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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

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)

NOT CONSOLIDATED

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

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

**OPENING BRIEF  
OF THE DIVISION OF RATEPAYER ADVOCATES  
ADDRESSING LEGAL ISSUES PERTAINING TO ELECTRIC  
SERVICE PROVIDER BONDING REQUIREMENTS**

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**I. INTRODUCTION**

Pursuant to the Amended Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge of January 14, 2011 in docket R.03-10-003 and the Administrative Law Judge's Ruling Amending Procedural Schedule of January 7, 2011 in docket R.07-05-025, the Division of Ratepayer Advocates ("DRA") hereby submits its opening brief to address legal issues pertaining to the bonding requirement for Electric Service Providers ("ESPs") and Community Choice Aggregators ("CCAs"). In accordance with these rulings, parties were asked to submit their legal briefs in both of the above-captioned dockets, addressing the legal obligations arising under Pub. Util. Code § 394.25(e) on January 24, 2011. DRA's opening brief will: (1) explain the purpose and applicability of § 394.25(e), (2) summarize the Commission's current

switching rules, and reentry fees; and (3) recommend that CCAs and ESPs be afforded the same treatment under § 394.25(e) for bonding purposes.

## **II. PURPOSE AND APPLICABILITY OF § 394.25(e)**

The bonding requirement issue as applied to CCAs and ESPs arises under the statutory language of Pub. Util. Code § 394.25(e). The primary legal issues raised by the parties are (a) whether section 394.25(e) requires both ESP and CCA customers to post a bond or insurance to cover reentry fees; and (b) whether the statute should be interpreted to protect only bundled utility customers, or should be read more broadly to protect both utility and ESP/CCA customers in the event of an ESP/CCA failure. The statute reads:

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.<sup>1</sup>

### **A. The Plain Language of Public Utilities Code Section 394.25(e) Extends the Bonding Requirements to ESPs and CCAs.**

The first sentence of the statute explicitly states that it “shall be the obligation of the *electric service provider or community choice aggregator*” to cover any reentry fees imposed on customers in the event they are “involuntarily returned to service provided by an electrical corporation” (emphasis added). The second sentence provides that both the

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<sup>1</sup> Pub. Util. Code § 394.25(e)

“*electric service provider or a community choice aggregator*” (emphasis added) shall post a bond or demonstrate insurance sufficient to cover those reentry fees” as a condition of registration. Thus, section 394.25(e) clearly makes the obligation to post a bond or evidence of insurance applicable to both CCAs and ESPs alike.

The last sentence of section 394.25(e), however, only address the situation of what happens if an electric service provider becomes insolvent and is unable to discharge its bonding obligation and cover the reentry fees. In this situation, the statutes makes clear that the returning ESP customers will be responsible for the costs of the reentry fees. Presumably, since ESP customers are larger commercial customers, they at least have the option of looking for another ESP provider in the event of an ESP default, rather than returning to utility service and imposing costs on bundled customers. The statute leaves open the question of whether CCA customers should also be held accountable for reentry fees in the event a CCA fails. DRA does not make a specific recommendation on this last question at this time, but notes that CCA customers consist largely of residential customers, who do not have the same options as an ESP to look for another service provider; rather, they will have to return to utility service, which will adversely impact bundled customers.

**B. The Public Utilities Code Section 394.25(e) Bonding Requirements Should Be Interpreted to Protect Both the Bundled Customers and the ESP/CCA Customers.**

Secondly, it follows from these same provisions that the statute should be interpreted to protect ESP and CCA customers as well as bundled customers in the event that customers are involuntarily returned due to the failure or default of the ESP/CCA. The statute requires ESPs and CCAs to be responsible for reentry fees “necessary to avoid imposing costs on the other customers of the electric corporation” when a customer is “involuntarily returned to service provided by an electrical corporation.” The use of the term “electric/electrical corporation” here refers to utility service; however, the statute need not be read so narrowly as to limit any additional protections for ESP and CCA customers.

While the statute clearly intends to protect the bundled customers from costs imposed by involuntarily returning customers, section 394.25(e) occurs in Article 12, entitled “Consumer Protections,” which sets forth the various provisions for protecting customers of *ESPs*, including registration requirements, proof of financial viability, and provisions for handling of customer complaints. Moreover, the statutory language allows the Commission to determine the appropriate amount of the reentry fee, which, should “avoid imposing costs on other customers of the electric corporation.” The statute then provides that the *ESP* or *CCA* post a bond or demonstrate insurance “*sufficient* to cover those reentry fees” as a condition of its registration (§ 394.25(e) (emphasis added).) Thus, the statute sets forth the minimum requirements that the bond must cover, and does not limit the Commission’s ability to protect *CCA* and *ESP* customers in the event they become insolvent.

### **III. CURRENT SWITCHING RULES**

Any bonding requirements established by the Commission will be intricately interwoven with the switching rules, therefore, *DRA* provides a brief summary of the current rules for Direct Access and *CCA* customers.

#### **A. Switching Rules, Minimum Stay Requirement and Transitional Bundled Service Rate**

##### **1. Direct Access**

In adopting the current switching rules, the Commission sought to adopt switching rules that prevent placing any burden on bundled customers and promote customer choice. Decision 03-05-034 adopted a three-year minimum commitment period so that Direct Access (*DA*) customers would not be able to come and go from bundled service without regard to the cost-shifting effects that may result.

Customers must provide six month’s notice to transfer to *DA* service on the open enrollment date. Notices are processed on a first come first serve basis, until the maximum allowable annual limit is reached. Likewise, *DA* customers choosing to return to bundled utility service must also provide six month’s advance notice. During the six

month waiting period, the customer may either remain with the ESP, or return to bundled service and pay the applicable transitional bundled service (TBS) rate (which is based on spot market prices). After six months, returning customers are subject to the same pricing terms and conditions as apply to other (existing) bundled customers.

Commission decision D.03-05-034 determined that when a DA customer is involuntarily returned to bundled service as a result of the ESP unilaterally discontinuing DA service, the DA customer may enter a 60-day “safe harbor,” without having an immediate candidate for a new ESP. If a Direct Access Service Request (DASR) is not submitted by the end of the 60 days, the customer will be returned to bundled service and become subject to the same pricing terms and conditions as other bundled customers.

## **2. Community Choice Aggregation**

Customers within a Community Choice Aggregation’s (CCA) service territory have the right to decline or “opt out” of CCA procurement service in the beginning during the CCA program’s two formal notification periods. If the customer opts out, it will continue on as a customer of the utility; if the customer does not opt out during these two notification periods, it will be automatically enrolled in the CCA.

Like ESPs, CCA customers also have the right to return to bundled service after the two formal notification periods end with six month’s advance notice. During the six month waiting period, the customer may remain with the CCA or return to bundled service under the applicable TBS rate for six months. Customers returning to bundled service without a six month advance notice will be placed under the applicable TBS rate for six months. After six months, customers will be returned to bundled service and becomes subject to the same pricing terms and conditions as apply to other bundled customers.

Pursuant to Commission decision D.05-12-041 and Public Utilities Code Section 366.2(c)(11), CCA customers are to be treated like DA customers when they switch between procurement providers.

#### **IV. WHAT SHOULD THE REENTRY FEE COVER?**

There are currently two types of reentry fees: (1) a nominal administrative fee charged by the IOU to cover processing fees for the change of service; and (2) the obligation to pay the TBS rate described above for a the six month transitional period. Since the TBS rate is based on the spot market price, it could result in the returning customer paying a higher rate than other IOU customers for the six month period, resulting in a “fee.” The TBS rate covers the IOU’s costs of incremental procurement resulting from the involuntarily returned customers, and thus protects bundled customers against cost-shifting. If the spot market price is lower than the bundled customer rate, the returning customers would not have to pay any TBS fee. At a minimum, the bond should continue to cover the existing reentry fees.

#### **V. CCA’S AND ESPS SHOULD BE AFFORDED THE SAME TREATMENT FOR BONDING PURPOSES.**

DRA’s position is that since Public Utilities Code section 394.25(e) explicitly imposes the obligation to post a bond or evidence of insurance sufficient to cover reentry fees on both CCAs and ESPs, and does not differentiate between the two, it makes sense that they be subject to the same bonding requirements. This does not mean, however, that the amount of the bond would be exactly the same, but rather, that both CCAs and ESPs be subject to the same criteria for assessing the amount of the bond.

DRA is familiar with the arguments of other parties, particularly the CCA’s, for why it should not be subject to the same bonding requirements as an ESP. For example, the “Designated CCA Parties” have argued in R.03-10-003 that CCAs are likely to purchase long-term contracts and be adequately hedged, therefore unlikely to cease operations when energy prices increase significantly.<sup>2</sup> They further imply that a “*sudden, involuntary, en mass* return” of CCA customers to bundled service is unlikely.<sup>3</sup> And

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<sup>2</sup> Joint Comments of the Designated CCA Parties on the Administrative Law Judge’s Ruling Setting Forth Bond Requirement Phase (July 14, 2008) at p. 12.

<sup>3</sup> *Id.* at p. 14 (emphasis in original).

finally, CCA parties point out that CCAs are governmental entities created for the benefit of the public rather than for pure profit, and as such will be held accountable to the public and open to public processes which make it less likely that it will suddenly cease operations.<sup>4</sup> DRA points out that of these three reasons, only the latter actually sets CCA's apart from ESPs, and DRA takes little comfort in the claim that because a CCA is a governmental entity, it might not run into financial difficulties that jeopardize its programs. With regard to the first two reasons, DRA hopes that all load serving entities are likely to be better hedged and have a much greater portion of long term contracts, and that a sudden, en mass return of ESP customers to bundled service is not likely to reoccur, as it did in 2001, but such events are not easy to predict. These factors should be taken into consideration in determining the amount of the bond for CCAs and ESPs alike.

Moreover, while ESP customers are primarily commercial customers who have actively signed up for Direct Access service, CCA customers are mostly residential customers, and under the rules, they automatically become a CCA customer unless they follow specified rules for "opting out" of CCA service and continuing on with bundled service. Thus, these CCA customers may be less informed about CCA risks and fees than the more savvy business customers. Therefore, DRA sees no reason why CCA's should have less stringent bonding requirements than ESPs.

## **VI. CONCLUSIONS AND RECOMMENDATIONS**

In summary, DRA makes the following recommendations:

- The bonding provisions should apply equally to CCA and ESP customers;
- The bonding provisions should protect customers of the CCA/ESPs as well as the bundled customers, in the event of a CCA/ESP default; and
- The bonding provisions should, at a minimum, continue to cover the administrative fees and six months TBS rate.

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<sup>4</sup> *Id.* at 17.

DRA will provide testimony regarding the methodology for calculating the amount of the bond requirement for ESP customers in the Direct Access proceeding (R.07-05-025), and will address the whether circumstances warrant updating the bond calculation methodology proposed in the CCA proceeding (R.03-10-003) in future briefings, according the schedule adopted in two ALJ rulings.

Respectfully submitted,

/s/ CHARLYN HOOK

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January 24, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ADDRESSING LEGAL ISSUES PERTAINING TO ELECTRIC SERVICE PROVIDER BONDING REQUIREMENTS**” to the official service list in **R.07-05-025 & R.03-10-003** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

**U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **January 24, 2011** at San Francisco, California.

/S/ NANCY SALYER

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Nancy Salyer