



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

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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.)

R.12-02-009
(Filed February 16, 2012)

**SCE'S OPENING COMMENTS ON THE 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**

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COMMUNITY CHOICE AGGREGATION PROGRAMS**

I.

INTRODUCTION

Pursuant to Rule 6.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), Southern California Edison Company (SCE) respectfully files these opening comments on the Commission’s 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 (R.)12-02-009 (the Rulemaking).

In the Rulemaking, the Commission proposes rules of conduct and enforcement procedures pursuant to the Legislature’s direction in Senate Bill (SB) 790. SB 790 added Section 707 to the Public

Utilities Code, which requires the Commission to consider and adopt a code of conduct, associated rules and enforcement procedures governing the conduct of electrical corporations relative to the consideration, formation, and implementation of CCA programs. Pursuant to the statute, the Commission proposes rules of conduct and enforcement procedures for utilities to follow relative to CCAs. The Commission based its proposal on rules previously approved by the Commission in Decision (D.)97-12-088 (the Affiliate Transactions Rulemaking decision) and D.08-06-016 (the decision approving the settlement between Pacific Gas and Electric Company (PG&E) and San Joaquin Power Authority) as well as the principles set forth in Resolution E-4250. SCE recognizes the Commission's concerns regarding utility marketing and lobbying against CCAs, and understands its intent to ensure that these activities are never performed with ratepayer funding. SCE agrees with this intent and supports customer choice. To that end, SCE has not and will not market or lobby against Community Choice Aggregators (CCAs).

SCE appreciates the Commission's efforts in drafting the proposed rules set forth in the Rulemaking. SCE's comments below propose adjustments to the proposed rules to ensure that investor-owned utilities (IOUs) are not unintentionally restricted from providing reasonable customer service at current service levels, without having to establish an Independent Marketing Division (IMD). Therefore, as more fully described in these opening comments, SCE requests the Commission modify the proposed rules to:

- Not restrict SCE from responding to customer inquiries regarding SCE rates and services that may relate to CCAs.
- Not restrict SCE from promoting utility programs and services that support broad state and Commission energy policies in its bills to all customers by illegally requiring IOUs to provide similar space to CCAs.
- Not restrict SCE from offering certain Commission-approved rates and programs only to bundled service customers.
- Exempt an IOU that elects not to create an IMD from shareholder funded biannual audits.

II.
DISCUSSION

As stated above, SCE does not perform any “marketing” or “lobbying” activities against CCAs, and SCE has no intention of engaging in such activities in the future. SCE understands the Commission’s concerns regarding these activities, and its desire to ensure that they are never performed with ratepayer funding. SCE supports a customer’s right to choose which entity will provide it with electric procurement services. SCE wishes to clarify, however, that the rules should not limit SCE from continuing to provide reasonable customer service and Commission-approved utility products and services to its customers. Therefore, SCE proposes revisions to the Commission’s proposed rules as discussed below. SCE proposes specific modifications to the Commission’s proposed rules consistent with these opening comments in Section F below.

A. An IOU’s Ability To Provide Reasonable Customer Service To Its Customers Should Not Be Limited By The Proposed Rules

SB 790 states in relevant part, “The code of conduct, associated rules, and enforcement procedures, shall . . . : (1) Ensure that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation’s shareholders”¹ Pursuant to the statute, the Commission proposed Rule 2 provides that:

“No electrical corporation shall market or lobby against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation’s shareholders and that is functionally and physically separate from the electrical corporation’s ratepayer funded divisions.”²

¹ SB 790 (2011), Section 707(a).

² Proposed Rule 2, Rulemaking, p. 6.

SCE agrees with this rule that any marketing or lobbying performed by IOUs against CCAs should be funded exclusively by shareholder dollars. As stated above, SCE does not intend to market or lobby against CCAs. SCE does, however, seek clarification of the definitions of “market” and “lobby” to ensure that current customer service practices are clearly exempt from the limitations of the proposed rules.

1. The Definition of “Market” Should be Clarified to Ensure that IOUs Can Continue To Provide Responses To Customer Inquiries For Factual Information Related To CCAs

Proposed Rule 1 defines “market” to include any and all communication with customers “regarding the electric corporation’s and community choice aggregators’ energy supply services and rates.”³ SCE seeks clarification that this definition combined with Proposed Rule 2 will not unintentionally interfere with SCE’s provision of basic customer service in response to customer inquiries “regarding” CCAs. SCE agrees that analyzing or interpreting a CCA’s rates for customers is not appropriate and would be correctly prohibited by the proposed rules. However, this language should not be construed to bar SCE from providing information regarding SCE rates, products and services to customers in a CCA’s or potential CCA’s service territory.⁴ For example, a customer may contact SCE to request a detailed breakdown of the customer’s SCE rate to compare to his/her CCA’s rates. Prospective and active CCA customers may also contact SCE to request information regarding SCE’s billing or delivery services. SCE should not be restricted from responding to these questions, even if the customers determine that they do not wish to participate in a CCA as a result. The rules should be clarified to specify that an IOU is not required to create an IMD in order to respond to these types of basic customer inquiries about utility rates, programs and services as this activity is properly provided with ratepayer funding as

³ Proposed Rule 2, Rulemaking, p. 6.

⁴ Proposed Rule 2. Rule 8 is similarly overbroad and bars SCE from “offering to provide customers advice or assistance” related to CCAs.

a basic utility customer service. SCE’s proposed modifications to the definition of “market” (see below Section E) would clearly permit IOUs to continue to provide the current level of reasonable customer care without allowing them to use ratepayer funded activities against CCAs.

2. The Definition Of “Lobby” Should Be Clarified To Ensure That IOUs Can Continue To Provide Responses To Government Customer Inquiries Related To CCAs

The definition of “lobby” contained in proposed Rule 1 includes all communications with “public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or withdraw from participation in, a community choice aggregation program.”⁵ Because government agencies that may potentially form CCAs are also SCE customers, SCE seeks clarification that this definition combined with proposed Rule 2 will not similarly interfere with SCE’s provision of basic customer service to government agencies. SCE agrees that IOUs should not use ratepayer resources “for the purpose of convincing a government agency” not to participate in a CCA. SCE is concerned, however, that it may sometimes be difficult to make a determination as to what constitutes lobbying against a CCA in hindsight. At times, government customers may reach out to SCE for factual information related to SCE rates, products and services. SCE has an obligation to provide its government customers with customer service, including responses to their questions and requests. Government entities may use the information provided in SCE’s responses to their questions, in their analysis of whether or not to participate in a CCA. A government entity may then determine after its analysis that it does not wish to participate in a CCA. Therefore, SCE seeks clarification that such a provision of factual information to public officials that manage government agencies should not be considered lobbying under the proposed rules.

⁵ Proposed Rule 1(b), Rulemaking, p. 6.

Additionally, SCE’s Commission-approved Tariff Rule 23 provides that SCE will facilitate “the CCA program and a CCA’s efforts to implement it . . .”⁶ SCE currently provides a valuable service to prospective CCAs by objectively explaining Rule 23, the CCA Handbook, and discussing how to establish a CCA relationship with SCE. Also, under Rule 23, Section P, SCE is required to perform billing services for CCAs. This billing relationship must also be discussed, even before a CCA is formed. It is possible that after obtaining this information regarding the CCA process from SCE, a government entity will decide not to form a CCA. As such, these communications could be perceived in hindsight to violate the rules. SCE seeks specific clarification that such communications are permitted by the proposed rules, so that it can continue to provide this service to its government customers who might seek to form a CCA without doing so through an IMD.

SCE urges the Commission to clarify the proposed rules to proscribe IOUs from marketing or lobbying against CCAs while specifically recognizing the need for IOUs to respond to customer questions and provide factual information related to their CCA tariffs and processes to potential CCAs. Restricting energy customers’ access to basic factual information does not protect customers or the energy market – it merely limits the amount of information available to customers and potential CCAs and restricts their ability to make an informed decision.

B. Proposed Rule 8 is Not Directly Transferrable to this Circumstance, is Redundant, and Should be Deleted

Proposed Rule 8 states that “An electric corporation shall not offer or provide customers advice or assistance with regard to the services of community choice aggregators, except through its independent marketing division.”⁷ This rule was adopted from the Affiliate Transaction Rules, and while the rule serves a basic purpose in the Affiliate Transaction process, it is not directly transferrable

⁶ SCE Tariff Rule 23.

⁷ Proposed Rule 8, Rulemaking, p. 7.

to this proceeding. The intent of this Rule, as applied to this proceeding, appears to be to limit the IOUs' ability to analyze or interpret CCA rates or services. SCE agrees that this is an appropriate prohibition. However, the rule could also be interpreted to prohibit the basic customer service activities as discussed above. Moreover, this prohibition is redundant because proposed Rule 2 already covers all communications with customers regarding CCAs, even with the clarification requested above. As such, the Commission should delete Rule 8 from the proposed rules.⁸

C. Advertising Programs and Services that Promote Broad State and Commission Energy Policies to All Customers Should Be Permitted Without Restriction

Proposed Rule 13 states that “An electric corporation shall not allow advertising for its electricity in utility billing envelopes or any other form of utility customer written communication unless it provides access to community choice aggregators on the same terms and conditions.”⁹ As written this rule would adversely affect SCE's ability to promote Commission-authorized utility rates, services and programs, as well as its ability to provide education and outreach related to broader Commission policies, to all customers. SCE currently includes such information in its written communications and this information is provided to all customers without differentiation for potential CCA customers. Additionally, this proposed rule violates the First Amendment of the United States Constitution by requiring IOUs to provide space in their communications to third parties.¹⁰ As such, the Commission should delete Rule 13 from the proposed rules.

⁸ If Rule 8 is not deleted, it should be revised to permit SCE to provide basic customer service as described above.

⁹ Rulemaking, p. 9.

¹⁰ See generally *Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 106 S.Ct. 903. (holding that the CPUC order to insert TURN's newsletter into PG&E's bill envelopes violated the first amendment by penalizing PG&E's expression of particular points of view and forcing it to alter its speech to conform with an agenda it did not set. It also held that this violation was not remedied by the fact that ratepayers, not PG&E owned the “extra space” in the billing envelope nor was it justified by the state's interest in promoting free speech to make a variety of views available to ratepayers or in fair and effective utility regulation).

D. The Proposed Rules Should Be Modified to Permit SCE to Continue Offering Certain Authorized Rates and Programs Only to Bundled Service Customers

Proposed Rule 16 provides that:

“Neither electric corporations nor their marketing divisions can offer to provide, or provide, any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a community choice aggregation program, or for the purpose of inducing the local government not to participate in a community choice aggregation program. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders.”¹¹

SCE requests clarification that this rule, as written, does not include certain Commission- approved utility rates and programs which are only open to bundled service customers. For example, pursuant to Commission authorization, SCE does not currently offer Critical Peak Pricing or Real Time Pricing to non-bundled service customers. As such, SCE proposes that Rule 16 be modified to permit IOUs to require customers be enrolled in bundled service in order to qualify for certain optional rates approved by the Commission only for bundled service customers.

E. SCE’s Shareholders Should Not Be Required to Fund Annual Audits if SCE Does Not Create an IMD

Proposed Rule 20 states that “No later than March 31, 2013, and every other year thereafter, the Commission’s Energy Division shall have audits prepared by independent auditors verifying that each electrical corporation is in compliance with the rules set forth herein.”¹² The Rule further requires that the costs of these audits shall be at shareholder expense.¹³ As SCE does not intend to create an IMD or market or lobby against potential CCAs, it is unclear whether an audit would be needed. Moreover, given that SCE’s shareholders have chosen not to market or lobby against CCAs, they should not be

¹¹ Rulemaking, p. 10.

¹² The Rulemaking, p. 12.

¹³ *Id.*

required to pay for such an audit. Thus, SCE recommends that audits not be required for a utility that has opted not to create an IMD. However, if the Commission deems that a compliance audit is necessary for IOUs that have opted out then this audit would be a cost of doing business as a utility. It would therefore be appropriate for the audit costs, for utilities that have chosen not to market or lobby against CCAs, to be funded by ratepayers rather than shareholders.

F. SCE's Proposed Revisions to the Proposed Rules Contained in the Rulemaking

SCE proposes the following revisions to the proposed rules contained in the Rulemaking. These revisions will clarify the rules and achieve the goal of SB 790 and this Rulemaking, namely to prevent the use of ratepayer resources or funds by IOUs against CCAs, without limiting the IOUs from providing necessary customer service.

1) The following definitions apply for the purposes of these rules:

a) "Market" means communicate with customers, whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), regarding the electric corporation's and community choice aggregators' energy supply services and rates. This does not include communications provided by the electric corporation throughout all of its service territory to its retail electricity customers that do not reference community choice aggregation programs, nor communications that are authorized or approved by the California Public Utilities Commission (CPUC) as part of a specific program, including but not limited to customer energy efficiency, demand response, SmartMeter™, and renewable energy rebate, or tariffed programs such as the California Solar Initiative and other similar CPUC-approved or authorized programs. Additionally, this does not include factual information provided in response to a specific customer request, including but not limited to rate analyses. (See D.08-06-016, Appendix A.)

b) "Lobby" means to communicate whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), with public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program. This does not include factual information provided in response to specific requests, including but not limited rate analyses and information about utility programs and services. This also does not include information provided to potential CCAs related to community choice aggregation program formation rules and processes. (Cf. D.08-06-016, Appendix A.)

~~8) An electric corporation shall not offer or provide customers with advice or assistance with regard to the services of community choice aggregators, except through its independent marketing division. (See D.97-12-088, App. A, Part IV.E.)~~

~~13) An electric corporation shall not allow advertising for its electricity in utility billing envelopes or any other form of utility customer written communication unless it provides access to community choice aggregators on the same terms and conditions. (See D.97-12-088, App. A, Part V.F.3.)~~

16) Neither electric corporations nor their marketing divisions can offer to provide, or provide, any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a community choice aggregation program, or for the purpose of inducing the local government not to participate in a community choice aggregation program. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. (This restriction also applies to any plan whereby the utility would pay someone else to provide such goods, services, or programs.) This restriction does not apply to optional rates, programs, and services authorized or approved by the Commission which are only available to bundled service customers. (See Resolution E-4250, Ordering Paragraph No. 4.)

20) No later than March 31, 2013, and every other year thereafter, the Commission's Energy Division shall have audits prepared by independent auditors verifying that each electrical corporation that has formed an independent marketing division is in compliance with the rules set forth herein. The Energy Division shall have the auditor serve a copy on each party to this proceeding, and publish the audit at the same time on the Commission's website. The Energy Division shall send an invoice to each electrical corporation for payment of auditor expenses, and the cost of the audits shall be at shareholder expense. (See D.06-12-029, App. A-1, Part VI.C.)

Alternatively, Rule 20 could state:

20) No later than March 31, 2013, and every other year thereafter, the Commission's Energy Division shall have audits prepared by independent auditors verifying that each electrical corporation is in compliance with the rules set forth herein. The Energy Division shall have the auditor serve a copy on each party to this proceeding, and publish the audit at the same time on the Commission's website. The Energy Division shall send an invoice to each electrical corporation for payment of auditor expenses, and the cost of the audits shall be at shareholder expense for those electrical corporations that have formed an independent marketing division, and at ratepayer expense for those electrical corporations that have not formed an independent marketing division. (See D.06-12-029, App. A-1, Part VI.C.)

III.

CONCLUSION

SCE appreciates the opportunity to submit these Opening Comments on the Commission's proposed 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.

Respectfully submitted,

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