

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



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03-26-12
04:59 PM

Order Instituting Rulemaking Pursuant to Senate Bill No. 790 to Consider and Adopt a Code of Conduct, Rules and Enforcement Procedures Governing the Conduct of Electrical Corporations Relative to the Consideration, Formation and Implementation of Community Choice Aggregation Programs.

Rulemaking 12-02-009
(Filed February 16, 2012)

**OPENING COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO
REGARDING RULEMAKING PURSUANT TO SENATE BILL NO. 790 TO CONSIDER
AND ADOPT A CODE OF CONDUCT, RULES AND ENFORCEMENT PROCEDURES
GOVERNING THE CONDUCT OF ELECTRICAL CORPORATIONS RELATIVE TO
THE CONSIDERATION, FORMATION AND IMPLEMENTATION OF COMMUNITY
CHOICE AGGREGATION PROGRAMS**

In accordance with the Order Instituting Rulemaking (OIR) in the above cited proceeding, the City and County of San Francisco respectfully submits these opening comments on the proposed code of conduct, and rules and enforcement procedures set forth in the OIR (the OIR Proposal). The City appreciates the careful work that went into development of the OIR Proposal, and considers the OIR Proposal a useful first draft for development of a code of conduct and enforcement procedures and rules. However, the OIR Proposal should be strengthened to achieve the goal of Senate Bill 790 (SB 790) “to facilitate the development of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization paid by ratepayers.”¹ A group of parties referring to themselves as the CCA Alliance is filing a response to the OIR today that includes a detailed mark-up of the OIR Proposal. The City generally supports the CCA Alliance’s proposed changes to the OIR Proposal as follows:

¹ Public Utilities Code Section 707(a)(4)(A). All references herein are to the Public Utilities Code unless otherwise noted.

- Functional separation in cost accounting would support equitable delivery and pricing of IOU services.
- The OIR Proposal should be strengthened to require the IOUs to equitably offer, provide and price services to CCAs, their customers and bundled customers, and to prohibit IOUs from improperly conditioning or tying the provision or pricing of services to non-participation in CCA.
- The OIR Proposal should be strengthened to require the IOUs to provide to CCAs technical and operational services comparable to those they provide to support their generation service to bundled customers.
- The OIR Proposal should be strengthened to clarify that CCAs are in charge of the opt-out process.
- The OIR Proposal should be strengthened to prohibit IOU deceptive, misleading or untruthful communications regarding CCA programs.
- The OIR Proposal should be strengthened to detail the commercially sensitive information IOUs should not share with their independent marketing divisions.
- The OIR Proposal should be strengthened to ensure that IOUs that opt not to market against CCAs do not abuse their inherent market power and to provide for strong penalties if an IOU claims it will not market against CCAs, takes advantage of the less stringent rules, but then markets against CCAs.

Because the CCA Alliance has already provided a proposed red-line of the OIR Proposal that reflects most of the changes above, the City does not including redlining recommendations in these comments.

In addition, the City agrees with the CCA Alliance that there are important issues related to the allocation of costs that remain to be addressed in order to foster fair competition. The City agrees that the CPUC should address these in a separate phase of this proceeding, to be undertaken promptly.

I. THE OIR PROPOSAL REQUIRES STRENGTHENING.

The OIR Proposal is a useful first draft of a code of conduct and enforcement procedures and rules, but requires strengthening. The City supports the OIR Proposal's emphasis on

requiring that any marketing against a CCA by an investor owned utility (IOU) be undertaken by an independent marketing division that is funded exclusively by shareholders, and that is functionally and physically separate from the electrical corporations's ratepayer-funded divisions, consistent with the requirements of Section 707(a)(1). Additional strong features of the OIR

Proposal include the following requirements:

- Any marketing against a CCA should be undertaken by a functionally separate entity funded exclusively by shareholders, consistent with the requirements of Section 707(a)(1) (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, section 2).
- An IOU should provide access to utility information, rates and services to CCAs on the same terms as it does for its independent marketing division (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, section 6).
- An IOU and its independent marketing division should maintain separate books and records, physically separated office space, and separate computer/information systems, among other restrictions. Furthermore, any joint purchases of goods and services should be reported in order to clearly identify whether the purchase was made by the IOU or its independent marketing division (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, sections 9, 10 and 11).
- IOUs should be limited in the sharing of support personnel between the utility and the independent marketing division, and all employee movement between the two should be tracked and reported annually to the Commission (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, sections 12, 14, and 15).
- IOUs may not refuse to sell excess electricity to a CCA, nor refuse in advance to deal with any CCA in selling electricity because it is a CCA (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, section 18).
- The Commission shall have an independent auditor prepare annual audits to verify compliance (OIR Proposal, Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs, section 20).

Nonetheless, while the OIR Proposal contains a number of useful provisions, it should be strengthened in several important respects, as recommended by the CCA Alliance.

A. Functional separation in cost accounting would support equitable delivery and pricing of IOU services.

While the OIR Proposal requires a separate independent marketing division, the City concurs with the CCA Alliance that additional functional separation in cost accounting between the retail electric generation service provided by an IOU and all other functions of the corporation would better foster fair competition. Below the City discusses the need to strengthen the OIR Proposal to provide for equitable application of tariff provisions, and equitable access to utility information, rates and services. In other words, other than as to retail generation service, the IOUs should be required to provide CCAs and their customers the same level of service at the same price as they provide to bundled customers, their affiliates and their independent marketing division.

These requirements for non-discriminatory treatment are fundamental, yet enforcing them is difficult in the absence of functional separation in cost accounting. This is because it is always complicated to identify and fully allocate all costs related to particular services if they are not separated upfront. While there would certainly be upfront effort required to implement functional separation in cost-accounting, such separation would facilitate a fair allocation of costs and determination of fair prices in the future. Another benefit to such separation is that it would require the Commission to clearly delineate upfront the services and costs associated with retail generation service, and all other services. In this regard, the City supports the concepts in the CCA Alliance redline of the rules of conduct, proposed new sections 2) functional separation in accounting, and 10) market analyses and reports.

B. The IOU should be required to equitably offer, provide and price their services and should be prohibited from conditioning provision or pricing of services on non-participation in CCA.

The City agrees with the CCA Alliance that the OIR Proposal should be strengthened to clarify that except as to those services that comprise bundled generation service, the IOUs must equitably apply their tariffs, and must offer relevant services to CCAs and their customers on the same basis and at the same price as these are offered to bundled customers, IOU affiliates and the IOU independent marketing division. Further, the IOUs should not improperly condition or tie the provision of services to a customer's participation or non-participation in CCA. The City also agrees with the CCA Alliance that the IOUs should provide comparable technical and operational services to CCAs as they provide to support their generation service to bundled customers, using the same prices and performance standards. The City supports these concepts which are reflected in the CCA Alliance redline of the rules of conduct, proposed new sections: 3) equitable application of tariff provisions; 4) misuse of incentives; 7) technical and operational performance; 9) utility information; 12) advertising in billing envelopes; and 13) program offerings.

Further, Section 6) b) of the OIR Proposal provides that "an electrical corporation's independent marketing division shall not have access to competitively sensitive information." The City agrees with the CCA Alliance that this prohibition should be strengthened and include more detail. Thus, the City supports the concepts set forth in CCA Alliance redline of the rules of conduct, proposed new section 10.

C. The OIR Proposal should be strengthened to clarify that CCAs are in charge of the opt-out process, and to prohibit deceptive, misleading or untruthful communications regarding CCA programs.

As the Commission directed in D.10-05-050, CCAs should determine the opt-out process to be used, provided it complies with the requirements of the law. See D.10-05-050, Conclusions of Law, 10, 11 and 12, and Ordering Paragraph 2. In this regard, the City supports the concepts in CCA Alliance proposed redline of the rules of conduct, new section 14) opting out customers. Further, as the Commission directed in D.10-05-050, the IOUs are prohibited from making deceptive, misleading, or untruthful communications regarding CCA programs. See D.10-05-050, Conclusion of Law 5 and Ordering Paragraph 1. In this regard, the City supports the concepts in CCA Alliance redline of the rules of conduct, proposed new sections: 5) accurate representations; and 11) customer interactions.

D. The OIR Proposal should be strengthened to ensure non-marketing IOUs do not abuse their inherent market power and to penalize IOUs that opt to operate as non-marketing IOUs but do market against CCAs.

The City agrees with the CCA Alliance that the OIR Proposal is too lax with respect to IOUs that represent they will not market against CCAs. As detailed in the City's petition to modify D. 05-12-041, while Pacific Gas and Electric Company (PG&E) initially professed that it would not market against CCAs, it went on to engage in aggressive and egregious marketing that included improper linking of ratepayer-funded programs to not developing or participating in a CCA program. In this context, the City agrees with the CCA Alliance that mechanisms must be in place to ensure that even non-marketing IOUs do not abuse their inherent market power, and to monitor an IOU's declaration that it will not market against CCAs. It will also be critical to ensure there are commensurate penalties if an IOU opts to take advantage of the non-marketing rules but then engages marketing. Otherwise, IOUs will have an incentive to opt for the less

rigorous no-marketing regime until caught, and only then be subject to the more stringent requirements that apply to IOUs that represent that they intend to undertake marketing. The City supports considering the concepts in CCA Alliance redline of the rules of conduct, proposed new section c. (Rules Regarding Non-Marketing Electrical Corporations) and using these to replace section 16) b. In addition, the City believes it is necessary to provide for significant penalties if IOUs claim to be non-marketing electrical corporations but then engage in marketing.

II. THE CITY SUPPORTS AN ADDITIONAL PHASE TO ADDRESS COST-ALLOCATION ISSUES.

The City agrees with the CCA Alliance that there are outstanding cost-allocation issues that must be addressed to “facilitate the development of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization paid by ratepayers.”² The City agrees that 1) there should be clear rules and criteria for “on-behalf-of” procurement, such as the cost allocation mechanism, and such procurement should be limited to exigent circumstances; 2) IOU costs should be allocated appropriately among generation, transmission, distribution and other charges; and 3) IOU charges on departing CCA customers and other departing retail loads should be fair and should not subsidize either bundled customers or CCAs. The City agrees with the CCA Alliance that these issues should be addressed in a separate phase of this proceeding, to be undertaken promptly.

² Section 707(a)(4)(A).

III. CONCLUSION.

The City welcomes the OIR Proposal as a useful first draft of a code of conduct and enforcement rules, and proposes strengthening the proposal to incorporate concepts set forth in the recommendations of the CCA Alliance.

Dated: March 26, 2012

Respectfully submitted,

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