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Decision 10-01-012 January 21, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Cerritos for a Determination of Rights Under Assembly Bill (AB) 80 and Modification of the AB 80 Agreement.	Application 09-06-008 (Filed June 12, 2009)

DECISION DETERMINING THE CITY OF CERRITOS' RIGHTS UNDER ASSEMBLY BILL 80

1. Summary

This decision determines that Assembly Bill (AB) 80 authorizes the City of Cerritos (Cerritos) to serve its customers on an opt-in basis. It further determines that the Initial Load Limit in the AB 80 Agreement entered into between Cerritos and Southern California Edison Company should be increased, if necessary, to reflect Cerritos' procurement obligations under the renewables portfolio standard program. This proceeding is closed.

2. Background

In 2001, in response to California's growing energy crisis, the Legislature enacted AB No. 1 from the First Extraordinary Session (Ch. 4, First Extraordinary Session 2001) (AB X1 1). Among other things, AB X1 1 added Water Code § 80110, which directed the Commission to suspend the right of retail end-use customers to subscribe to direct access service.[1] [2] The Commission subsequently

[1] A direct access customer receives distribution and transmission service from the utility, but purchases its electric energy from an electric service provider.

issued Decision (D.) 01-09-060, which determined that the suspension of direct access service would be effective September 21, 2001.

Assembly Bill 80 (AB 80) (Stats. 2002, ch. 857), codified as Pub. Util. Code § 366.1, was enacted on September 24, 2002. This bill concerned cities that had rights and obligations to the Magnolia Power Project (MPP) and provided, in pertinent part:

> Notwithstanding Section 80110 of the Water Code or Commission Decision 01-09-060, if the Magnolia Power Project has been constructed and is otherwise capable of beginning deliveries of electricity to the existing project participants, an existing project participant may serve as a community aggregator on behalf of all retail end-use customers within its jurisdiction.[3]

On January 13, 2005, the Commission issued D.05-01-009, which approved an application filed by the City of Cerritos and Southern California Edison Company (SCE) to implement AB 80 pursuant to their agreement (AB 80 Agreement). The AB 80 Agreement specified the conditions under which Cerritos could act as a community aggregator on behalf of retail end-use customers within its jurisdiction following construction of MPP. Among other things, the AB 80 Agreement included an Initial Load Limit (ILL) of 13.02 megawatts (MW), which represented Cerritos' generation entitlement share

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[2] On October 11, 2009, the Legislature enacted Senate Bill (SB) 695 (Stats. 2009, ch. 337). Among other issues, SB 695 deletes the previously effective suspension of direct access service, and requires the Commission to authorize increases in the maximum kilowatt-hour (kWh) limit on direct access transactions. This decision does not address SB 695 because this application was filed prior to SB 695's enactment and no party addressed SB 695.

[3] Pub. Util. Code § 366.1(b).

of power from MPP. The agreement further provides that Cerritos may increase the ILL:

> upon (a) obtaining SCE's written agreement to an increase, or (b) providing thirty (30) calendar days advance written notice to SCE after obtaining a final, unappealable decision from the CPUC or a court of competent jurisdiction as to Cerritos' rights under AB 80 to serve as a community aggregator for customers within its jurisdiction on an opt-in, as opposed to opt-out, basis. In any proceeding to determine Cerritos' rights and/or obligations under AB 80, the initial implementation of AB 80 under this Agreement shall not be construed as precedential, nor shall SCE or Cerritos be deemed to have waived any right to assert or challenge any theory respecting Cerritos' rights and/or obligations under AB 80.[4]

On June 12, 2009, Cerritos filed the instant application. Cerritos requests that the Commission determine whether AB 80 authorizes Cerritos to serve its customers on an opt-in (direct access) basis or on an opt-out (community choice aggregation) basis. Cerritos further seeks to modify the AB 80 Agreement to remove the ILL.

On July 16, 2009, SCE filed a timely protest to Cerritos' application. Cerritos replied to SCE's protest on July 27, 2009. After reviewing the application, protest and reply to the protest, and conferring with parties, the Administrative Law Judge (ALJ) determined that a prehearing conference was unnecessary.

The assigned Commissioner and ALJ issued a scoping memo and schedule (Scoping Memo) on September 2, 2009. The Scoping Memo provided for a single round of comments and replies. Both Cerritos and SCE filed timely comments and reply comments.

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[4] D.05-01-009, Appendix A, AB 80 Agreement, ¶ 4.b.

3. Parties' Positions

Cerritos argues that AB 80 should be interpreted as granting a complete exemption from the direct access suspension so that it may offer service to retail end-use customers within its jurisdiction on an opt-in basis and that the power to provide this service may come from generation sources other than MPP. It notes that the exemption granted in § 366.1(b) is "notwithstanding" the suspension direct access service ordered Water Code § 80110 and D.09-01-060.[5] It further states that the term "community aggregator" is a term of art that was used to describe a form of direct access service.[6] Cerritos additionally relies on the legislative history of AB 80 to support its conclusion that the Legislature intended to reinstate direct access service for Cerritos.[7] Finally, Cerritos argues that AB 80 does not limit Cerritos' load to its entitlement share of output from MPP. As support, it refers to a Legislative Counsel opinion issued as part of the Legislature's consideration of AB 1169 (2003-2004 Legislative Session). That analysis concluded that since § 366.1 contained no express language limiting the quantity of customer load, Cerritos was not limited to serving its customers with output from MPP.[8]

Cerritos further contends that there are no substantive reasons why the ILL should remain in place since AB 80 is already self-limiting. It notes that AB 80 only authorizes Cerritos to serve retail end-use customers in its jurisdiction and provide service on an opt-in basis. Further, Cerritos states that any customer

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[5] Cerritos' Application at 14-15.

[6] Cerritos' Opening Comments at 4.

[7] Cerritos' Opening Comments at 10-13.

[8] Cerritos' Opening Comments at 22-23; see also Cerritos' Opening Comments, Exh. H at 4-5.

opting-in for service would need to meet its definition of public benefit customer. As such, Cerritos claims that the maximum additional load that it could serve if the ILL were removed would be 32 MW, which it believes would have a minimal impact on SCE.[9] In contrast, Cerritos states that retaining the ILL has a significant negative impact on Cerritos. It claims that since the ILL is based on peak demand, it cannot use the entirety of its generation entitlement share to serve retail load and must sell its excess generation entitlement share in the wholesale market at lower prices. As a result, Cerritos contends that retaining the ILL prevents it from realizing the full economic benefit of its generation entitlement share.[10] Further, Cerritos asserts that the ILL results in Cerritos being dependent on a single source of generation, making it vulnerable to fuel and operating risks.[11]

SCE maintains that AB 80 is ambiguous and may be interpreted in one of two ways. It states that AB 80 may be interpreted as authorizing Cerritos to offer direct access service on an opt-in basis and to serve this load with its generation entitlement share from MPP.[12] Alternatively, it believes that AB 80 could be interpreted as a full exemption from the direct access suspension, but that all customers could take service under community aggregation on an opt-out basis. SCE asserts that Cerritos' interpretation is both contradictory to legislative intent

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[9] Cerritos' Application at 24-25.

[10] Cerritos also argues that sale of output from MPP to the wholesale market could potentially raise tax law issues, since Cerritos' share of MPP was financed using tax-exempt bonds. (Cerritos' Opening Comments at 20.) We find this argument speculative. Cerritos claims there is a potential violation but cites to no authority as to the likelihood of such a violation if sale of excess electricity were to continue.

[11] Cerritos' Opening Comments at 19-20.

[12] SCE's Opening Comments at 6.

and places MPP participants in a better position than other pre-suspension direct access arrangements.[13]

SCE further argues that AB 80 was enacted to ensure that there is a market for MPP's generation so that MPP would come on line.[14] It asserts that to accomplish this purpose, the Legislature only needed to provide a limited exemption from the suspension of direct access service to allow for the sale of output from MPP. SCE contends if Cerritos' interpretation were adopted, then Cerritos would have more rights than other pre-existing direct access arrangements. SCE believes such an outcome would be unfair to other providers of direct access service, who were also impacted by the suspension of direct access service.[15]

4. Discussion

The issue to be resolved in this proceeding is strictly one of statutory interpretation. The Commission must determine whether § 366.1(b) requires Cerritos to serve all retail end-use customers in its jurisdiction on an opt-in or opt-out basis and whether Cerritos had been granted a complete exemption from the suspension of direct access service, thus warranting removal of the ILL from the AB 80 Agreement.

Under the rules of statutory construction, the Commission must

> look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the statutory language permits more than one reasonable interpretation, courts

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[13] SCE's Opening Comments at 7-8.

[14] SCE's Opening Comments at 10.

[15] SCE's Opening Comments at 13.

> may consider other aids, such as the statute's purpose, legislative history, and public policy.
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> . . .
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> Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation. Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.[16]

We find that the statutory language is clear that Cerritos has been authorized to offer service on an opt-in basis. Section 366.1(b) states that the authority granted to Cerritos is "notwithstanding" Water Code § 80110 and D.01-09-060. Both of these relate solely to the suspension of direct access service and this service is obtained by retail end-use customers on an opt-in basis. Further, as Cerritos notes, the term "community aggregator" was a term of art used in the context of direct access service. Additionally, at the time AB 80 was enacted, § 366, which concerned direct access service, stated:

> If a public agency seeks to serve as a community aggregator on behalf of residential customers, it shall be obligated to offer the opportunity to purchase electricity to all residential customers within its jurisdiction.

By providing that residential customers be "offer[ed] the opportunity to purchase electricity" from the community aggregator, the Legislature signaled that customers would be able to affirmatively select this service. Affirmative

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[16] *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4th 381, 387-388.

selection may only be done on an opt-in, not opt-out, basis. In light of these considerations, AB 80 can only be interpreted as authorizing MPP participants to offer community aggregation service on an opt-in basis.

We find the statutory language ambiguous, however, on whether AB 80 granted Cerritos a complete exemption from the suspension of direct access service or an exemption only up to its entitlement share of generation power from MPP. Under § 366.1(b), MPP participants may serve as community aggregators "if the Magnolia Power Project has been constructed and is otherwise capable of beginning deliveries of electricity to the existing project participants." However, it is not clear whether construction of MPP is a condition precedent before Cerritos would be exempt from the direct access suspension or whether power delivered from MPP is exempt from the direct access suspension. Thus, we must look at the legislative history and interpret the statute in a manner that would give the more reasonable result.

A review of the legislative history of AB 80 reveals that the purpose of this bill was to ensure that MPP would be completed. The bill states it is the intent of the Legislature

> to recognize contributions made in response to California's need for the expedited investment in and development of new environmentally superior electrical generation projects. [ ] It is further the intent of the Legislature to avoid the potential delay in adding new electrical generating capacity that might be caused if certain project participants are not allowed to utilize community aggregation to deliver their share of the project output to customers within their jurisdiction.[17]

[17] Stats. 2001, Ch. 837, § 1.

Analyses by various state agencies further demonstrate that AB 80 was to address concerns that MPP would not be completed if the MPP participants were not able to sell power from the plant on a retail basis. For example, the Department of Water Resources states: "It is unclear whether [Cerritos and San Marcos], absent enactment of [AB 80], would be able to recoup their investment in MPP through other means such as sale of the power at wholesale."[18] The California Energy Commission also notes that AB 80 would allow Cerritos "to serve as a power aggregator on behalf of all retail end-use customers within its jurisdiction for purposes of procuring electricity from the plant" and "would ensure that the current financing arrangements for the Magnolia Power Project remain valid."[19] Further, if there was no assurance that Cerritos and San Marcos could sell power from MPP to retail end-use customers, "it is unknown whether or not they would continue with [MPP] and unclear whether or not [MPP] would go forward without the participation of Cerritos and San Marcos."[20] Moreover, in a letter to Senator Bowen seeking her support for AB 80, Cerritos states:

> AB 80 recognizes the importance of the timely development of the MPP, an environmentally superior electricity generating project that will positively contribute to the State's urgent need for more generating capacity to be brought on line in the next few years.[21]

Similarly, "withdrawal of [Cerritos and San Marcos from MPP] may cause a delay or suspension in the development of the project, thereby forestalling

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[18] Cerritos' Application, Exh. F at 2.

[19] Cerritos' Application, Exh. G at 2.

[20] Cerritos' Application, Exh. G at 4.

[21] Cerritos' Application, Exh. A at 2.

needed electrical generation within California."[22] Finally, this Commission's analysis concludes that AB 80 "provides a limited exception to the direct access suspension in AB X1 1."[23]

None of the supporting documentation provided by Cerritos or SCE expresses any intent that Cerritos was to be granted a complete exemption from the suspension of direct access service. Rather, the documents demonstrate that the exemption was to ensure that MPP could be completed and provide needed generation capacity. Further, we agree with SCE that interpreting AB 80 as granting a complete exemption from the suspension of direct access service would put MPP participants in a better position than other electric service providers. It is unlikely that the Legislature would have intended such an outcome. Consequently, the more reasonable interpretation of AB 80 is that exemption from the suspension of direct access service is limited to energy provided from MPP. Accordingly, we deny Cerritos' request to eliminate the ILL from the AB 80 Agreement. However, we believe the load limit should be modified to reflect Cerritos' share of output from the MPP on an energy basis.

Cerritos has argued that § 366.1(b) is unambiguous and AB 80 provides for a complete exemption from the suspension of direct access service. This argument is based primarily on a Legislative Counsel opinion issued in connection with AB 1169. We find Cerritos' reliance misplaced. Among other things, AB 1169 had sought to clarify that § 366.1 did not require Cerritos to rely solely on power from MPP, and the Legislative Counsel opinion was to assist the Legislature in its consideration of that bill. The fact that AB 1169 sought this

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[22] SCE's Opening Comments, Exh. C.

[23] SCE's Opening Comments, Exh. D at 2.

clarification would suggest that the language in § 366.1 was not as clear as Cerritos would like to believe. Further, AB 1169 was never enacted, and the Legislative Counsel opinion was not used to assist the Legislature in its consideration of AB 80.[24] Thus, we do not find the Legislative Counsel's opinion persuasive in this case.

We also are not persuaded by Cerritos' arguments that the ILL should be eliminated because AB 80 is self-limiting or could prevent Cerritos from realizing the full economic benefit of its investment in MPP. As we discussed above, it would be unreasonable to interpret AB 80 as granting Cerritos a complete exemption from the suspension of direct access service. The fact that Cerritos' proposed interpretation of AB 80 would not result in a significant increase in the amount of load that could be served by Cerritos is not a compelling reason to adopt it.

Finally, we find Cerritos' claims of a lack of resource diversity unpersuasive. Under the AB 80 Agreement:

> If Cerritos is required under law to participate as a retail seller in the renewable portfolio standard program, then upon the effective date of such requirement, the Initial Load Limit shall increase by the amount of renewable generation, qualified under Section 1078 of the California Public Utilities Code (the "P.U. Code"), that Cerritos is obligated to acquire under the renewable portfolio standard program. The Parties shall execute a written amendment to this Agreement to effectuate any such increase in the Initial Load Limit.[25]

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[24] The legislative history of AB 1169 may be found at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1151-1200/ab_1169_bill_20041130_history.html. This bill's history also reveals that AB 1169 was subsequently amended to delete the proposed modifications to § 366.1.

[25] D.05-01-009, Appendix A, AB 80 Agreement, ¶ 4.a.

The Scoping Memo issued by the assigned Commissioner and ALJ determined that prior Commission decisions require Cerritos to be subject to the renewables portfolio standard (RPS) requirements and to participate in the RPS program.[26] We affirm that determination in this decision. Since Cerritos is required to procure electricity from renewable resources, there is no lack of resource diversity.

For these reasons, we believe the AB 80 Agreement should be amended to reflect that Cerritos' load limit is based on its share of output from MPP on an energy basis. Further, as discussed above, the ILL should include Cerritos' RPS obligations. Therefore, if SCE and Cerritos have not already increased the ILL pursuant to ¶ 4.a of the AB 80 Agreement, they should amend the Agreement within 90 days of this decision. The amended Agreement shall be submitted to the Commission's Energy Division through the filing of a Tier 2 Advice Letter.

5. Conclusion

We find that AB 80 should be interpreted as granting a limited exemption from the suspension of direct access service to participants in the MPP. This exemption authorizes the MPP participants to offer service on an opt-in basis up to their entitlement share of generation power from MPP to retail end-use customers in their jurisdiction. Since the ILL currently represents Cerritos' share of power from MPP on a peak capacity basis, the AB 80 Agreement should be amended to modify the ILL so that it represents Cerritos' share of output from MPP on an energy basis. Cerritos and SCE should also amend the AB 80

[26] *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge*, September 2, 2009, at 3.

Agreement, if necessary, to increase the ILL to reflect Cerritos' procurement obligations under the RPS program.

6. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on January 11, 2010 by Cerritos and SCE, and reply comments were filed on January 19, 2010 by SCE.

In comments to the PD, Cerritos contends that the ILL was a negotiated inital placeholder and should not be considered precedential. It asserts that since the intent of AB 80 was to allow community aggregators "to deliver their share of the project output to customers within their jurisdiction,"[27] any load limitation should be based on an energy basis, not peak capacity. Cerritos argues that this intent can only be achieved if it is allowed to sell *all* of its entitlement share on a *retail* basis. Consequently, Cerritos maintains that the PD should be revised to state that Cerritos' retail load is limited based on its share of energy from MPP. We find Cerritos' arguments persuasive. Accordingly, this decision has been revised as appropriate.

7. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Amy C. Yip-Kikugawa is the assigned ALJ in this proceeding.

Findings of Fact

1. Water Code § 80110 suspended the right of retail end-use customers to subscribe to direct access service.

2. D.01-09-060 determined that the suspension of direct access service would be effective September 21, 2001.

3. The AB 80 specified the conditions under which Cerritos could act as a community aggregator on behalf of retail end-use customers within its jurisdiction following construction of the MPP.

4. The AB 80 Agreement included an ILL and specified how Cerritos could increase this limitation in the future.

5. AB 1169 sought to modify AB 80 to clarify, among other things, that § 366.1 did not require Cerritos to rely solely on power from the MPP.

6. AB 1169 was never enacted.

7. The legislative history of AB 80 reveals that AB 80 had been proposed to ensure that MPP would be completed and serve as a generation resource.

8. The legislative history of AB 80 does not support a conclusion that the Legislature had intended to put Cerritos in a better position than other electric service providers affected by the suspension of direct access service.

9. Cerritos is subject to the RPS requirements and is required to participate in the RPS program.

Conclusions of Law

1. Under the rules of statutory interpretation, the Commission should first look at the plain meaning of the statute; if there is more than one reasonable interpretation, the Commission may consider other aids to determine statutory intent.

2. Section 366.1(b) is clear that Cerritos may provide service to retail end-use customers on an opt-in basis.

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[27] Stats. 2001, Ch. 837, § 1.

3. Section 366.1(b) is ambiguous as to whether Cerritos was granted a complete exemption from the suspension of direct access service or an exemption up to its entitlement share of generation power from MPP.

4. It would be unreasonable to interpret AB 80 as granting Cerritos complete exemption from the suspension of direct access service.

5. Cerritos and SCE should amend the AB 80 Agreement to modify the ILL to reflect Cerritos' share of output from MPP on an energy basis.

6. Cerritos and SCE should amend the AB 80 agreement, if necessary, to increase the ILL to include Cerritos' RPS obligations.

O R D E R

IT IS ORDERED that:

1. The City of Cerritos shall serve as a community aggregator to retail end-use customers in its jurisdiction pursuant to Public Utilities Code Section 366.1 on an opt-in basis.

2. The load provided by the City of Cerritos as a community aggregator is limited to its entitlement share of energy from the Magnolia Power Plant plus any obligations under the renewables portfolio standard program.

3. The City of Cerritos' request to amend the Assembly Bill 80 Agreement to eliminate the Initial Load Limit is denied.

4. The City of Cerritos and Southern California Edison Company shall amend the Assembly Bill 80 Agreement to: (1) modify the Initial Load Limit to reflect Cerritos' share of output from Magnolia Power Project on an energy basis, and (2) if necessary, increase the Initial Load Limit to include Cerritos' obligations under the renewables portfolio standard program. This amendment shall be made within 90 days of this decision.

5. Southern California Edison Company shall file an advice letter in compliance with General Order 96-B within 30 days after the amended agreement is signed. The advice letter shall include the amended Assembly Bill 80 Agreement.

6. Application 09-06-008 is closed.

This order is effective today.

Dated January 21, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
Commissioners