



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Implement  
Portions of AB117 concerning Community  
Choice Aggregation.  
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) Rulemaking 03-10-003  
) (Filed October 2, 2003)  
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**REPLY BRIEF OF THE UTILITY REFORM NETWORK  
ON QUESTIONS RAISED IN THE AMENDED SCOPING MEMO**

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March 14, 2011

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**REPLY BRIEF OF TURN ON QUESTIONS RAISED IN  
THE AMENDED SCOPING MEMO**

Pursuant to the Assigned Commissioner and Administrative Law Judge (ALJ) Amended Scoping Memo and Ruling, issued January 14, 2011 in R.03-10-003, The Utility Reform Network (TURN) respectfully submits this reply brief on the issues identified in the *Amended Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge Amending the Scoping Memo and Reopening the Record* (Amended Scoping Memo).

**I. The Current Situation Is Sufficiently Awkward That It May Not Be Resolved Through This Round of Briefs.**

The opening briefs clearly illustrate one central point – the Commission and the parties are in a very awkward predicament. On the one hand there are proposed settlements that reflect compromises and concessions that the settling parties believed produced a reasonable outcome based on what was known some twenty months ago. On the other hand, there are parties who did not join the 2009 settlements and now seek different approaches and different outcomes on some of the issues that had been addressed by the proposed settlements. The *Amended Scoping Memo* seems to reflect concern that changes that have occurred since mid-2009 warrant consideration of modifications to the proposed settlements. But so long as the proposed settlements are under consideration, the ability of each settling party to provide the Commission with further information or analysis of these matters is constrained to the extent such information or analysis might seem contrary to the proposed settlements.<sup>1</sup>

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<sup>1</sup> The Settlement Agreement set forth as Attachment A to the Proposed Decision stated, in part, “It is the intent of the Settling Parties that the Commission adopt this Agreement in its entirety and without modification” (Section D), “the Parties agree to oppose any modification of this Agreement not agreed to by all of the Parties” (Section E), and “[t]he Parties shall joint request that the Commission . . . [a]dopt this Agreement in its entirety and without modification as reasonable in light of the record, consistent with law, and in the public interest” (Section F).

The settlements that have been pending since mid-2009 were submitted with the support of the three utilities, TURN, and San Joaquin Valley Power Authority and the City of Victorville, two parties who at the time were actively investigating or implementing CCA programs but are no longer doing so.<sup>2</sup> Had the Commission acted on the settlements closer to the time they were submitted, TURN is confident that it would have found them to be reasonable given the then-existing conditions and the then-current state of knowledge about establishing and operating CCAs. However, to state the obvious, that did not happen.

But even if the Commission had adopted the proposed settlements at the earliest opportunity after their submission, it seems highly likely that it would still be facing the need to now resolve many of the same questions and issues identified raised in the opening briefs. As described in Conclusion 8 of the now-withdrawn Proposed Decision:

The Commission has ample ability, under the Public Utilities Code and its Rules of Practice and Procedure, to modify the rules adopted in today's decision, as experience and changed circumstances may suggest.

So even assuming the Commission had issued a 2009 decision adopting the proposed settlements as submitted, it would likely still be facing the current arguments of MEA and CCSF that, based on their experience and what they would characterize as changed circumstances since 2009, the bonding rules proposed in the settlements should be modified going forward.

Thus the questions the Commission needs to address at this juncture would seem to have less to do with whether or not to approve the pending settlements, and more to do with developing a reasonable set of rules not only given what was known at the time the settlements were entered into, but also the experience accrued since 2009 and the circumstances that exist today and going forward. The *Amended Scoping Memo* seems to recognize as much:

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<sup>2</sup> *Amended Scoping Memo*, p. 3, citing Reply Comments of SJVPA and Victorville from 12/14/10.

The settlement agreements were entered into almost two years ago when there were no CCAs in operation. Since that time, Marin Energy Authority (MEA) has commenced its CCA program, and has been in operation for almost eight months. Additionally, the two settling parties who were actively investigating or implementing CCA programs (SJVPA and Victorville) are no longer doing so.<sup>3</sup>

The *Amended Scoping Memo* could have extended this list of the changes that have occurred since the settlements were submitted. In its opening brief CCSF describes additional experience and resources that it has gained since mid-2009 as it sought to launch a CCA program.<sup>4</sup> The Commission could also deem this to be further “actual experience with CCA programs”<sup>5</sup> that it may wish to consider and perhaps reflect in its decision on these matters. And the data analysis presented in CCSF’s brief, based largely on information the utilities provided in late 2010, appears to be information not available to the Commission until very recently.

For the settling parties, though, so long as the proposed settlements remain viable the *Amended Scoping Memo* can only expect to get limited assistance for supplementing the record so that the Commission may consider whether the proposed decision should be adopted as currently written or modified. This is as one would expect, not only because of the settlement language compelling fealty to the proposed settlement terms, but also because the proposed settlements represent some amount of concessions and compromises already. Asking for the settling parties to identify possibilities for further modifications to the proposed settlements is asking for them to negotiate against themselves.

For all of these reasons, TURN submits that this may be the odd set of conditions where the Commission’s best path forward starts with what might normally seem to be a step backward. Assuming that the Commission determines that it does not intend to adopt the proposed

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<sup>3</sup> *Amended Scoping Memo*, p. 3.

<sup>4</sup> CCSF Opening Brief, p. 5-6.

<sup>5</sup> *Amended Scoping Memo*, p. 3.

settlements as proposed due to material changes that have occurred since 2009, this round of briefing should result in a return to a workshop setting or some other forum that would permit the parties to better understand each other's positions and hopefully develop mutually acceptable bond requirements given more current circumstances. While workshops typically precede briefs in Commission proceedings, here it may make the most sense (and achieve the most progress) to flip the usual order.

## **II. Possible Next Steps**

### **A. The Commission's First Step Should Be To Address the Fate Of The Long-Pending Settlements.**

With all due respect, TURN submits that the opening briefs illustrate a flaw in the *Amended Scoping Memo*. In asking parties to comment on whether the proposed settlements should be modified in order to better reflect the experience and any changed circumstances since 2009, the *Amended Scoping Memo* effectively asked the utilities and the other settling parties to negotiate against themselves. The settlement agreements already reflect concessions and compromises; the *Amended Scoping Memo*'s questions seemed premised on consideration of even further concessions and compromises. Not surprisingly, the utilities' opening brief presented no such concession or compromises from their earlier positions, at least not that TURN identified.<sup>6</sup>

Therefore the Commission's first order of business should be to squarely address the fate of the long-pending settlements. If the Commission decides that there have been no material changes since mid-2009, it could adopt the settlements. TURN understands that such an outcome may be unlikely, given that it would effectively require the Commission to determine that the settling parties, based on what was known at the time, achieved a reasonable and

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<sup>6</sup> To be fair, the opening briefs of MEA and CCSF seemed to also share this characteristic.

appropriate resolution of not only the issues identified and considered in 2009, but of the issues that have emerged since then due to the more recent experience and current circumstances. Even the Proposed Decision that would have adopted the settlements “acknowledged that, due to the novelty of the issues addressed in the proceeding, any adopted bond calculation methodology may need to be reconsidered, and possibly modified, once parties had actual experience with CCA programs.”<sup>7</sup> The questions posed in the *Amended Scoping Memo* seem to indicate that the assigned ALJ and Commissioner harbor some suspicion that the time for possible reconsideration and modification had already arrived. But if the opening briefs convince the Commission that there is no need for any such modification, the proposed settlements could be adopted as proposed.

On the other hand, if the Commission believes that material changes have occurred such that the bond calculation methodology proposed in the settlement needs to be reconsidered and possibly modified, it needs to reject the proposed settlements or take some other step that would make it clear that the settling parties are no longer bound by the settlements. Any of the settling parties could, of course, continue to advocate for the outcomes that would have occurred had the settlements been adopted without modification. But if this occurs, it should be because that party believes that the position makes the most sense given the conditions that exist today, not because it is the position set out in a settlement agreement from nearly two years ago that some might argue each settling party continues to be contractually bound to support.

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<sup>7</sup> *Amended Scoping Memo*, p. 4.

**B. If the Commission Determines Not To Adopt The Settlements, It Should Direct The Parties To Engage In Further Discussions Aimed At Better Understanding And, Hopefully, Bridging Their Differences On These Issues.**

The Commission should devise and pursue a course that will get the parties talking about the best way to achieve reasonable outcomes on the bonding issues under current conditions. TURN suggests a workshop process conducted by either the assigned ALJ or one of the ALJs trained in mediation.

The opening briefs illustrate that many of the issues underlying the disputes regarding the bond calculation now seem more fully fleshed out than they were in mid-2009. This is due in part to the accumulated experience of MEA and CCSF as they have moved through the process of becoming a CCA. There is also the advantage of having additional information on the results that the implied volatility data and stress factor calculations proposed in 2009 would have produced had they been in effect. Finally, the inquiries CCSF has made into the quality of the data underlying the stress factor calculations and the conditions of gaining access to that data may be important considerations for all parties going forward.

However, much of the material that might prove helpful in fleshing out parties' current positions has to date only appeared in comments on a proposed decision or this current round of briefs, rather than in a manner more typically used to present or examine factual evidence. Workshops might permit the parties to pursue further discussions of the factual assertions and to craft bonding requirements that serve the intended purpose of protecting bundled ratepayer interests without unduly impeding the development or operation of CCAs. And if the proposed settlement agreements are no longer constraining any party with regard to the position they might consider on any of the disputed issues, the Commission has reason to hope that the discussions will benefit from the less restricted participation those parties could now have in those discussions.

To the extent that issues remain after a workshop process, the Commission may need to consider an accelerated round of testimony and hearings in order to develop a record that would permit the agency to finally resolve those issues. But the opening briefs seem to indicate that some of the central issues are coming into clearer focus, such that further discussions may help identify a clear path that accommodates both the desire to enable the establishment of CCAs and to protect ratepayers from the risks associated with establishing CCAs.

Respectfully submitted,

**THE UTILITY REFORM NETWORK**

March 14, 2011

By: \_\_\_\_\_/S/\_\_\_\_\_

Robert Finkelstein  
Legal Director

CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On March 14, 2011, I served the attached:

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**ON QUESTIONS RAISED IN THE AMENDED SCOPING MEMO**

on all eligible parties on the attached list **R.03-10-003** by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this March 14, 2011, at San Francisco, California.

/S/  
Larry Wong

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