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)

LOCAL POWER WITNESS PAUL FENN'S REPLY TESTIMONY ON THE PREPARED TESTIMONY OF THOMAS K. CLARKE ON BEHALF OF THE INLAND VALLEY DEVELOPMENT AGENCY

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1. Introduction

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Paul Fenn and I am founder and executive director of Local Power, which is located at 4281 Piedmont Avenue in Oakland, California.

Q. DID YOU SUBMIT OPENING TESTIMONY IN THIS PROCEEDING?

A. Yes, I submitted opening testimony "Local Power Comments on the Customer Responsibility Surcharge and Utility Costs Issues" on April 15, 2004, which was accepted by ALJ Kim Malcolm as my opening testimony on behalf of Local Power.

Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS REPLY TESTIMONY?

A. I am presenting this testimony on behalf of Local Power.

Q. TO WHOSE TESTIMONY ARE YOU REPLYING IN THIS TESTIMONY?

A. My reply testimony addresses late filled opening testimony of Thomas K. Clarke on behalf of the Inland Valley Development Agency.

2. Department of Water Resources Cost Responsibility Surcharge (CRS) for Community Choice Aggregator (CCA) is Limited to Costs Attributable to the CCA Customer

Q. DO YOU AGREE THAT A LIMITED CRS EXEMPTION SHOULD BE GIVEN TO LOAD THAT IS SHOWN OR DEEMED TO HAVE BEEN EXCLUDED FROM THE LOAD FORECASTS ON WHICH THE DEPARTMENT OF WATER RESOURCES DWR) REPLIED IN MAKING ITS POWER PURCHASES?

A. Yes. AB117 specifically requires that CRS for DWR and utility contracts be limited to

actual costs that are attributable to the actual customers who are being charged through their CCA. While 366.2(d) (1) indicates that "It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers" for Department of Water Resources contracts, it also indicates that CCA customers "should bear a *fair share* of (DWR) electricity purchase contracts." 366.2(e)(1) indicates that CCA customers should pay "A charge equivalent to the charges that would otherwise be imposed on the customer by the commission to recover bond related costs" meaning the fair share of bond charges is what they would otherwise have paid had they not participated in a CCA. Finally, 366.2(e)(2) provides that a CCA customer should pay for "(a)ny additional costs of the Department of Water Resources, equal to the customer's proportionate share of the Department of Water Resources' estimated net unavoidable electricity purchase contract costs 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 Department of Water Resources." Because the load at Norton base was not included in the DWR's forecasts, the DWR did not enter into power electricity purchase contracts on behalf of loads associated with Norton, and incurred neither bond charges nor other costs related to these customers. Therefore, the load at Norton should be exempt from the DWR component of the CRS.

3. Cost Responsibility Surcharge Exemption for Electric Utility Procurement Is Needed

Q. DO YOU BELIEVE THAT A SIMILAR EXEMPTION SHOULD BE APPLIED TO CRS OBLIGATIONS ASSOCIATED WITH ELECTRIC UTILITY PROCUREMENT?

A. Yes, and I believe that the exemption should be even broader. The principle proposed by Mr. Clarke of IVDA is that unforecasted load should be exempt from a CRS because DWR costs are not attributable to such load. Clearly, this principle should be applied in all

instances. Whereas DWR obligations were incurred by a state agency acting to relieve Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric of their historic obligation to serve their customers (and thus also the regulatory compact itself) in the middle of a government crisis, New World utility procurement is a new process conducted pursuant to Assembly Bill 57 (Wright, 2002), which was signed by Governor Davis on September 24, 2002 - the same day he signed AB117. AB117 itself is very clear that CRS obligations associated with utility procurement shall be limited to *costs associated with a particular customer*. 366.2 (f) provides that a retail end-use customer purchasing electricity from a CCA shall reimburse the utility that previously served the customer for (1) " The electrical corporation's unrecovered past under collections for electricity purchases, including any financing costs, *attributable to that customer*, that the commission lawfully determines may be recovered in rates" and (2) "Any additional costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated net unavoidable electricity purchase contract costs *attributable to the customer*, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation." Thus, the utility CRS to be imposed on CCA customers for both under-collection and New World Procurement are statutorily limited to costs associated with each customer, and must have been avoidable - meaning costs associated with over-procurement by utilities are not recoverable from CCA customers.

Q. WHY IS A CCA CRS EXEMPTION NEEDED?

A. Witnesses from PG&E, Edison and SDG&E have each indicated that they consider CCAs to be their "competitors." In particular, PG&E witness Sandra Burns indicated that "while PG&E does not necessarily view CCAs as competitors in an adversarial sense, PG&E does recognize that there may be healthy competition in seeking to reduce customer cost," and classes them as "Market Participants" alongside Electric Service Providers and other

sellers of power. SDG&E and Edison's witnesses have made similar statements, ignoring AB117's *assertion that "Customers shall be entitled to aggregate their electric loads as members* of their local community with community choice aggregators (emphasis added, PUC 366.2. (a) (1)), and also that "(n)otwithstanding 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.*" (Emphasis added, PUC 366.2©)(1)). This presents a serious legal conflict for the utilities, because the officers of PG&E, Edison and SDG&E have a fiduciary responsibility to their shareholders to maximize their return on investment. If the utilities view CCAs as competitors, the utilities have an incentive to over-procure in order to deliberately create stranded costs and an increased CCA CRS, in order to prevent CCA load departures. Yet AB117 requires that "(a)ll electrical corporations shall *cooperate fully* with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs" (PUC 366.2(c)(9). As the utilities have said they view CCAs as competitors, they put themselves in the position of violating their fiduciary responsibility to their customers, or violating the law. As AB57 authorizes procurement without Commission review of contracts, a dangerous situation could face the commission unless it establishes mechanisms with which to prevent over-procurement. With the potential advent of shareholder incentives, this problem becomes deeper. Thus a CCA CRS exemption is not only appropriate but needed.

4. AB117 Cost-Shifting Principle Includes Only Costs That Are Attributable to a Particular CCA or a Particular CCA Customer

Q. WOULD A CCA CRS EXEMPTION FROM COSTS ASSOCIATED WITH UTILITY OVER-PROCUREMENT NOT VIOLATE THE COST-SHIFTING PROVISIONS OF AB117?

A. No. While AB117 has provisions that express the principle of avoiding cost-shifting from CCA customers to bundled service customers, it clearly does not intend for this principle to be applied without constraints. For example, while 366.2(a) 17 provides that "(a)n

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," it also indicates that "*(a)ny costs not reasonably attributable to a community choice aggregator shall be recovered from ratepayers*, as determined by the commission. Thus, AB117's principle of avoiding cost-shifting does not mean that bundled service customers should not bear any of the costs associated with CCA in general, and may not be used simply to charge a CCA wherever there is a cost associated with CCA's in general.

5. CCA CRS Exemption For Costs Associated with Utility Procurement Should Not Be Subject to Direct Access (DA) "Principle of Indifference"

Q. DO YOU BELIEVE THAT A CCA CRS EXEMPTION FROM CERTAIN KINDS OF ELECTRIC UTILITY PROCUREMENT WOULD BE BARRED BECAUSE OF THE "INDIFFERENCE PRINCIPLE" FROM DIRECT ACCESS (DA)?

A. No. The principle of indifference does not govern CCA and should be modified to reflect changes introduced by AB117. First, because AB117 section 366.2(a)(3)(b) provides that "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," and section 366.2(c)(4)(A) requires that CCA implementation plans include provisions for "universal access," CCA customers are statutorily required to include all bundled service customers in a CCA jurisdiction who do not opt-out of the CCA program. Unlike Direct Access, under which cherry picking of customers with optimal loads was allowed and widely practiced, CCA's are subject to universal service requirements, thus CCA customers are by definition indistinguishable from bundled service customers, and are entitled to the same protection against cost shifting from utility over-procurement that bundled services customers deserve. Second, because Section 366.2(c)(9) provides 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," CCA customers, unlike DA customers, are statutorily required to remain utility customers for all utility services, and as such are entitled to the same protection against cost shifting from utility over-procurement that is enjoyed by bundled service customers.

Q. ARE YOU AWARE OF OTHER PARTIES THAT ARE SPONSORING PROPOSALS IN THIS PROCEEDING FOR EXEMPTIONS FROM COST RESPONSIBILITY SURCHARGES?

A. Yes. Apart from IVDA, The Utility Reform Network (TURN) supported the establishment of a "credit" for CCAs that develop eligible new generating resources, similar to the exemption given to customer generation departing load (TURN, Florio Reply Testimony, pp.11-12). The California Clean Energy Resources Authority (Cal-CLERA) proposed that cost responsibility surcharges be reduced based on various factors (Cal-CLERA, Cichetti Opening Testimony, pp.20-22). The Local Government Commission coalition (LGCC, Monsen Opening Testimony, pp.25-28) suggested it may be appropriate for the CPUC to provide limited exemptions to CCA programs (LGCC, Monsen Opening Testimony, pp.25-28).

Q. WHAT KINDS OF BENEFITS TO BUNDLED SERVICE CUSTOMERS MIGHT BE INCLUDED IN A CRS CREDIT?

A. As I indicated in my opening testimony, the current crop of CCA's now spending funds on implementation have set a goal of a minimum 40% Renewable Portfolio Standard. Whereas the 20% RPS law will result in an 8% increase under California's current statewide average of 12% renewable in the mix, the CCA cities'40% RPS will result in a 28% increase. Clearly, this will have a significant beneficial impact on bundled service customers in the form of freeing up thousands of Megawatts of transmission capacity for use by bundled service customers, eliminating the need for new transmission to meet regional growth, eliminating the need for substation and line upgrades, and decreasing the

likelihood of blackouts for bundled service customers. A more specific example is illustrative. The City and County of San Francisco has already indicated in its recently adopted CCA ordinance that it will not accept bids that do not include 360 Megawatts of new wind, solar, energy efficiency and conservation measures for a customer base that ranges from 650 Megawatts to 850 Megawatts of load. With a minimum of 211 Megawatts of this being installed on the distribution side of PG&E's substations, this CCA will make at least 211 Megawatts of transmission capacity available to bundled service customers in the South Peninsula that are served by the same PG&E transmission line. These sorts of benefits are tangible and should receive a commensurate CRS credit.

Q. WHAT IS YOUR UNDERSTANDING OF THE CPUC'S DISCRETION IN GRANTING EXEMPTIONS TO COST RESPONSIBILITY SURCHARGES?

A. I agree with IVDA witness Thomas Clarke (Prepared Testimony, p.4) that CPUC Decision (d.) 03-04-030 established the legal framework for analyzing the CPUC's discretion in granting exceptions to the CRS, in particular that "AB 177 gives the Commission the authority for imposing a 'fair share' of cost responsibility on customers (D.03-04-030, p.39). I also agree with Mr. Clarke that "(t)he CPUC's determination of "fair share" appears to turn on whether load was reasonable assumed to be included in the underlying load forecast used by DWR to support its power purchases." (Clarke Prepared Testimony, p.5).

Q. WHAT OTHER CRS EXEMPTIONS SHOULD THE CPUC USE ITS DISCRETION TO GRANT TO CCA CUSTOMERS?

A. As I stated in my Opening Testimony (Paul Fenn, Local Power, April 15, p. 4), the Commission should limit CCA CRS obligations according to an annual "Integrated Resource Calendar" (IRC) under which the Commission can plan, triage and coordinate between CCA load departures and electric utility procurement according to a uniform schedule. We propose that the Commission employ an IRC to circumscribe and annually modify its utility procurement forecasting, AB57 authorizations and energy efficiency

funds allocations based on annual CCA notifications/compliance with the IRC including specific planning and implementation deadlines that are specified in my testimony. Under such a process, we have proposed that the Commission limit AB57 electric utility procurement authorizations to allow 5-10% of statewide aggregate investor-owned utility customer load to depart from electric utility procurement each year (Paul Fenn, Local Power, April 15, 2004, p.11). At a minimum, the Commission should use its discretion to exempt CCA's and CCA customers from any electric utility procurement that would encroach on this 5-10% CCA load departure window. In addition, the Commission should use its discretion to exempt CCA's and CCA customers from any electric utility procurement authorized after a CCA has approved an ordinance as outlined in section 366.2(c)(10) (A) for an individual municipality or county, and 366.2(c)(10)(B) for Joint Powers Agencies formed by multiple municipal and/or county jurisdictions.

Q. WOULD CCA CRS EXEMPTIONS ON COSTS ASSOCIATED WITH UTILITY PROCUREMENT AUTHORIZED AFTER A CCA HAS APPROVED AN ORDINANCE PURSUANT TO AB117 CAUSE COST SHIFTING AS DEFINED IN AB117?

A. No. As indicated above, AB117 specifically limits CCA CRS obligations for utility procurement to costs that are "attributable to" a CCA customer (PUC 366.2(f)(1) and 366.2(f)(2)), and provides that costs associated with CCA in general that are not reasonably attributable to a particular CCA "shall be recovered from ratepayers, as determined by the commission." (PUC 366.2(c)(17)). Thus, bundled service customers may pay for costs associated with CCA in general - that is, costs which are inherent to having CCA as a permanent recourse to bundled service customers under California law. Because AB117 requires that every CCA to prepare and pass an ordinance to implement CCA, to prepare and file a detailed implementation plan with the Commission and wait 90 days to receive certification and a CRS from the Commission ((366.2(c)(3)), then undertake a 120 day opt-out period for notification of customers and opt-out prior to the actual transfer of customers, the utility procurement costs and risks associated with this time lag are not attributable to the CCA's customers, but are, rather, inherent costs

associated with CCA in general. Accordingly, these costs should be born by all bundled service *customers*, who under AB117 have an interest in maintaining their "entitlement" to aggregate (PUC 366.2(a)) and depart utility procurement - and in this sense will benefit from the availability of CCA as a permanent recourse to high electric utility rates that may be incurred by electric utilities pursuant to AB57. Given that it is AB57, not any historical "regulatory compact" or "obligation to serve" (both of which were abrogated by the utilities when the state assumed their obligation to serve California ratepayers at great expense in 2001) that now authorizes utility procurement, it is clearly in the interests of ratepayers to have this recourse, and logical that they would bear the costs of maintaining Community Choice in order to keep it available to them. Considering that CPUC Decision 04-01-050 on January 22, 2004 also formally eliminated Commission review of electric utility procurement contracts, replacing it with a surrogate "procurement review committee," the diluted regulatory authority of the Commission over electric utility procurement may not provide adequate protection for residents, emphasizing the fact that bundled service ratepayers need Community Choice as a permanent option, and should bear any CCA-related costs that are not attributable to a specific CCA or to a specific customer. In particular, the incremental added cost associated with an electric utility entering into short-term contracts in order to make room for a CCA which has provided notice, and at minimum for 5-10% of it customer load to depart each year, should be born by bundled service customers - the cost of having CCA as a recourse.

Q. WHAT VALUE DOES A COMMUNITY CHOICE ORDINANCE PROVIDE FOR ELECTRIC UTILITY PROCUREMENT PLANNING?

A. Because the Commission has discretion to apply a CCA CRS exemption under certain circumstances, it has the implied authority to define under what conditions it will grant CCAs exemptions, including notification requirements in both the statutorily required CCA ordinance and the statutorily required CCA implementation plan. The CCA ordinance approved by San Francisco provides a useful example of how a CCA ordinance might provide the Commission and the utility with basic planning tools. Attached, please

find the City and County of San Francisco's "Ordinance establishing a Community Choice Aggregation Program," (San Francisco Ordinance Number 86-04) passed by the San Francisco Board of Supervisors on May 11, and signed by Mayor Gavin Newsom on May 27 (Attachment 1). This document not only declares San Francisco a CCA, but it also includes a number of specific bidding requirements. First, the ordinance indicates that an Electric Service Provider's prices must include the cost of installing 150 Megawatts of n new wind capacity, 107 Megawatts of load reductions from new conservation and energy efficiency installations, and 104 Megawatts of new Distributed Generation such as fuel cells including 31 Megawatts of solar photovoltaic cells. The ordinance specifies that the Electric Service Provider, not the CCA, must post a bond or demonstrate insurance to cover the potential cost of an involuntary return of customers to Pacific Gas and Electric. Finally, the ordinance establishes a nine-month schedule for adopting an Implementation Plan and Request for Proposals that are consistent with the ordinance. These details offer significant planning tools to the Commission and Pacific Gas & Electric in their AB57 procurement process - tools that eliminate uncertainties (and related costs) associated with a particular CCA. The Commission has discretion to improve on the San Francisco ordinance template in order to eliminate any other uncertainties (and related costs) associated with a particular CCA. Should it do so, any remaining costs from utility procurement would be not associated with any particular CCA, but would rather be costs that are inherent to having CCA as a bundled service customer entitlement - and thus may be born by bundled service customers without causing cost shifting as defined by AB117.

Q. DOES THIS CONCLUDE YOUR REPLY TESTIMONY?

A. Yes.

CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On June 15, 2004, I caused to be served an electronic copy of the attached:

LOCAL POWER WITNESS PAUL FENN'S REPLY TESTIMONY ON THE PREPARED TESTIMONY OF THOMAS K. CLARKE ON BEHALF OF THE INLAND VALLEY DEVELOPMENT AGENCY

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

Executed this 15th day of June, 2004, at Oakland, California.

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Paul Fenn