



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE **FILED**

STATE OF CALIFORNIA

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Commission's Post-2008 Energy Efficiency )  
Policies, Programs, Evaluation, Measurement and )  
Verification, and Related Issues. )

Rulemaking 09-11-014  
(Filed November 20, 2009)

**SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING COMMENTS**  
**ON ADMINISTRATIVE LAW JUDGE'S RULING**

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Dated: **August 10, 2012**

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**I.**

**INTRODUCTION**

Pursuant to the California Public Utilities Commission (Commission) Rules of Practice and Procedure and in Response to Administrative Law Judge (ALJ) Fitch’s Ruling Regarding Procedures for Local Government Regional Energy Network Submissions for 2013-2014 and for Community Choice Aggregators to Administer Energy Efficiency Programs, issued on June 20, 2012 (Ruling), Southern California Edison Company (SCE) hereby provides its opening comments. SCE appreciates the opportunity to provide this input and hereby respectfully submits the following comments on these important issues.

**II.**

**DISCUSSION**

In the Ruling, ALJ Fitch requests “comments from parties to refresh the record in this proceeding on the subject of how community choice aggregators (CCAs) will be able to participate in administering energy

efficiency programs on behalf of the customers and/or geographic areas they serve.”<sup>1</sup> These issues were addressed in workshops, a Joint Workshop Report, responses and replies in late 2010. In October 2011, the Governor signed Senate Bill (SB) 790 into law, which among other things, amended Public Utilities Code Section 381.1<sup>2</sup> to provide further detail regarding CCA requests to implement energy efficiency programs. As discussed below, SCE asserts that the Commission’s legally required role extends beyond simply certifying a CCA’s plan; the Commission has a duty to provide oversight and regulation of the use of utility ratepayer funds. The Commission should also adopt procedures for CCA implementation and funding of energy efficiency programs that are consistent with and include the same performance and program compliance requirements the Commission applies to investor-owned utilities (IOUs).

**A. The Ruling Fails to Establish Procedures for the Commission to Provide Ratepayer Funds to CCAs with Legally Required Commission Oversight and Regulation**

An important issue which is not directly addressed by the Ruling is whether the Commission can properly discharge its statutory duty to oversee the use and expenditure of ratepayer funds by a CCA as an administrator. The Commission previously examined this issue based on a thorough record of the relevant legal and policy issues, fully vetted and vigorously litigated by the parties and the Commission in Decision (D.)05-01-055. Although the legislature has since adopted SB 790, as described below, based on California law, the legislature is presumed to be aware of the Commission’s long standing interpretation of the word administrator in Section 331.1. Therefore, since the legislature took no active steps to change that definition when enacting SB 790, this definition must stand. The Commission cannot simply ignore its previous legal findings and reach a different conclusion on the legality of non-IOU energy efficiency program administration. Therefore, the procedure contained in the Ruling should be modified to require CCAs to contract to implement energy efficiency programs with IOUs under the auspices of the Commission.

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<sup>1</sup> Ruling, p. 2.

<sup>2</sup> All references are to the Public Utilities Code unless otherwise specified.

**1. Allowing CCAs to Administer Ratepayer Funds is Unlawful Because it Would Divest the CPUC of its Jurisdiction Over Ratepayers Funds**

The Commission, in D.05-01-055, found that non-IOU administration of energy efficiency programs funded by IOU ratepayers would impede its ability to discharge its statutory obligation to oversee program funds, and require statutory authorization because ratepayer funds are public trust funds. The Decision acknowledged the State Attorney General’s assessment that “ratepayer money such as the [Energy Efficiency] funds were public funds” that were imbued with the public trust.<sup>3</sup> This was in recognition of the general rule that powers conferred upon public agencies and officers that involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authority.<sup>4</sup> Thus, the public trust is the primary reason why the Commission cannot permit energy efficiency program administration by any party that is not regulated by the Commission. The Commission must retain regulatory jurisdiction over energy efficiency program administration to ensure that energy efficiency funds are properly spent. This is part of the Commission’s overriding statutory duty to ensure that programs funded by ratepayers are carried out in the public interest.<sup>5</sup> The Ruling fails to provide a mechanism by which the third party implementer of ratepayer funded programs, here CCAs, will be subject to the oversight of the Commission.

The Commission’s regulatory jurisdiction is limited to IOUs, unless expressly extended by legislation.<sup>6</sup> The Commission has found that it lacks jurisdiction to regulate third parties such as CCAs.<sup>7</sup> The Commission, in D.05-01-055, correctly observed that it would have limited recourse in

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<sup>3</sup> See D.05-01-055, *mimeo* p. 35.

<sup>4</sup> See *Cal. School Employees’ Assn v. Personnel Commission*, 3 Cal.3d 139, 144 (1970).

<sup>5</sup> See e.g., Section 451, providing that “[a]ll charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded, or received for such product or commodity or service is unlawful.”

<sup>6</sup> *Television Transmission v. Public Utilities Commission* (1956), 47 Cal.2d 82, (301 P.2d 862). The legislature has occasionally provided for limited jurisdiction by the Commission over non-utilities.

<sup>7</sup> See D.05-01-055, *mimeo* p. 35.

the event that the programs do not deliver the requisite energy savings or the program administrator fails to perform in other ways.<sup>8</sup> The Commission found certain proposals:

contemplate the transfer of ratepayer funds from the IOUs to independent administrator(s). Based on past rulings from the Attorney General and the Department of Finance, such transfers require statutory authority. Seeking statutory authority would introduce delays and uncertainty into the process, and *render program funding vulnerable to borrowing by the Legislature.* (emphasis added)<sup>9</sup>

Ratepayer funding transferred to a CCA is equally vulnerable to borrowing for uses other than Commission-authorized or certified energy efficiency programs, and the Commission would have little recourse for recovering the money if that were to occur.<sup>10</sup>

Accordingly, the Ruling must specifically provide for IOU administration so that the Commission can oversee the energy efficiency programs in the public interest. The general character of IOUs involves undertaking public functions subject to Commission supervision and regulation to ensure that it is done in the public interest. This is especially pertinent in the context of energy efficiency, which is another means of meeting electricity demand and is thus an integral part of the IOUs' duty to serve. Indeed, California's Energy Action Plans reveal that cost-effective energy efficiency is a high priority resource that should be maximized by the IOUs in meeting customer demand and formulating long-term procurement plans. To that end, the Commission in D.05-01-055 was clear that to meet the state's goals for energy efficiency:

[W]e must have the authority to hold the administrator(s) fully accountable for delivering energy savings without recourse to litigation. We believe that this

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<sup>8</sup> D.05-01-055, *mimeo* p. 63, stating “[t]he Commission has broad regulatory authority to ensure and enforce the IOUs’ compliance with our policy rules and requirements based on current statute and Constitutional authority. In contrast, the proposals for independent administrators in this proceeding rely on contractual authority. This form of authority is potentially weaker, more complex, and less flexible than relying on our regulatory powers. In particular, we would have limited recourse in the event that the programs do not deliver the requisite energy savings or the program administrator fails to perform in other ways. . . . [T]he remedies for breach of contract are much more limited than our regulatory authority under current law . . .”

<sup>9</sup> *Id.*, Finding of Fact 13.

<sup>10</sup> The risk of government borrowing from agencies holding ratepayer monies for EE program administration has materialized on numerous occasions in the past. See SCE’s Application for Rehearing of D.11-12-035, filed January 19, 2012 in R.11-10-003, at Section II.A.7, discussing the Legislature’s various diversions of Public Goods Charge funds held by the California Energy Commission.

authority is clearly established with our regulatory oversight of the IOUs, but considerably less certain under the proposals for independent administration in this proceeding.<sup>11</sup>

Section 366.2(a)(5) does not negate this requirement in the least. This section provides:

A community choice aggregator shall be solely responsible for all generation procurement activities on behalf of the community choice aggregator's customers, except where other generation procurement arrangements are expressly authorized by statute.

While this statute does require CCAs to be responsible for generation procurement activities on behalf of their customers, IOUs collect energy efficiency program funds from their distribution ratepayers. Therefore, these funds are subject to the jurisdiction of the Commission and the Commission must have the authority to hold the administrator accountable. This requirement is not satisfied unless the CCAs are required to contract with the IOUs for implementation of ratepayer funded energy efficiency programs which are supervised and regulated by the Commission.

**2. The Commission's Interpretation of Administration in Section 381.1 to Mean Implementer Is Unchanged By the Addition of SB 790 Under California Law**

The Commission, in D.03-07-034, interpreted the term administrator in Section 381.1 to mean an entity that implements an energy efficiency program.<sup>12</sup> Specifically, the Commission stated:

We interpret "administrator" in this context [of Section 381.1] to mean an entity implementing an energy efficiency program which is the subject of Section 381, which authorizes the expenditure of certain funds on energy efficiency programs. This contrasts with the Commission's energy efficiency policy manual which distinguishes "administrators" from "implementers."<sup>13</sup>

The Commission reaffirmed its interpretation of the term "administrator" in Section 381.1 in D.05-07-046, which upheld its determination in D.05-01-055 regarding energy efficiency program

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<sup>11</sup> D.05-01-055, *mimeo* p. 65.

<sup>12</sup> D.04-01-032, p. 9 (citing D.03-07-034).

<sup>13</sup> D.04-01-032, p. 9 (citing D.03-07-034, p. 7, fn 2).

administration. Furthermore, the Commission stated “[Section 381.1] does not grant non-IOUs the authority to hold, manage or control ratepayer funds collected for the energy efficiency programs.”<sup>14</sup>

In D.04-01-032, the Commission also mentioned that “courts will generally defer to an agency’s long-time consistent interpretation of a statute.”<sup>15</sup> More generally, California law follows “a presumption that the Legislature is aware of an administrative construction of a statute,” and this presumption “should be applied if the agency’s interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it.”<sup>16</sup> Therefore, in 2011, when SB 790 was enacted, the Legislature was presumed to have known of the Commission’s long standing 2003 interpretation of Section 381.1. Nothing in the language of SB 790 indicates a contrary intent of the Legislature to overturn the Commission’s interpretation of “administrator” in Section 381.1. Thus, because the Legislature is presumed to know the Commission’s interpretation of the term administrator and in SB 790 the Legislature did nothing to alter this interpretation, the previous long-standing and legally sound Commission interpretation stands.

Moreover, Section 381.1(f) requires a CCA program be consistent with the goals of Section 399.4, which discusses participation in energy efficiency programs by local governments, community-based organizations, and energy efficiency service providers and states they “are encouraged to participate in *program implementation* where appropriate.” (emphasis added). This reveals that the Legislature is also using the words implementation and administration interchangeably.

Therefore, as discussed in D.03-07-034, D. 04-01-032, D.05-01-055, and D.05-07-046, the Commission’s interpretation of the term administrator in Section 381.1 must stand and the Commission should include a requirement in the CCA procedures that CCAs must contract with

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<sup>14</sup> D.05-07-046, p. 9.

<sup>15</sup> D.04-01-032, p. 10.

<sup>16</sup> *Redevelopment Agency of the City of Long Beach v. Cnty. Of L.A.*, 75 Cal.App.4<sup>th</sup> 68, 89 Cal.Rptr.2d 10, 17 n.5 (1999) (quoting *Moore v. Cal.*, 2 Cal.4<sup>th</sup> 999, 9 Cal.Rptr.2d 358, 831 P.2d 798, 809 (Cal.1992)).

IOUs to implement energy efficiency programs under the jurisdiction and regulation of the Commission.

**B. Procedures for CCA Energy Efficiency Programs Should be Consistent with Commission Requirements for IOUs**

As stated above, the ALJ Ruling incorrectly assumes that, under Section 381.1(f) CCA “elections,” the Commission’s role is limited to “certifying” that the CCA’s plan meets all of the objectives identified in 381.1. Section 381.1(f)(4) and (6), along with Section 381(a) and (b), give the Commission the same discretion to review and approve or reject a CCA plan under Section 381.1(e) and (f), and to audit a CCA’s performance and implementation of its plan, as the Commission’s existing authority over third-party energy efficiency plans generally, including under Section 381.1(a). Section 381.1 specifically provides that CCA energy efficiency programs are subject to cost effectiveness requirements, audits and reporting requirements, Evaluation, Measurement, & Verification (EM&V), and Program Performance Metrics.<sup>17</sup> Based on Section 381.1, all parties offering energy efficiency programs must be treated the same, including: the assignment of energy savings goals; approval of energy efficiency program plans and respective program performance metrics; and subjection to the same EM&V guidelines, cost-effectiveness requirements, and Commission oversight and audit. Therefore, the Commission must provide clear direction to CCAs with approved energy efficiency plans on all requirements and hold CCAs to the same standards as other energy efficiency programs, to ensure the consistency, predictability, and reliability of energy savings, and the effective use of ratepayer funding.

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<sup>17</sup> § 381.1, subsection (f) (2, 4 – 5)

**C. The CCA Funding Formula Proposed in the Ruling Should be Revised to Ensure All IOU Statewide and Regional Programs Are Accounted For**

Under Section 381.1(e)<sup>18</sup> any CCA electing to administer energy efficiency funds collected from its customers under Section 381.1(e) may access only those funds that are allocated to strictly local energy efficiency programs – not energy efficiency portfolio programs that are dedicated to statewide or regional programs. In the Ruling, ALJ Fitch recommends a formula for CCA funding requests based on Section 381.1(e) that states:

CCA maximum funding = Total electricity energy efficiency nonbypassable charge collections from the CCA’s customers – (total electricity energy efficiency nonbypassable charge collections from the CCA’s customers \* % of the applicable IOU portfolio budget that was dedicated to statewide and regional programs in the most recently authorized program cycle).<sup>19</sup>

The Commission should clarify that for this calculation, any energy efficiency program that is offered by an IOU on a consistent statewide or regional basis –including service-area wide programs that are implemented by IOU vendors on a local basis but are part of the IOU’s service-area-wide programs—should be defined as “statewide” or “regional” for purposes of the CCA funding calculation.

**D. CCA Energy Efficiency Program Proposals Should be Consistent with IOUs’ Schedules**

CCA energy efficiency proposals should be filed concurrently with IOU energy efficiency applications and the CCA procedure should allow for public comment simultaneously with submission of comments on IOU applications for 2015 and beyond. The Commission should establish written procedures that ensure that CCA energy efficiency programs are considered in the same proceedings and for the same time-frames as other local government energy efficiency program proposals, including IOU-administered local government partnerships (LGPs).

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<sup>18</sup> § 381.1, subsection (e) states: The impartial process established by the commission shall allow a registered community choice aggregator to elect to become the administrator of funds collected from the aggregator’s electric service customers and collected through a nonbypassable charge authorized by the commission, for cost-effective energy efficiency and conservation programs, except those funds collected for broader statewide and regional programs authorized by the commission.

<sup>19</sup> Ruling, p. 10.

**E. The Commission Should Revise the Definition of Collections to Only Include Funds for Periods in Which the CCAs will be Implementing Energy Efficiency Programs**

The Ruling defines “Collections” as “Funds collected or reasonably expected to be collected from the date the CCA’s energy efficiency administration plan was submitted to the Commission, through the end of the period of operations of programs under the plan.”<sup>20</sup> This definition appears to provide CCAs with funding for their proposed energy efficiency programs prior to the start date of the CCAs’ programs. As mentioned above, CCAs should utilize the same schedule as IOUs for submission of energy efficiency proposals. In that case, CCAs will be proposing programs for the same program cycles as the IOUs and funding should cover those prospective cycles. Providing funding to CCAs from the date their plan is submitted to the Commission would provide CCAs for funding during a time when the CCA could not run programs.

**III.**

**CONCLUSION**

SCE appreciates the opportunity to provide these comments.

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<sup>20</sup> Ruling, p. 11.

Respectfully submitted,

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**August 10, 2012**