Application No. 03-10-003

Exhibit No. _____

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 MATTHEW PATRICK ON BEHALF OF LOCAL POWER

May 12, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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

A: No, this Reply Testimony is the first instance in which I have submitted testimony in R.03-10-003.

Q: Please state your qualifications.

A: I am a State Representative representing the 3rd Barnstable District on Cape Cod, Massachusetts, and now serve as a member of the Joint Committee on Telecommunications, Utilities and Energy at he House of Representatives. Formerly a Falmouth Selectman and Executive Director of Self Reliance, which studied and helped develop the concept of Community Choice Aggregation with Paul Fenn in the mid-1990's, I represented Falmouth on the Cape Light Compact as a founding member; this was the first Community Choice Aggregation (CCA) ever formed, and now has a power supply contract in effect following a smooth transition from utility service. In this process, I participated actively in both the regulatory creation of rules and procedures for CCA at the Massachusetts Department of Telecommunications and Energy (DTE), as well as in the process of CCA formation, planning, negotiation, and customer transfer. As such I am familiar with the basic CCA process of negotiating with Electric Service Providers (ESPs), coordination with the utility, undertaking the CCA opt-out process which Massachusetts also employs under its 1997 Community Choice law. More

generally, I am familiar with the challenges facing commencement of CCA service. I have also participated as an expert witness in utility restructuring act hearings in Maine, Ohio, Texas, New Jersey, Virginia, and Montana..

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 you have any comments on direct testimony of parties on the use of ordinances or implementation plans to limit CCA CRS obligations, define Open Season or Vintaging rules?

A: Yes. The utilities assert that "(a)ctions such as passing of ordinances or submitting an implementation plan to the Commission do not constitute a binding commitment or notice of such a commitment that the CCA Provider will, in fact, implement a CCA program or that service will commence on a specific date or the amount of load the CCA Provider seeks to serve. *Thus these events do not sufficiently inform the utility or provide a sound basis for resource planning and should not be used as the basis for "locking-in" a particular CRS vintage*." (Emphasis added, Utilities' Opening Testimony, April 28, p.12). Yet AB117 specifically requires that the implementation plan must be adopted by a CCA and submitted to the Commission "*(i)n order to determine* the cost-recovery mechanism to be imposed on the community choice aggregator pursuant to subdivisions (d), (e), and (f) that shall be paid by the customers of the community choice aggregator to

prevent shifting of costs, the community choice aggregator shall file the implementation plan with the commission." (Emphasis added, Public Utilities Code Section 366.2(c)(5)). Thus, it is clear that the legislature intended for the implementation plan to provide *the basis* for determination of the cost recovery mechanism. If a cost-recovery mechanism based on an implementation plan binds the CCA that adopted it, then the implementation plan must in some form bind the CCA. Elected municipal officials are also held accountable by the electorate, as well as ethics rules and laws and open meeting laws. Many municipalities will enter into binding inter-municipal agreements, further committing them to act.

Q: Could an adopted implementation plan ensure, as the utilities deny, that (1) the CCA Provider will, in fact, implement a CCA program or (2) that service will commence on a specific date or (3) the amount of load the CCA Provider seeks to serve"?
A:(1) yes, (2)no and (3)yes. I agree that the implementation plan cannot ensure that a CCA will be successful in its negotiations with ESPs; thus it cannot "ensure" that the CCA will receive customers from the utility on a specific date. This kind of binding commitment would have to occur later, after the CCA has actually negotiated with ESPs and successfully secured an ESPs binding commitment to provide service. However, Commission can use its authority to present its findings regarding cost recovery and setting the earliest possible date of CCA service based on a CCA's implementation plan to bind a CCA to its particular implementation schedule and CCA program definition, including the amount and kinds of load the CCA seeks to serve, the terms of service to be sought, and the consequences of the program if an ESP will make a binding commitment to provide the service. In other words, once the Commission notifies the utility and certifies receipt of a CCA's implementation plan following the statutory ninety-day information request process, *the utility will have been provided a sound basis for resource*

planning. Thus, the implemenation plan should be used as part of the basis for "locking-in" a particular CRS vintage.

Q: What is inappropriate or illegal about the utilities' concept of a single binding commitment by a CCA?

A: The utilities' insistence on a single binding commitment in order to limit CCA CRS liability places the entire burden and responsibility for coordination between CCA and utility procurement on CCA's, when the Commission has already decided that utilities must bear responsibility for unreasonable or avoidable over-procurement. It is draconian, and would either cause dangerous procurement errors or prevent CCAs from negotiating with ESPs, in violation of 366(a) of the Public Utilities Code. A single binding commitment as proposed by the utilities would interfere with the normal manner of negotiations with ESPs, and could make it impossible for CCAs to commence service ever. A CCA must complete negotiation with ESPs and sign a contract with an ESP before it can make a fully binding commitment that has any penalty attached. Again, the utilities confuse the CCA role - aggregating customers and deciding matters of public policy - with the ESP role, which is providing service and managing risk. If a CCA is required to make a binding commitment to receive customers before signing a contract with an ESP, its negotiations would be undertaken under severe duress and extreme prejudice; its ability to negotiate with ESPs, and to protect ratepayers, would be fundamentally threatened by the prospect of penalties if its negotiations are unsuccessful. A CCA is a non-profit venture to provide citizens and businesses a service. Flexibility and reasonable amount of time are essential to negotiating a power supply contract. Municipalities will also be making a considerable investment in time and funds for paid consultants.

Q: How should a binding commitment occur?

A: The binding commitment should not be a single drastic step taken by the CCA, but should rather consist of a series of gradual steps of which the implementation plan is the second step, each of which incrementally limits the CCA's implementation options while also incrementally limiting the CCA's future customers' CRS liabilities for New World Procurement.

Q: How could the Commission make an implementation plan bind a CCA beyond the manner proposed by the utilities?

A: The Commission could make its findings regarding cost recovery and earliest date of commencing CCA service depend on a CCA's good faith effort to implement CCA in accordance with its adopted Implementation Plan. Furthermore, the Commission could determine that costs associated with CCA deviations from the implementation plan would be attributable to the CCA and charged to its customers. Towards this purpose, the Commission should employ a three-step incremental process, each step of which increasingly binds the CCA to a particular course - and each step of which requires the utility to modify its procurement assumptions and limit its actual procurement to minimize over-procurement. The implementation plan would form the second of three steps in the process of refining, then making, a commitment to the Commission. I have proposed three steps: (1) adoption of an ordinance by a CCA would require the utility to include this possible load departure by name and load characteristics in its implementation plan filings and advice letter filings; (2) adoption of an Implementation Plan by a CCA would limit utility procurement for the jurisdiction to one-year contracts, and any costs not attributable to the CCA's deviation from its adopted implementation plan would be born by all ratepayers.

Q: Under this system, when would the final commitment binding the CCA to receive customers by a certain date, which the utilities mention, occur?

A: The final, contractually-based binding commitment that relieves the utility of its responsibility to procure for the CCA's participating customers following a certain date would occur as the third of three steps in the CCA "gating" process I have proposed. After a CCA adopts its Implementation Plan in step 2, it is prepared to negotiate with ESPs, and upon securing a binding commitment from an ESP, the CCA is prepared to make a final binding commitment that would reasonably establish a date on which the CCA (under contract with its ESP) will commit to receiving customers.

Q: Are the utilities correct in asserting that AB117 holds a CCA responsible to "serve a certain amount of load" (p. 12) and thus for load forecasting errors (p.13) associated with customers that choose to opt-out of the CCA during the 120 day opt-out period?

A: No, the utilities are wrong in this assertion. First, under AB117, the opt-out process is a method of ratepayer participation. Costs associated with customers who choose not to participate in a CCA program may not be charged to other customers who elect to participate. As customers who opt-out of a CCA program are not participating in the CCA program but remain bundled service customers, their decision not to participate is not the responsibility of the CCA, so that costs associated with their decision not to participate are not attributable to the CCA, and must therefore be born by all ratepayers. Second, as the utilities will be in a position to influence the opt-out rate of ratepayers from CCA programs in their service territories - from making public statements about a CCA program to seeking rate reductions for certain customer classes, as PG&E is now seeking for commercial customers - the CCA cannot be held responsible for potentially adverse activities it simply cannot control.

Q: Are the utilities wrong is saying forecasting errors from opt-out are "clearly attributable to a particular CCA?" (P.12).

A: Yes, the utilities are wrong for the above reasons.

Q: Who should be responsible for such costs as the utilities mention?

A: Opt-out related costs are implementation costs. Public Utilities Code Section 366.2(c)(17)specifically requires that "(a)ny costs not reasonably attributable to a community choice aggregator shall be recovered from ratepayers, as determined by the commission."

Q: Does the 10% deadband proposed by the utilities solve this problem?

A: No, it merely dilutes the problem, but does not address the fundamental legal issue, as they have not demonstrated that CCAs are in control of 90% of forecasting accuracy and 90% of the opt-out rate, when in fact the utilities have more control than this, both in the form of providing all the forecasting data, influencing ratepayers, and changing their rates in a manner that influences load changes.

Q: Do the utilities' Open Season Tariff unlawfully impose requirements on CCAs?

A: Yes. As I pointed out in my Opening Testimony, the utilities conflate ESP requirements with CCA requirements. Under the Commission's policy, either a CCA or its chosen ESP must meet the LSE requirement, as determined by a CCA. The Open Season Tariff should not foreclose this option.

Q? Does this conclude your Phase II Reply Testimony in R.03-10-003?

A? Yes, it does.