

Application No. 03-10-003

Exhibit No. _____

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**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 TESTIMONY OF PAUL FENN
ON BEHALF OF LOCAL POWER**

May 12, 2005

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Q: Have you previously submitted testimony in this phase of the proceeding?

A: Yes, my Opening Testimony was distributed on April 28.

Q: What is the purpose of this reply testimony?

A: I am responding to the direct testimony submitted by other parties to this Community Choice Aggregation (CCA) rulemaking, particularly with respect to issues regarding the process for handling CCA implementation plans at the Commission, the “open season” for CCAs to declare their intent to provide service, tariff issues raised by the investor-owned utilities (IOUs) and other parties, including CCAs, and matters relating to the calculation of the CCA Cost Responsibility Surcharge (CRS). Failure to comment on any particular issue does not imply any position on such issues.

Q: Do the utilities err in their assessment of the primary purpose of an implementation plan?

A: Yes. The utilities say the principal goal of the Implementation Plan “should be to enable consumers to make informed decisions about their energy supplier and to seek recourse in the event they are harmed” (p.16, line 14). This confuses the role of the implementation plan with the opt-out notification requirements and registration process to ensure basic consumer protection. Worse, the utility statement is contrary to AB117, which provides that “(i)n order to determine the cost-recovery mechanism to be imposed

1 on the community choice aggregator pursuant to subdivisions (d), (e), and (f) that shall
2 be paid by the customers of the community choice aggregator *to prevent shifting of costs*,
3 the community choice aggregator shall file the implementation plan with the
4 commission, and any other information requested by the commission that the
5 commission determines is necessary to develop develop the cost-recovery mechanism in
6 subdivisions (d), (e), and (f).” (Public Utilities Code Section 366.2 (c) (5)). In other
7 words, the principal statutory purpose of the implementation plan is to establish the cost-
8 recovery mechanism that CCA customers shall pay to prevent cost-shifting. Thus, the
9 purpose of the implementation *is to establish “net” costs associated with the CCA*
10 *program.*

11
12 Q: How would establishment of cost shifting factors or “net” costs, which you say is
13 required by AB117, impact the utilities’ assessment of the role of the implementation
14 plan?

15 A: The utilities’ misinterpretation of the role of the Implementation Plan required by
16 AB117 leads them to claim elsewhere in their opening testimony that “submitting an
17 Implementation Plan to the Commission (does) not constitute a binding
18 commitment...(does) not sufficiently inform the utility or provide a sound basis for
19 resource planning and should not be used as the basis for “locking in” a particular CRS
20 vintage” (p.12, lines 1-6). Thus, confusing the implementation plan with the basic
21 consumer protection measures involved in CCA registration, the utilities underrate the
22 role of the implementation plan in limiting a CCA CRS liabilities and coordinating
23 between utility procurement and CCA load departures to minimize overprocurement and
24 the shifting of costs between customers as required by AB117 and D.04-12-046.

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

14
15 **1. Process of a CCA** includes an outline of the public hearing process, applicable
16 authorities and adopted ordinances, resolutions or other officially adopted documents that
17 bear on the CCA program. It includes an outline of planned actions and corresponding
18 requests to the utility and the Commission in order to facilitate cooperation, and an
19 outline of the CCA's Request for Proposals (RFP) or bidding process, including a
20 schedule from adoption of the implementation plan to the end of the opt-out period;
21

22 **2. Consequences of a CCA** includes an assessment of impacts on ongoing utility
23 procurement contract negotiations and Commission review, consequences for the
24 Commission's energy efficiency programs, consequences for physical reliability within
25 the CCA jurisdiction, transmission grid impacts from planned new renewable generation,
26 consequences for ratepayer risk, and consequences for ISO reliability.
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1 **3. Program Scope** includes an overall program schedule and a qualitative program
2 expenditure profile, including potential expenditures for new renewable generation,
3 conservation and energy efficiency programs.
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5 **4. Program Funding and Budget** includes the use of Public Goods Charge funds,
6 municipal revenue bonds and other funding to support the program; CCA program
7 implementation funding, and outlines any available rollout schedule for renewable
8 energy, conservation and energy efficiency program components of the CCA program.
9

10 **5. Rights and Responsibilities** include an outline of tariffs and outlines a structure of
11 roles between the CCA, the ESP, and the customer.
12

13 Q: Do the utilities err in asserting that the Commission has authority to regulate
14 CCAs in the same manner that they regulate ESPs?

15 A: Yes. The utilities asserts that the Commission’s role with respect to CCAs
16 “should mirror the role the Commission successfully served in monitoring and registering
17 private Electric Service Providers (“ESPs”) for DA” based on the fact that ESPs will
18 perform many of the functions of the service (p. 17, lines 1-5). This both contradicts
19 AB117 and is contrary to adopted Commission policy. First, as the Commission
20 indicated in D.04-12-046, unlike ESPs, CCAs are elected local government entities that
21 may be trusted not only with confidential customer data, but also ratesetting authority as
22 specified by AB117. AB117 also requires an ordinance to award contract to an ESP, and
23 that the implementation plan be duly adopted at a public hearing. Thus, both the
24 ordinance and the implementation plan are subject to Sunshine Ordinance and Public
25 Meeting laws, unlike the decision-making of an ESP or a utility, which are private. While
26 an ESP will indeed implement energy services for a CCA, it will do so under a CCA
27 contract whose terms must conform to the CCA’s adopted implementation plan, which
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1 the Commission will have 90 days to review and request information on, then present
2 cost recovery findings and establish the earliest possible date for service commencement.
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4 Q: Do the utilities err in their assertion that the Commission must protect ratepayers
5 against the CCA because customers “may presume they are entitled to the same
6 protections that the Commission provides for all utility customers” ?

7 A: Yes. AB117 specifically states that the purpose of authorizing a CCA is “to
8 aggregate the electrical load of interested electricity consumers within its boundaries to
9 reduce transaction costs to consumers, *provide consumer protections*, and leverage the
10 negotiation of contracts” (Emphasis added, Public Utilities Code Section 366.2(c)(1)).
11 In other words, CCAs are consumer protection entities. Again, the Commission has
12 already established that CCA’s are trustworthy institutions, even with respect to having
13 access to confidential customer information that ESPs are specifically prohibited from
14 obtaining. For the Commission to regulate CCAs in the same manner that for-profit,
15 unelected, unaccountable market participants like ESPs or the utilities themselves are
16 regulated, would distort the CCA process and effect a failure of the Commission, both to
17 facilitate negotiation between CCAs and ESPs in violation of Section 366(a) of the
18 Public Utilities Code, and to obey the delegation of ratesetting authority from the
19 Commission to CCAs that AB117 expressly requires.
20

21 Q: Do the utilities err in stating that the Commission has authority to refuse to accept
22 an Implementation Plan filing?

23 A: Yes, whereas the utilities state that the Commission should undertake a process to
24 determine “whether to accept the filing” (p.21, line 21), AB117 requires that “(w)ithin 90
25 days after the community choice aggregator establishing load aggregation files its
26 implementation plan, the commission *shall certify that it has received the implementation*
27 *plan.*” (Emphasis added, Public Utilities Code Section 366.2 (c)(7)). For the
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1 Commission to deny receiving a CCA’s implementation plan which it factually has
2 received from a CCA would amount to fraud, not regulation. It is critical, for the
3 Commission to ensure successful coordination of CCA and utility procurement, that the
4 Commission operate within the actual authorities granted to it by the legislature. In
5 particular, during the 90 day period, the Commission may request any additional
6 information necessary to determine a cost-recovery mechanism, after which it informs
7 the *CCA of its findings* regarding any cost recovery that must be paid by customers of the
8 CCA to prevent a shifting of costs. Finally, the Commission has authority to “designate
9 the earliest possible effective date for implementation of a community choice aggregation
10 program, taking into consideration the impact on any annual procurement plan of the
11 electrical corporation that has been approved by the commission” (PUC Section 366.2(c
12)(8)). No other authority is granted the Commission over the implementation plan. Thus,
13 the authority implied by the utilities’ proposal that the Commission “adopt a final
14 resolution regarding the *adequacy* of the Implementation Plan at one of its regularly
15 scheduled meetings” (p. 22, pp.4-5) is nonexistent. Similarly, the utilities’ insertion of
16 implementation plan requirements in Rule 23/27 or anywhere in the tariffs (p.22, lines
17 16-20), is unlawful. The utilities recourse to interpreting the “additional information
18 request” process during the 90 day Implementation Plan review as an enforcement
19 measure “to ensure compliance with basic consumer protection rules” (p.23, line23, p.24,
20 line 1) is completely wrong.

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22 Q: Do you agree or disagree with any of the elements the utilities propose for
23 inclusion in the Implementation Plan?

24 A: I disagree on most accounts but propose one modification of the utility proposal
25 regarding portfolio disclosure in a CCA implementation plan. I disagree with the notion
26 that the statutory requirement for a disclosure of organizational structure in the plan
27 should include “level and sophistication of the operations,” (p.20), because the meaning
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1 of such a requirement is totally unclear. I disagree with the utilities' assertion that in the
2 Implementation Plan "CCA customer should also be able to review the power sources
3 (portfolio mix) of the energy supply (including length of contracts) in the third party
4 portfolio and resource mix (renewable, gas, coal)" because this presumes that a CCA has
5 already entered into a contract with an ESP at the adoption of its implementation plan,
6 when in fact CCAs will not have such details at this juncture, as having them would
7 depend upon having a signed contract with an ESP that has committed to such specific
8 information. A CCA will not have such information until it has made its "binding
9 commitment" to the Commission. Considering that the utilities assert the Implementation
10 Plan to be inadequate to provide such a commitment, there are no grounds for expecting
11 such detail in an Implementation Plan. However, as I pointed out in my Opening
12 Testimony, I agree that the implementation plan should establish a firm RPS schedule
13 commitment, formulated not as a goal but as a bidding requirement for ESPs (such as the
14 40% RPS and higher target adopted by many current CCAs) and should outline the
15 intentions of the CCA regarding energy efficiency, conservation, distributed generation,
16 and renewable resource development and programs in its Implementation Plan. I support
17 the inclusion of these elements not as consumer protection measures as the utilities do,
18 but as basic elements of the "processes and consequences of aggregation, as required by
19 Public Utilities Code Section 366.2(c)(3), impacting the CCA's answers to the
20 information required by subsections (A), (C) and (E) of that section.

21
22 Q: Do the utilities err in treating CCAs as being the same as ESPs?

23 A: Yes. The utilities resort to confusing ESP with CCA responsibilities using their
24 term "Community Choice Provider": "(t)he Utilities do not find any support in AB117
25 that makes CCA Providers themselves the only provider and guarantor of consumer
26 protections *for the services that CCA Providers themselves provide*" (p.24, lines 1-3).
27 Again, by failing to distinguish between their competitor (an ESP) and their own
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1 customers combining loads to find a better supplier (CCA), the utilities falsely conflate
2 elementally different entities in order to cast doubt on the trustworthiness of local
3 governments, when AB117 defines them as customers, and the Commission confirmed
4 their trustworthiness as local governments in its Phase I decision, D.04-12-046. It should
5 be noted that other parties make similar errors; Jody London's opening testimony
6 outlines "four groups of players defined in statute: customers, the Commission, the
7 investor-owned utilities, and community choice aggregators" (p.6, lines 13-14). In fact,
8 AB117 defines Electric Service Providers, who provide a distinctive role as competitors,
9 risk managers, and suppliers of services. It is critical that the important distinction
10 between suppliers and customers be observed by all parties in R.03-10-003.

11
12 Q: Is the utilities' warning about CCA's becoming ESPs relevant to this proceeding?

13 A: No. The utilities refer obliquely to some unnamed public agency, alleging that it
14 formed an ESP under DA and mismanaged its affairs, resulting in "a significant out-of-
15 court settlement. Apart from being completely unsubstantiated, even if true, such a
16 scenario could not happen under CCA. Whereas under Direct Access some public
17 jurisdictions formed ESPs to sell power, AB117 creates a firewall between ESPs and
18 CCAs. AB117 asserts that the definition of Electric Service Provider "does not include...a
19 public agency that offers electrical service to residential and small commercial customers
20 within its jurisdiction, or within the service territory of a local publicly owned electric
21 utility" (Public Utilities Code 218.3). Thus CCAs are not permitted to play both
22 aggregator and marketer under AB117, and the alarm raised by the utilities is wholly
23 unfounded.

24
25 Q: Do you agree with the utilities that the Commission's role "is central to the
26 implementation of CCA through its authority to register CCA Providers"?

1 A: Yes, I agree with that assertion by the utilities (p.24, lines 19-20). CCA
2 registration is the process in which the Commission may ensure basic consumer
3 protection, as provided by AB117. However, the utilities' proposal suffers from
4 continued confusion of CCAs with ESPs, as if a local government and a company that
5 sells energy services were the same entity. Thus I would propose modifications. Among
6 the registration procedures proposed by the utilities, I agree with the utilities' proposed
7 modification of the ESP registration form (on p.26, lines 3-31), but disagree that the
8 Commission has authority to deny the application for registration to a local government,
9 to annually change registration requirements and suspend a CCA registration for
10 noncompliance is unfounded. Considering that, once commencing service the CCA has
11 entered into multi-year contracts with an ESP that must be honored not only by the CCA
12 but also by the state government, such an approach is both inadvisable and unlawful.
13 Moreover, the utilities' proposal that "suspension and revocation procedures applicable
14 to the ESP registration process also be adopted for the process of registering a CCA
15 provider" (p.27, lines 6-8) is inappropriate; the form should reflect the fact that a CCA is
16 designated a "trustworthy" elected local government entity and not a for-profit energy
17 enterprise that must be carefully policed. I agree with San Francisco witness Sean Casey
18 that the Commission should "recognize the local government process inherent in a CCA
19 program by not seeking to duplicate or oversee that process in any Rule 23/27" (p.4, lines
20 12-14). Thus, the utilities' proposal that a CCA be required to submit customer opt-out
21 notifications to the Commission and utility as a condition of registration is inappropriate,
22 as well as unnecessary, provided that the notifications made by CCAs are consistent with
23 AB117 and the CCA's adopted Implementation Plan. Finally, I agree with Sean Casey's
24 position that Section P. In the utilities' proposed Rule 23/27, concerning rate ready
25 billing, would limit a CCA to charging on a two-tier basis - while PG&E charges on a
26 five tier basis, and for commercial customers, to charging for generation in energy rates
27 only, whereas PG&E recovers from both energy rates and demand charges (Casey, p. 5,
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1 lines2-8). It is critical that no tariffs be approved which would prevent a CCA from
2 matching the utility's tariff structure, otherwise disproportionate rate impacts among
3 customer classes will inevitably result. I also agree that under ready rate billing a CCA
4 should not be prevented from mirroring the utility's generation cost recovery and provide
5 CCA customers the information they need to make clear comparisons of charges and
6 impacts on customer bills (p. 5, lines 10-14).

7
8 Q: Do you agree with Mr. Burke's testimony for Energy Choice Inc that benefits of
9 CCA's are tangible?

10 A: Yes, I do (Burke, p.6, lines 5-10), and I will refer readers to the Reply Testimony
11 of Robert Freehling for Local Power on a basis for monetizing these benefits.

12
13 Q: Do you disagree with any of the utilities' proposed customer notification
14 elements?

15 A: Yes. Generally, the utilities propose that the notification follow ESP notification
16 rules. This is inappropriate and unlawful, as AB117 provides specific provisions for this
17 notification, which is left to the CCA's administration, and should not be subject to
18 tariffs except regarding costs and processes for inserting the notification in normally
19 scheduled monthly electric utility bills, as required by Public Utilities Code Section
20 366.2(c)(13)(B), to the extent that the CCA requests the Commission to order a utility to
21 accommodate a CCA. All the proposed DA notice modifications proposed by the utilities
22 (p.29, lines7-30) should be rejected on this basis.

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24 Q: Do you disagree with the utilities proposed rules for CCAs not participating in an
25 Open Season in its proposed Rule 23.2/27.2 Community Choice Open Season
26 (Attachment A)?

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1 A: Yes I disagree. The utility draft would require that “Those CCA Providers who
2 elect not to participate in an Open Season assume liability going forward for those utility
3 and Department of Water Resources’ procurement and generation obligations that were
4 in place at the time they commence serving customers, or in the event a CCA Provider
5 elects to phase-in service, the obligations are accrued until the CCA Provider completes
6 its phase-in” (April 28 Appendix A, p.1 Paragraph A). This would appear to relieve the
7 utilities of liability for costs related to over-procurement, even if a CCA not participating
8 in Open Season has provided the utility with reasonable means of avoiding such costs by
9 adopting a CCA ordinance and/or a CCA Implementation Plan, in which case the
10 Commission would have notified the utility within ten (10) days of adoption pursuant to
11 Public Utilities Code Section 366.2(c)(6), requested detailed information about the
12 program over a ninety day period, and presented findings regarding cost-recovery. Such
13 an approach would put a CCA in a “Catch-22” situation in which it is required either
14 conform to Open Season, which is supposed to be “optional,” or to accept liability for all
15 utility procurement activities up until it has signed a contract with an ESP. Given that one
16 utility - SDG&E - continues to maintain that CCA will not occur within its service
17 territory despite the adoption of a CCA ordinance by the City of Chula Vista in 2004, this
18 approach would invite further unreasonable procurement practices by utilities, and would
19 result in over-procurement that is not unavoidable; thus, the utilities’ proposal that CCAs
20 not participating in Open Season be liable for such over-procurement is in direct
21 violation of D.04-12-046, which limits CCA CRS liabilities to utility contracts that were
22 “reasonably” entered into and were “unavoidable.” I agree with Jody London’s assertion
23 that “the utilities should be working with community aggregators during the aggregators’
24 study process and will have a reasonable idea of when the aggregators will begin
25 service,” (p.13, lines 14-16), though I believe the ordinance and implementation plan are
26 critical for accuracy and CCA processes to be credible. I also agree with Ms. London that
27 utility resource plans “routinely include discounted likelihood of certain events
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1 occurring,” and do not justify the utilities pretending to be completely innocent of their
2 own decision-making. R.04-12-046 made this clear enough, and as Ms. London points
3 out, “(t)hat is why the Commission requests low-, medium-, and high-load scenarios in
4 the resource plan” (p.14, lines 15-16).

5
6 Q: Do you disagree with any of the utility proposals for CCAs that do participate in
7 an Open Season in the same Attachment A of the utilities’ Opening Testimony?

8 A: Yes. I agree with Jody London’s opening testimony that the utilities’ proposed
9 forecasting requirement for CCA’s “would require the community choice aggregator to
10 be accurate to a degree not required by other market participants” (Jody London, p.12,
11 lines16-19). Second, the utilities’ proposed Open Season would require a CCA to provide
12 the utility with a 5 year forecast beginning with the CCA commencement date (Utilities’
13 Attachment A, (A)(1)). This is a mischaracterization, because in point of fact the utility
14 will provide all data to the CCA that underlies this forecast., so the utility might as well
15 provide the forecast itself. Second, the utilities propose making a Joint Powers Agency
16 (JPA) liable for costs associated with load loss if a member municipality of the JPA pulls
17 out (A)(3). This is arbitrary and unlawful because these costs are not necessarily
18 associated with the JPA; clearly such a provision would discourage formation of JPAs.
19 The utilities propose that any forecast or contract-related windfalls resulting from lower
20 than average utility costs not be credit to the CCA (A)(5)(a); thus, the utilities propose
21 that CCAs pay on a cost basis where there are costs, but receive no benefit where there
22 are benefits. This clearly violates AB117 and D.04-12-046 commitment to prevent
23 shifting of costs between CCA customers and bundled service customers, not merely cost
24 shifting to bundled service customers. Thus it should be rejected. The utilities propose
25 must satisfy utility credit worthiness standards (including provision of security or other
26 assurance), which has no basis in law and is inappropriate for local governments. Finally,
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1 the utilities propose that CCA's be bound to the Energy Action Plan's preferred loading
2 order, which would commit CCAs to a Plan that does not even directly bind the utilities.
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4 Q: Do you have any objections to the utilities proposed CCA Provider Registration
5 Form (Appendix B)?

6 A: Yes. First, it repeats the error of conflating ESP with CCA. Thus, while the
7 "registrant" is composed of local governments on this form (3) with governing
8 board members who under law are elected officials, the form also requests names,
9 titles and other information on key personell involved in the technical and
10 operational aspects of the business (9). This would be ESP personnel, not CCA
11 personnel. The form asks whether the registrant has been authorized by the
12 California Independent System Operator (ISO) as a scheduling coordinator (10).
13 Again, this is the ESP, not the CCA or its governing board. The form requires the
14 registrant to include a statement of commitment that demonstrates to the CPUC
15 the Registrant's ability meet resource adequacy requirements. Not only does this
16 place a responsibility that CCAs will place on an ESP under contract, but this
17 would also create new jurisdiction for the Commission which is limited to the
18 CEC.
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20 Q: Do you have comment on the utilities proposed notification form (Appendix C)?

21 A: Yes, the utility has no business proposing opt-out content; this is the legal
22 province of the CCA. It should be rejected in whole.
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Q Does this conclude your Phase II Reply Testimony in R.03-10-003?

A Yes, it does.