

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

01-24-11
04:59 PM

Order Instituting Rulemaking to Implement
Portions of AB 117 Concerning Community
Choice Aggregation.

Rulemaking 03-10-003
(Filed October 2, 2003)

Rulemaking Regarding Whether, or Subject to
What Conditions, the Suspension of Direct Access
May Be Lifted Consistent with Assembly Bill 1X
and Decision 01-09-060.

NOT CONSOLIDATED

Rulemaking 07-05-025
(Filed May 24, 2007)

**OPENING BRIEF OF
THE CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION AND
THE CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION
ON LEGAL ISSUES ARISING UNDER PUBLIC UTILITIES CODE SECTION 394.25(e)**

William H. Booth
Law Offices of William H. Booth
67 Carr Drive
Moraga, CA 94556
(925) 376-7370
wbooth@booth-law.com

Keith R. McCrea
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100
(202) 637-3593 facsimile
keith.mccrea@sutherland.com

*Counsel for the California Large Energy
Consumers Association*

*Counsel for the California Manufacturers &
Technology Association*

January 24, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement Portions of AB 117 Concerning Community Choice Aggregation.

Rulemaking 03-10-003
(Filed October 2, 2003)

NOT CONSOLIDATED

Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.

Rulemaking 07-05-025
(Filed May 24, 2007)

**OPENING BRIEF OF
THE CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION AND
THE CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION
ON LEGAL ISSUES ARISING UNDER PUBLIC UTILITIES CODE SECTION 394.25(e)**

Pursuant to the *Amended Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge Amending the Scoping Memo and Reopening the Record*, issued in Rulemaking (“R.”) 03-10-003 on January 14, 2011 (“Amended Scoping Memo”), and the *Administrative Law Judge’s Ruling Amending Procedural Schedule*, issued in R.07-05-025 on January 7, 2011, the California Large Energy Consumers Association (CLECA) and the California Manufacturers & Technology Association (CMTA) submit this opening brief on legal issues pertaining to the bonding requirement under Public Utilities Code § 394.25(e), for Electric Service Providers (ESPs) and Community Choice Aggregators (CCAs).

I. INTRODUCTION

As we have stated several times before in this proceeding, CLECA and CMTA have members in both the DA and bundled service categories. As such, CLECA and CMTA have no interest in rules or fees which would allow DA customers to impose additional costs on bundled service customers or vice versa. Section 394.25(e) of the Public Utilities Code seeks to ensure

that involuntarily returned DA customers do not impose costs on the utility's other customers and states as follows (emphasis added):

If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, *any reentry fee imposed on that customer that the commission deems is necessary to avoid imposing costs on other customers* of the electrical corporation shall be the obligation of the electric service provider or a community choice aggregator, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer's contract has expired. As a condition of its registration, an electric service provider or a community choice aggregator shall post a bond or demonstrate insurance sufficient to cover those reentry fees. In the event that an electric service provider becomes insolvent and is unable to discharge its obligation to pay reentry fees, the fees shall be allocated to the returning customers.

The *Amended Scoping Memo* asks the parties to include in their discussion of legal issues whether the legal obligations pertaining to this section would apply differently to ESPs and CCAs. At the outset, it is important to recognize that Section 394.25(e), by its express terms, vests the Commission with a substantial amount of discretion. The phrase “*any reentry fee imposed on that customer that the Commission deems necessary to avoid imposing costs on other customers*” clearly allows the Commission to determine the conditions and circumstances under which a reentry fee for involuntarily returned customers may or may not be necessary. Stated differently, under Section 394.25(e), it is within the Commission's discretion to find that with appropriate safeguards in place, no reentry fee is necessary. In this event, the bonding requirement would become moot by the express terms of Section 394.25(e).

II. ANALYSIS AND ARGUMENT

A. Are CCAs and ESPs Subject to the Same Obligations?

In response to the *Amended Scoping Memo's* question concerning whether the legal obligations under Section 394.25(e) apply differently to CCAs and ESPs, CLECA and CMTA

believe that both such entities are subject to the same potential obligation with respect to involuntarily returned customers. That is, for both CCAs and ESPs, a reentry fee or *some other measure* must be in place to ensure that involuntarily returned customers of CCAs and ESPs do not impose costs on other customers. However, depending on the circumstances and whatever other measures the Commission may decide to adopt, it is possible that the Commission could decide that different mechanisms or methodologies should be applied to CCAs and ESPs in order to prevent involuntarily returned customers from imposing costs on the utility's bundled customers.

B. Is a Reentry Fee Necessary?

CLECA and CMTA submit that a reentry fee is unnecessary if the Commission adopts appropriate terms and conditions for the service to be provided by the utility for involuntarily returned customers. During the workshop phase of the R.07-05-025 proceeding, a group of parties known as the Direct Access Parties¹ proposed that involuntarily returned customers be required to take Transitional Bundled Service (TBS) for a period of six months. As currently established, the rate for TBS reflects the utility's short-term procurement costs. The Direct Access Parties proposed (with the apparent support of all parties) that the TBS rate also include a capacity adder to reflect Resource Adequacy. At the end of the six-month period, the customer would take service under the otherwise applicable rate unless the customer had elected to return to DA service before that time. With this type of TBS rate, the involuntarily returned customer will not impose costs on other bundled customers and thus no reentry fee is needed.

¹ The Direct Access Parties include Alliance for Retail Energy Markets, BlueStar Energy, California Alliance for Choice in Energy Solutions, CLECA, CMTA, California State University, Direct Access Customer Coalition, Energy Users Forum, School Project for Utility Rate Reduction, and Walmart.

It also should be clear that such a TBS rate itself does not constitute a “reentry fee” (which would trigger a bonding requirement under Section 394.25(e)) since the TBS rate includes costs such as transmission and distribution (T&D), along with short run energy procurement costs and an RA adder. The involuntarily returned customer would have paid these T&D costs as a DA customer and would continue to pay them as a TBS customer. Thus, they are not costs which are imposed on any other customer. In sum, by requiring the involuntarily returned customer to pay the procurement costs actually incurred by the utility to serve the returning customer plus an RA capacity adder, the TBS rate proposal ensures that the involuntarily returned customer does not impose costs on other customers. To the extent there are additional administrative costs incurred by the utility for dealing with involuntarily returned customers, CLECA and CMTA would have no objection to the inclusion of reasonable administrative costs in the TBS rate.

Accordingly, the Commission should find that a reasonable TBS rate can be structured so that any reentry fee is unnecessary. Such an approach and finding is fully consistent with the plain language of Section 394.25(e).

III. CONCLUSION

For the reasons set forth above, CLECA and CMTA respectfully request that the Commission conclude that the requirements of Section 394.25(e) are generally applicable to both CCAs and ESPs and that a properly constructed TBS such as proposed by the Direct Access Parties makes a reentry fee unnecessary.

Respectfully submitted,



William H. Booth
Law Offices of William H. Booth
67 Carr Drive
Moraga, CA 94556
(925) 376-7370
wbooth@booth-law.com

Keith R. McCrea
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100
(202) 637-3593 facsimile
keith.mccrea@sutherland.com

*Counsel for the California Large Energy
Consumers Association*

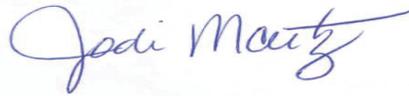
*Counsel for the California Manufacturers &
Technology Association*

January 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing “Opening Brief of the California Large Energy Consumers Association and the California Manufacturers & Technology Association on Legal Issues Arising Under Public Utilities Code Section 394.25(e)” upon each person designated on the official service list compiled in these proceedings via electronic copy on their email.

Dated at Washington, D.C. this 24th day of January, 2011.

A handwritten signature in blue ink that reads "Jodi Martz". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Jodi Martz

SERVICE LIST R.03-10-003

jnelson@psrec.coop
pstoner@lgc.org
sesco@optonline.net
roger@berlinerlawpllc.com
emello@sppc.com
rkeen@manatt.com
susan.munves@smgov.net
mburke50@msn.com
cmlong@earthlink.net
douglass@energyattorney.com
matt_gorman@ci.pomona.ca.us
Janet.Combs@sce.com
Jennifer.Shigekawa@sce.com
rkmoore@scwater.com
mgorman@agclawfirm.com
mmeacham@ci.chula-vista.ca.us
KHassan@SempraUtilities.com
GloriaB@anzaelectric.org
dorth@krcd.org
paulfenn@local.org
thomas.long@sfgov.org
jzr@cpuc.ca.gov
fsmith@sfwater.org
jhendry@sfwater.org
mflorio@turn.org
scarter@nrdc.org
JIPc@pge.com
steven@sfpower.org
dhuard@manatt.com
phanschen@mofo.com
jerryl@abag.ca.gov
jody_london_consulting@earthlink.net
swentworth@oaklandnet.com
cwootencohen@earthlink.net
rschmidt@bartlewells.com
ndesnoo@ci.berkeley.ca.us
clyde.murley@comcast.net
jim@tobinlaw.us
tim@marinemt.org
wem@igc.org
sberlin@mccarthyllaw.com
jstone@ci.manteca.ca.us
brbarkovich@earthlink.net
michaelkyes@sbcglobal.net
wamer@kirkwood.com
jdalessi@navigantconsulting.com
blaising@braunlegal.com
smith@braunlegal.com
etiedemann@kmtg.com
abb@eslawfirm.com
lmh@eslawfirm.com
michelle.mishoe@pacificcorp.com
CKeblor@SempraGeneration.com
liddell@energyattorney.com
klatt@energyattorney.com
jleslie@luce.com
jlowell@ci.pleasanton.ca.us
lettenson@nrdc.org
nlong@nrdc.org
tam.hunt@gmail.com
mrw@mrwassoc.org
kgillick@sfwater.org
rasmith@sfwater.org
jmmahon@8760energy.com
shastie@navigantconsulting.com
dsaul@pacificsolar.net
sorr@rwglaw.com
AdviceTariffManager@sce.com
case.admin@sce.com
dwood8@cox.net
melaniem@environmentalhealth.org
rebeccap@environmentalhealth.org
PSzymanski@SempraUtilities.com
mshames@ucan.org
KKloberdanz@SempraUtilities.com
WKeilani@SempraUtilities.com
CentralFiles@SempraUtilities.com
kjk@kjkammerer.com
jskillman@prodigy.net
jdelatova@windwardenergy.com
gsmith@adamsbroadwell.com
mcampbell@sfwater.org
theresa.mueller@sfgov.org
Dan.adler@calcef.org
mmeal@sfwater.org
srovetti@sfwater.org
norman.furuta@navy.mil
nsuetake@turn.org
RegRelCpucCases@pge.com
cjlw5@pge.com
M6Sk@exchange.pge.com
Sxpg@pge.com
jscancarelli@crowell.com
marc_theobald@emcorgroup.com
irene@igc.org
mfeldman@resourcedecisions.net
jim@prudens.com
Diane.Fellman@nrgenergy.com
cem@newsdata.com
CPUCcases@pge.com
rfg2@pge.com
pvhl@pge.com
edchang@flynnrci.com
service@spurr.org
info@calseia.org
ramonag@ebmud.com
spierce@ebmud.com
daveroom@gmail.com
dweisz@marinenergyauthority.org
erasmussen@marinenergyauthority.org
darmanino@co.marin.ca.us
zena12@earthlink.net
rita@ritanortonconsulting.com
bmcc@mccarthyllaw.com
tomk@mid.org
chris_k@cornerstoneconsulting.biz
Mwoods@mrwlawcorp.com
Henry.Nanjo@dgs.ca.gov
rmccann@umich.edu
kdusel@navigantconsulting.com
cpucrulings@navigantconsulting.com
kemery@navigantconsulting.com
steveng@destrategies.com
mclaughlin@braunlegal.com
dgeis@dolphingroup.org
dcarroll@downeybrand.com
wynne@braunlegal.com
kdw@woodruff-expert-services.com
karen@klindh.com
atowbridge@daycartermurphy.com
californiadockets@pacificcorp.com
rfp@eesconsulting.com
SGM@cpuc.ca.gov
jmcmahon@8760energy.com
abl@cpuc.ca.gov
ayk@cpuc.ca.gov
aes@cpuc.ca.gov
los@cpuc.ca.gov
cxc@cpuc.ca.gov
cec@cpuc.ca.gov
ctd@cpuc.ca.gov
dbp@cpuc.ca.gov
dil@cpuc.ca.gov
hsy@cpuc.ca.gov
jtt@cpuc.ca.gov
jf2@cpuc.ca.gov
kho@cpuc.ca.gov
lmi@cpuc.ca.gov
psd@cpuc.ca.gov
scr@cpuc.ca.gov
txb@cpuc.ca.gov
marg@tobiaslo.com
cmcdonald@navigantconsulting.com
Marshall.Clark@dgs.ca.gov
hmohamme@energy.state.ca.us
jpacheco@water.ca.gov
ldecarlo@energy.state.ca.us
jgeorge@water.ca.gov
mwofford@water.ca.gov
ikwasny@water.ca.gov

SERVICE LIST R.07-05-025

douglass@energyattorney.com
liddell@energyattorney.com
klatt@energyattorney.com
jleslie@luce.com
kmills@cfbf.com
janreid@coastecon.com
RLane@semprautilities.com
martinhomcec@gmail.com
etoppi@ces-ltd.com
keith.mccrea@sablax.com
tlocascio@libertypowercorp.com
iibarguren@tyrenergy.com
debra.gallo@swgas.com
chilen@nvenergy.com
tdillard@sppc.com
nwhang@manatt.com
lpettis@calstate.edu
AdviceTariffManager@sce.com
mike.montoya@sce.com
rkmoore@scwater.com
khassan@semprautilities.com
KFoley@SempraUtilities.com
jeff.malone@calpeak.com
ewdlaw@sbcglobal.net
mtierney-lloyd@enernoc.com
ek@a-klaw.com
mdjoseph@adamsbroadwell.com
chh@cpuc.ca.gov
jeanne.sole@sfgov.org
norman.furuta@navy.mil
mflorio@turn.org
scarter@nrdc.org
mrh2@pge.com
nes@a-klaw.com
michael.hindus@pillsburylaw.com
lisazycherman@dwt.com
mday@goodinmacbride.com
stevegreenwald@dwt.com
CRMd@pge.com
bkc7@pge.com
lex@consumercal.org
Service@spurr.org
wbooth@booth-law.com
mbyron@gwfpower.com
barmackm@calpine.com
ds1957@att.com
george.waidelich@safeway.com
phanschen@mofa.com
gmorris@emf.net
patrickm@crossborderenergy.com
erasmussen@marinenergyauthority.org
eric.a.artman@gmail.com
michaelboyd@sbcglobal.net

rasmith@sfwater.org
jmcmahon@8760energy.com
steven.huhman@morganstanley.com
AndersonR@conedsolutions.com
myuffee@mwe.com
srantala@energymarketers.com
joseph.donovan@constellation.com
ralphdennis@insightbb.com
shannonrmaloney@msn.com
jcasadont@bluestarenergy.com
mkuchera@bluestarenergy.com
iibarguren@tyrenergy.com
ddickey@tenaska.com
dcurrie@rrienergy.com
plook@rrienergy.com
tcarlson@rrienergy.com
julie.martin@bp.com
ntreadway@defgllc.com
HKingerski@mxenergy.com
john.holtz@greenmountain.com
kjsimonsen@ems-ca.com
pucservice@manatt.com
igoodman@commerceenergy.com
gbawa@cityofpasadena.net
amber.wyatt@sce.com
case.admin@sce.com
dhaval.dagli@sce.com
james.schichtl@sce.com
janet.combs@sce.com
jennifer.shigekawa@sce.com
debeberger@cox.net
Jennifer.Hein@nrgenergy.com
mary@solutionsforutilities.com
WDSmith@SempraUtilities.com
MMcclenahan@SempraUtilities.com
SNelson@Sempra.com
TRoberts@SempraUtilities.com
TCorr@SempraUtilities.com
mshames@ucan.org
rob@teamryno.com
marcie.milner@shell.com
KKloberdanz@SempraUtilities.com
WKeilani@SempraUtilities.com
thomas.r.del.monte@gmail.com
kjuedes@urmgroupp.com
pk@utilitycostmanagement.com
dorth@krcc.org
rshilling@krcc.org
sue.mara@rtoadvisors.com
michael.mcdonald@ieee.org
colin.cushnie@sce.com
omv@cpuc.ca.gov
mramirez@sfwater.org

kerry.hattevik@nexteraenergy.com
ralf1241a@cs.com
sean.beatty@mirant.com
kowalewskia@calpine.com
sbeserra@sbcglobal.net
perdue@montaguederose.com
phil@auclairconsulting.com
JerryL@abag.ca.gov
brbarkovich@earthlink.net
pasteer@sbcglobal.net
ron.perry@commercialenergy.net
rschmidt@bartlewells.com
philm@scedenergy.com
sberlin@mccarthylaw.com
mary.tucker@sanjoseca.gov
blairj@mid.org
joyw@mid.org
rogerv@mid.org
dgrandy@caonsitegen.com
Saeed.Farrokhpay@ferc.gov
david.oliver@navigantconsulting.com
kenneth.swain@navigantconsulting.com
lwhouse@innercite.com
grehal@water.ca.gov
gohara@calplg.com
mcox@calplg.com
mjaske@energy.state.ca.us
millsr@water.ca.gov
bernardo@braunlegal.com
dvidaver@energy.state.ca.us
lmarshal@energy.state.ca.us
jig@eslawfirm.com
lmh@eslawfirm.com
rpistoc@smud.org
makens@water.ca.gov
jspence@water.ca.gov
karen@klindh.com
sas@a-klaw.com
wmc@a-klaw.com
californiadockets@pacificorp.com
michelle.mishoe@pacificorp.com
gifford.jung@powerex.com
DBR@cpuc.ca.gov
kdw@cpuc.ca.gov
SJP@cpuc.ca.gov
jmcmahon@8760energy.com
ayk@cpuc.ca.gov
ako@cpuc.ca.gov
bfs@cpuc.ca.gov
los@cpuc.ca.gov
clu@cpuc.ca.gov
crv@cpuc.ca.gov
dbp@cpuc.ca.gov

bhines@svlg.org
mike@alpinenaturalgas.com
westgas@aol.com
jderosa@ces-ltd.com
wamer@kirkwood.com
mary.lynych@constellation.com
cmkehrein@ems-ca.com
ddavie@wellhead.com
blaising@braunlegal.com
steven@iepa.com
abb@eslawfirm.com
atrowbridge@daycartermurphy.com
zdavis@advantageiq.com
wetstone@alamedamp.com
clamasbabbini@comverge.com
cassandra.sweet@dowjones.com
ccasselman@pilotpowergroup.com
cmansbridge@ces-ltd.com
kb@enercalusa.com
tam.hunt@gmail.com
tciardella@nvenergy.com
mrw@mrwassoc.com
DWTCPUCDOCKETS@dwt.com
jkern@bluestarenergy.com
judypau@dwt.com

tburke@sflower.org
cjw5@pge.com
Kcj5@pge.com
sww9@pge.com
Sxpg@pge.com
RegRelCpucCases@pge.com
bcragg@goodinmacbride.com
gblack@cwclaw.com
hgolub@nixonpeabody.com
jscancarelli@crowell.com
jarmstrong@goodinmacbride.com
sdhilton@stoel.com
todd.edmister@bingham.com
dhuard@manatt.com
jkarp@winston.com
tsolomon@winston.com
jeffgray@dwt.com
Diane.Fellman@nrgenergy.com
cem@newsdata.com
cem@newsdata.com
lisa_weinzimer@platts.com
rfg2@pge.com
ssmyers@att.net
ken@in-houseenergy.com

edd@cpuc.ca.gov
jw2@cpuc.ca.gov
kpp@cpuc.ca.gov
kar@cpuc.ca.gov
kkm@cpuc.ca.gov
kho@cpuc.ca.gov
lwt@cpuc.ca.gov
lmi@cpuc.ca.gov
mjd@cpuc.ca.gov
wtr@cpuc.ca.gov
rhh@cpuc.ca.gov
scr@cpuc.ca.gov
trp@cpuc.ca.gov
jpacheco@water.ca.gov
kellie.smith@sen.ca.gov
mwofford@water.ca.gov
ikwasny@water.ca.gov