false premises, and adopts a proposal that was never made." In fact Local Power, CalCLERA, Kings River Conservation Authority and other parties to this proceeding have proposed a "take or pay" approach to DWR contracts in precisely the same manner that the DPD orders - that "payment of the CRS should entitle CCAs to negotiate an allocation of utility power." (PG&E, Nov 18, p.l2). Notwithstanding this question, as R.03-10-003 is a non-judicial proceeding, the presiding judge holds authority to make proposals that no party has made.

The argument raised by PG&E that "the CRS is only a reflection of the 'above market' component of the utility's costs" does nothing to invalidate the DPD's approach, and is academic. Indeed, PG&E later contradicts itself in its comments on Norton:

> Specifically, Section 366.2(c) of the PUC, requires customers of a CCA to pay **both** the bond charge that "would otherwise be imposed on the customer" (i.e. the charge that would have been incurred had the customer been a customer of the IOU)[Section 366.2(e)(1)] **and** the customers "proportionate share"" of DWR power costs [Section 366.2(e)(2)]." (PG&E, p.6)

As the CCA customers will in fact pay for both the power and above market costs, CCAs should be entitled to negotiate an allocation of utility power.

Finally, while PG&E claims the DPD's take or pay approach would "contravene previous Commission decisions on the CRS," PG&E does not even attempt to explain this assertion, nor to provide a single example of such a Commission precedent. Therefore, PG&E's objections to this provision of the DPD are invalid.

III EXISTENCE OF A CRS TRUE UP MAKES UTILITY FORECAST NEEDED WITHIN 30 DAYS

PG&E supports the initial $.022/kWh CRS (CTC and DWR power charge) subject to true-up. However, in response to the DPD's requirement that the utilities should submit a forecast of the CRS consistent with the Order. PG&E indicates that there is "little to be gained from requiring the utilities to submit 'final' forecasts within 30 days," and suggests that the DPD be changed so that the "Commission should therefore state its intent to implement a timely adjustment to the CRS if forecasts exceed actual costs (subject to a 30% variance)." PG&E says this adjustment procedure "could be addressed in Phase II (or some other appropriate forum)." (PG&E, p.8).

At a minimum, the stated purpose of Phase I was to resolve threshold issues, the principal being the CRS. Given that dozens of California municipalities and counties are now pursuing, investigating or implementing Community Choice, delaying clarification of the actual CRS to be encountered starting on January 1, 2005 would be contrary to this stated purpose. Therefore, it is critical that the utilities be required to submit a forecast consistent with the Order as in the DPD.

IV. CCAS NOT RESPONSIBLE FOR RE-ENTRY FEES OR OPT-OUT COSTS

Edison (p.8) and PG&E want CCAs to pay coming and going, proposing both that (1) if a customer opts out of a CCA program the CCA should pay, and (2) also that if a customer is returned to utility service the CCA should also pay. First, PG&E proposes that "the PD should clarify that initial opt-out costs, i.e., at the inception of a CCA's program, should be charged to the CCA since the customers are still on utility service." However, the fact that, as PG&E admits, "(t)hese customers are already the utility's customers who do not want to leave utility service," (PG&E, p.18) would indicate that the choice not to participate in a CCA program is the choice of a bundled service customer, not a CCA customer. Therefore it is not attributable to the CCA but to a utility customer, and must be born by all ratepayers (PUC 366.2(c)(17).

Then there is the matter of re-entry. PG&E objects to the DPD's conclusion that because "the CCA should not have to assume the cost of activities that ultimately deprive the CCA of a customer" (PD. P.18), the cost of transferring a customer from the CCA to the utility should not be assumed by the CCA. PG&E objects that "(a)lthough the *customer* may be subject to reentry fees on the same basis as a returning DA customer pursuant to Section 366.2 (c)(11), this does not mean that a CCA that defaults or otherwise finds it convenient to return customers to the utility (perhaps because of energy crisis conditions) should escape liability related thereto."(PG&E, pp.11-12). This is an unacceptable attempt to ignore the cited PUC section's specific provision establishing the terms of such liability, and is therefore unacceptable.

V. CCAS ARE NOT POWER WHOLESALERS

PG&E agrees that under AB117 utilities have Provider of Last Resort (POLR) responsibilities to customers, but denies it has responsibilities to serve or sell power to the CCA, and thus indicates that Ordering Paragraph 7 which states that utility tariffs should include "a service pack to provide back-up energy supplies at cost, but which does not permit service interruptions, must apply to returning CCA customers, not the provision of service to a CCA. Citing D.04-01-050 which determined that all LSEs including CCAs are responsible for planning for and meeting resource adequacy requirements, and R.04-04-003 now involves planning for reserves and commitment levels, this requirement calls into question whether the IOU ever really steps out of its procurement responsibilities for any and all CCA customers, and whether vintaging makes any sense at all. Furthermore, PG&E indicates that "Before the Commission could require the utility to provide service to the CCA, a number of issues would have to be addressed, including, the legal authority of the Commission to order what appears to be a wholesale power transaction regulated by the Federal Energy Regulatory Commission (FERC). Local Power agrees that any actions that construe CCAs as wholesaling entities threatens to undermine the authority of the Commission and runs contrary to AB117, which establishes CCAs as organizations of *customers* "entitled to aggregate their electric loads as members of their local community with community choice aggregators." [366.2. (a) (1)]. Local Power agrees that the details of what should occur in

the case of a defaulting CCA should be addressed during Phase II.

VI. CCAS ARE CUSTOMERS

In objecting to the definition of a CCA as a wholesaler, however, PG&E cannot have it both ways, also denying that CCAs are retail customers. While rejecting the definition of CCAs as a wholesale entity above, the utility also rejects its definition as retail customers:

> "By no stretch of the imagination is a CCA a utility customer as that term is used in the Public Utilities Code or PG&Es' rules and tariffs." (PG&E, p.18).

This is demonstrably false. Public Utilities Code Section 331.1(a) defines a CCA as "a communitywide electricity *buyers*' program." (Emphasis added). PUC Section 366 (a) provides that "*(c)ustomers* shall be entitled to aggregate their electrical loads on a voluntary basis." (Emphasis added) PUC Section 366.2(c)(9) says that "(e)lectrical corporations shall continue to provide all metering, billing, collection, and customer service to retail customers that participate in community choice aggregation programs," meaning that customers forming a CCA are not only utility customers, but are *captive* customers for these services. Because a CCA is a retail customer (as opposed to wholesale supplier) seeking provision of service from an Electric Service Provider (ESP), the CCA is indeed a utility customer.

In truth, PG&E is egregiously wrong to contradict the DPD's assertion that CCAs are "customers and partners" with the utilities. Conversely, the utilities 'position that CCAs are their "competitors" not only ignores repeated definitions of CCAs as customers in the Public Utilities Code, but indicates the utility's intention of violating the statutory requirement that it cooperate with its customers:

> "All electrical corporations *shall cooperate fully* with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs" [PUC 366.2(c)(9)]

Requiring utilities to cooperate fully with CCAs is inconsistent with the Commission's treatment of the relationship between competitors (such as utilities and ESPs), and underscores the importance of preserving the definition of CCAs as customers in the DPD. Thus, PG&E's assertion that the DPD's clear definition of CCAs as customers should be deleted is false and should be ignored.

VII. SENSITIVE MARKET-BASED INFORMATION NOT PROVIDED TO COMPETING ENERGY PROVIDERS SHOULD BE PROVIDED TO CCAS WITH STANDARD NONDISCLOSURE AGREEMENT (PD, IV.C, p.27).

PG&E objects to Ordering paragraph 7 of the PD which orders the IOUs to make available to CCAs information supportive of the CRS applicable to their respective territories, in particular the DPD's requirement that "elements of workpapers that are confidential shall be subject to a standard nondisclosure agreement." PG&E indicates that it does not disclose "certain market sensitive information to market participants, *such as CCAs* and their independent energy service providers. Again, PG&E falsely treats CCAs as competitors the same as ESPs:

> "PG&E does not want to disclose confidential information regarding its procurement activities to CCAs merely so they can gain <u>competitive advantages</u> over utility procurement activities on behalf of remaining bundled customers." (PG&E, p.14).

This definition of CCAs as competitors is contrary to AB117 and the DPD, which define CCAs as *customers* acting through a public process, with which utilities are required to "fully cooperate"" (see above). PG&E's proposed solution - that a CCA requesting confidential information should have to raise the items on a case-by-case basis as a Phase II issue or in a

petition for modification, then document why the particular *needs* of the CCA are distinguishable from those of ESPs generally (PG&E, p 13) - confuses the "needs" of a "competitor" with the *rights of customers to a full disclosure of the CRS applicable to them*. Thus, the utilities should be required to prepare new standard nondisclosure agreements for CCAs in which the CCA agrees not to release confidential information to its ESP or other third parties.

VIII. CHARGING UP FRONT FOR CUSTOMER-SPECIFIC WORK

PG&E appears confused about whether it considers CCAs as customers or competitors, referring to them as competitors when it comes to releasing CRS data to CCAs, but then treating CCAs as customers when it comes to charging them:

> "PG&E testified that a CCA who asks the utility to perform specific infrastructure development work (e.g., programming for special functionality for an individual CCA) should either pay in advance for this work or provide security. As PG&E testified, this is a practice *consistent with how customer-specific work is performed* for commercial customers under existing tariffs." (PG&E, p.19).

In this instance, *PG&E switches back into treating CCAs as customers* so as to find a precedent for charging them up-front. It should be noted that this move directly contradicts the utility's claim on the page directly preceding that "(b)y no stretch of the imagination is a CCA a utility customer as that term is used in the Public Utilities Code or PG&E's rules and tariffs." (PG&E, p.18)

IX. UTILITIES SHOULD BE REQUIRED MAKE ANY AND ALL BILLING AND LOAD DATA AVAILABLE TO CCAS UPON ADOPTION OF ORDINANCE AUTHORIZING INVESTIGATION OF CCA FORMATION

PG&E objects to the DPD's requirement that utilities should "provide all relevant usage information, load data, and customer information to CCAs," and its provision that the utilities

share relevant information, including customer specific information, with CCAs subject to a suitable non-disclosure agreement. PG&E claims that "(t)his approach would open the door for cities or counties to ask for any information they wish, for whatever purpose they wish, so long as it is somehow connected to usage, load or customer data." (PG&E, p.20).

PG&E proposes that the Commission adopt a list of "relevant" cost information, and puts forth the information list developed by the utilities' in their January 30, 2004 report on information issues.[1] While PG&E claims that this report "was developed with full participation by CCAs," PG&E overstates the relevancy and inclusiveness of this report, which was developed by the utilities prior to any evidentiary hearings by the utilities with CCA participation limited to the few CCAs who were participating in R.03-10-003 at the time.

The DPD is correct in observing that local governments are routinely entrusted with confidential information, and in providing that CCAs are therefore entitled to any and all data provided they wish to have provided that they sign a non-disclosure agreement to protect the confidentiality of customer information. *Thus, the DPD should not remove the existing language providing that "[t]he 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." (PD, p.50).*

Finally, in order to limit access to confidential data, PG&E proposes that the Commission should define at what point a city or county is in legitimate pursuit of a CCA program, such that a utility would be required to provide confidential customer information pursuant to a Non-Disclosure Agreement." (PG&E, p.21) PG&E proposes that the DPD be amended to provide that customer-specific information would not be supplied to a city or county until it has adopted an *ordinance authorizing investigation of CCA formation*. Local Power agrees with this particular proposal as a reasonable method of triage for separating legitimate data requests from illegitimate ones,

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[1]See "Joint Utility Report on Community Choice Aggregation Information Issues Filed Pursuant to the Administrative Law Judge's Ruling Bifurcating Proceeding, and Scheduling Workshop and Evidentiary Hearings," January 30, 2004, Appendix B).

provided that no other restrictions are placed on the availability of any forms of such data to CCAs.

X. THE RECORD SUPPORTS THE DPD'S FINDING THAT CERTAIN INCREMENTAL COSTS TO PROVIDE CCA SERVICES ARE EMBEDDED IN CURRENT RATES

PG&E disagrees with DPD Finding of Fact 4 which states that certain costs of providing CCA services, such as billing and call centers, are embedded in utility rates, saying "(t)he CCA program will certainly generate calls that would not be made if the CCA program was not in existence and if all customers were on bundled service...(this) will produce demand for more call center staff and call processing time." (PG&E, p.17). PG&E indicates it will propose charges for any incremental call center and billing costs in its draft tariffs. This is inappropriate because AB117 establishes that CCA customers shall remain captive customers for all customer service, billing and meter reading (see above). In effect, costs related to customer service, billing and meter reading are not "attributable" ((366.2(c)(17) to specific CCA programs, but rather are attributable to utility customer service programs - they are indeed "embedded," as the DPD asserts. Therefore, any changes to such tariffs should be addressed in a separate rulemaking on utility customer service tariffs, and should apply equally to all customers.

Respectfully submitted,

November 23, 2004

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City of Oakland, California; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is 4281 Piedmont Avenue, Oakland, California 94611.

On the 23rd day of November 2004, I caused service of:

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to be made by EMAIL upon the parties or their attorneys of record for R.03-10-003. I declare under penalty of perjury that the foregoing is true and correct. Dated in Oakland, California, this 23rd day of November, 2004.

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