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OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Approval of its 2009-2011 Energy Efficiency Program Plans And Associated Public Goods Charge (PGC) And Procurement Funding Requests.	Application 08-07-021 (Filed July 21, 2008)
Application of Southern California Gas Company (U904G) for Approval of Natural Gas energy Efficiency Programs and Budgets for Years 2009 through 2011.	Application 08-07-022 (Filed July 21, 2008)
Application of San Diego Gas & Electric Company (U902M) for Approval of Electric and Natural Gas Energy Efficiency Programs and Budgets for Years 2009 through 2011.	Application 08-07-023 (Filed July 21, 2008)
Application of Pacific Gas and Electric Company for Approval of the 2009-2011 Energy Efficiency Programs and Budget. (U39M).	Application 08-07-031 (Filed July 21, 2008)

WOMEN'S ENERGY MATTERS
APPLICATION FOR REHEARING OF D0909047

November 2, 2009

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APPLICATION FOR REHEARING

I. INTRODUCTION

On September 24, 2009, the Commission issued Decision (D.) 09-09-047, ("Decision") approving the applications of four large California Investor-owned Utilities ("IOUs), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) for Energy Efficiency (EE) programs for the next three year-cycle (2010-12). The IOUs were authorized to collect $3.1 Billion from ratepayers for these programs.

The Decision authorized utilities to continue to be monopoly administrators over all California energy efficiency programs, a monopoly that was granted in D0501055. However, there has been a significant change in California's energy efficiency landscape since that decision in 2005. In D0809040, the Commission authored a *Strategic Plan for Energy Efficiency through 2020*, which incorporates many non-utility actors, including State and Local Governments, and Publicly-Owned Utilities. Giving investor-owned utilities authority over government entities allows utilities to usurp government functions, which is forbidden by the California Constitution, Article 11, Section 11.

Although the Commission initially put utilities in the lead for the process of *creating* the Strategic Plan, it eventually recognized that it must take the process in-house, and the final Plan was authored by the CPUC. For similar reasons, the Commission may not allow utilities to *administer* the Strategic Plan. It must administer programs in-house or provide some other method of independent administration, as requested by multiple parties and described herein.

Many parties, including Women's Energy Matters (WEM), argued for independent administration of 2010-12 EE programs. Among the reasons they cited were that utility control of all ratepayer-funded programs is incompatible with programs funded by the federal stimulus programs under HR1, the American Recovery and Reinvestment Act as well as those funded under AB811, which will be administered by Local Governments. The Decision authorized IOUs to claim credit for energy savings achieved with federal stimulus funds — which would result in a denial of credit to the federal government, which is a violation of the intent of ARRA. The utilities may also be able to claim "shareholders incentives" (i.e. EE profits) on ARRA funds, based on existing policies which were affirmed by this decision.

In addition to violating the California Constitution and the American Recovery and Reinvestment Act, the Decision also violated the Community Choice law, AB117 (2002), which required the Commission to create procedures by which any party may apply to administer cost-effective energy efficiency programs. The intent of AB117 was to create competition in energy as well as energy efficiency programs. At least two Community Choice Aggregators (CCAs) anticipate serving customers during 2010-12, and should have the opportunity to apply for EE funds, but the Commission has not offered an EE application process for CCAs since 2003.

Furthermore, substantial evidence was entered into the record in this proceeding demonstrating that PG&E is misusing energy efficiency program funds in Marin County, offering special deals to convince local governments to reject the CCA program. PG&E's actions constitute serious violations of the Sherman Act — the federal anti-trust law. While the decision states utilities should not use EE funds this way, this is insufficient to prevent further misuse. The Commission must also suspend PG&E's administration of EE programs at this time, and provide for independent administration of energy efficiency. It should also make sure that energy efficiency is coordinated with procurement, and the locations where utilities spent the EE money and achieved savings should be revealed, as WEM has argued in this proceeding and procurement proceedings.

Pursuant to Rule 16.3 of the Commission's Rules of Practice and Procedure, Women's Energy Matters respectfully submits this Application for Rehearing of D0909047. This Application for Rehearing is timely filed within 30 days of the date of the Decision's mailing, October 1, 2009.

II. BASIS FOR REHEARING

1. Decision failed to order an investigation or to impose sanctions for misuse of EE funds that has already occurred and failed to take the minimum steps necessary to *prevent* PG&E's misuse of EE funds in future

> PU Code §453(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.
>
> PU Code §453(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Ordering Paragraph (OP) 39, subparagraph 11 of the Decision stated investor-owned utilities (IOUs) "shall not use energy efficiency funds in any way which would discourage or interfere with a local government's efforts to consider becoming, or to become, a Community Choice Aggregator."

The Decision acknowledged complaints by the public at the 7-28-09 Public Participation Hearing that PG&E has been misusing EE funds and programs to market against Community Choice Aggregators (CCAs). Decision, p. 272.

While we appreciate the Commission including this issue in its order, it must go further. It must also order an investigation of the misuse of EE funds, impose sanctions for misuse that has already occurred, and propose sanctions to prevent further misuse (including interfering with local governments' attempts to municipalize, which was not mentioned).

The decision failed to acknowledge, much less address, the detailed descriptions of misuse submitted in multiple filings by WEM, or WEM's warning of the likelihood of further misuse because of the anti-CCA statewide ballot measure that PG&E is funding.[1]

Most importantly, the decision failed to take the minimum steps necessary to prevent further misuse: it ordered no investigation or hearings; it imposed no sanctions for misuse that has already occurred and proposed none for future misuse; and it made no attempt to define what would constitute "discouraging or interfering."[2]

Decision failed to order utilities to reveal location of EE spending and achievements

The decision also failed to require utilities to reveal where in their territories they spent EE funds or where energy savings were achieved, despite WEM's frequent requests.[3] *The Commission should recognize that this allows utilities unlimited discretion to continue to use EE funds for political purposes*.[4]

PG&E's offers of special EE and solar programs to Novato is discriminatory, a violation of PU Code §453(c). Novato is getting deals that have not been offered to other communities across PG&E's territory, with the clear intent that the city of Novato and its ratepayers would get better services and lower rates. This violates PU Code 453(a) and PU Code 453(c).

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[1] WEM filed detailed descriptions of PG&E misuse of funds in Marin Co., and appealed for the Commission to investigation, in our 6-29-09 Comment on Workshops, p. 12-13; 9-14-09 Comment on the PD, p. 3-12; also in our 4-17-09 Protest, p. 18-19; 7-17-09 Comment on Portfolios, p. 7-10; 8-28-09 Comment on Portfolios.

[2] WEM's 9-14-09 Comment on the Proposed Decision requested the Commission to take all of the above-named steps and/or take EE funds away from PG&E as long as it is fighting against Marin's CCA plans and fighting for its 2/3 vote ballot measure, designed to undermine all CCA and municipalization efforts.

[3] WEM's 5-5-09 Reply re Portfolios, p. 10; 4-17-09 Protest Portfolios, pp. 3, 18; 4-29-09 Comment ED White Paper, p. 4; 9-14-09 Comment on PD, p. 55

[4] Failure to reveal the location of energy savings also makes it impossible for ISO or procurement planners to utilize EE to actually "defer or displace" any specific supply side resources — because the location of resources relative to the grid is essential. See section 8, below, for further discussion of this issue.)

WEM explained that PG&E's rationalization for the special offers is false; PG&E's claim that it is "responding to customer requests" ignores key facts: (1) its additional marketing and lobbying efforts were designed to spur those requests, and (2) it began making offers before the alleged "requests" were received. (WEM 9-14-09 Comments)

Anti-Trust Violations

PG&E's offers of special EE and solar deals for Marin jurisdictions that reject Community Choice raises issues of anti-trust violations, which we discuss in section 3, below.

2. **Decision wrongfully privatized key functions of government, including implementation of the Statewide EE Strategic Plan, by establishing utility control of a variety of activities that are the proper province of government and not utilities (where in many cases utilities have a conflict of interest).**

> California Constitution, Article 11 Local Government, Section 11. (a) The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.

Ordering Paragraph 1 approved the applications of the four large investor-owned utilities, subject to modifications. None of the modifications include allowing any entity other then the IOUs to administer EE programs. *As monopoly administrators, utilities are authorized to make key decisions about all ratepayer-funded programs, including the implementation of the Strategic Plan, all programs involving Local Governments, and all Local Government Partnerships (LGPs).*

FOF 4 stated that "The vision and goals of the Strategic Plan are intended to be implemented starting with this portfolio cycle." The Commission's Strategic Plan incorporates public and private entities, statewide, many of which are not subject to CPUC regulation.

Although the Commission initially put the IOUs in charge of producing the Strategic Plan, it ultimately recognized that this was inappropriate and took the process in-house:[5]

> [W]e wish to incorporate the tremendous efforts made by all of the participants into a Commission-approved plan, on behalf of the state of California… This rulemaking will allow for development of a record and consideration of ideas above and beyond the detailed strategies and implementation plans discussed in

[5] The summary of the Strategic Planning process failed to mention the Commission taking over the process. Decision, pp. 18-19.

> the Utilities' CEESP application. 7-14-08 Order Instituting Rulemaking 0807011, p. 2doc.

OP 4 of D0809040 stated, "The Energy Division, in consultation with the assigned Commissioner and Administrative Law Judge, shall take the steps necessary to implement the Plan…" IOUs were not mentioned in that paragraph. The decision described an independent entity that "the scope of the Plan demands:"

> **California Alliance:** A number of parties, including CCSF, Community Environmental Council, DRA, and the Municipal Utilities, emphasized that the objectives of the plan would be particularly well-served in later stages by coordination under a broader alliance. A dedicated California Energy Efficiency organization with membership and mandate to match the scope of the goals presented in the Plan could be organized on a non-profit or quasi-governmental basis. While the Commission has limited authority to unilaterally implement this recommendation, ***we generally agree that the scope of the Plan demands a broad-based alliance which invites participation by all stakeholders.*** The Plan now reflects this aspiration. However, until such an entity is formed, ***the Commission will continue to take the lead in moving the Plan's directives forward, with increasing participation by non-Commission and non-IOU entities.*** D0809040, p. 9, emphasis added.

The Commission said it would take the lead to implement the Plan "until such an entity is formed," and gained support throughout California on that basis.

It is an illegal bait and switch for the Commission to put investor-owned utilities in charge of implementing the Strategic Plan — the parties with the greatest conflict of interest — as it has done in D0909047.

This decision puts utilities in charge of many functions of local governments such as drafting local codes and standards and school curricula, and "leveraging" cities' funding from the federal stimulus, AB811 and other sources for projects such as Streetlight Retrofits or Whole House programs. (See further discussion below in 5, below.)

Such activities violate jurisdictional boundaries by putting investor-owned utilities in charge of *controlling and/or supervising county or municipal corporation improvements, money, or property… or performing municipal functions,* which is forbidden by the CA Constitution Article 11, §11.

The Decision even put utilities in charge of picking which aspects of the Strategic Plan Local Governments are allowed to participate in. OP39 sub-paragraph 3 states that the IOUs "shall provide one, statewide list of Strategic Plan strategies that local governments can choose among."

Even local governments with Publicly Owned Utilities or CCAs, are subject to investor-owned utility supervision under this decision. (See further discussion below.)

The record in this proceeding strongly opposed utility control of the implementation of the Strategic Plan

The Initial Protest of DRA and TURN warned against utility control of the Strategic Plan. They stated:

> The Commission and other agencies in California have a responsibility to oversee and manage areas under their jurisdiction to protect the public interest. Such responsibility should not be relinquished to the Utilities, but should be exercised to promote the public interest for the entire state. DRA/TURN, 8-28-08 Protest, p. 30.

The City & County of San Francisco's 8-19-08 Protest expressed similar concerns, recommending that the Commission form a not-for-profit California Energy Efficiency Alliance (CEEA) "to aggressively pursue activities that are beyond the JOUs core competency and that require participation by other government agencies and stakeholders…"

> This exercise should assign to a CEEA, or to the Commission, those program activities that 1) require input or coordination with other state entities, 2) require significant innovation; 3) are necessary to achieve the CLEESP but are not included or adequately covered in the proposed IOU portfolios, or 4) the lOUs are unwilling to implement if they are accountable and must demonstrate real savings or other outcomes. CCSF, 8-28-09 Protest, pp. 6-7.

DRA/TURN named "Local Government Programs" as chief among the "key strategic elements" that should not be relinquished to Utilities, because "the interests of the Utilities are not aligned with those of local governments…" Referencing the Commission's intention that "ratepayer dollars should seek to build capacity in local governments"[6] DRA/TURN noted:

> While building such energy expertise and independence in local governments will benefit California, it is inherently competitive with the Utilities on a number of fronts, such as Community Choice Aggregation. This, accordingly, creates a conflict of interest for the Utilities to manage local government programs. Local governments cannot be fully optimized with ratepayer dollars in the Utility-managed scenario, resulting in a huge missed opportunity of energy savings for the state of California. (DRA/TURN Protest, p. 34)

As an example of utilities' conflict of interest, DRA/TURN's Protest Footnote 84 gave the website of the No on H coalition — a campaign against a 2008 ballot measure promoting public power and Community Choice in San Francisco. PG&E was the only named member of the coalition (and in fact provided the bulk of the $10 million spent on the campaign).

[6] 8-19-08 Strategic Plan, p. 94

WEM noted an example of IOU competition vs. Local Governments over EE infrastructure. We described Novato's request for funding for a local government EE staff position, and PG&E's refusal. PG&E would only consider funding EE staff in-house at the utility.[7] WEM 6-29-09 Comment, p. 12.

3. Decision failed to consider independent administration, especially for Local Governments

> PU Code §381.1. (a) No later than July 15, 2003, the commission shall establish policies and procedures by which any party, including, but not limited to, a local entity that establishes a community choice aggregation program, may apply to become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381… (etc.)

The Commission's failure to consider independent administration for the upcoming EE program cycle — in this proceeding or in any other proceeding prior to approving the 2010-12 portfolios — violated the California Constitution, Article 11 Sec. 11 of the State Constitution (quoted above) as well as the CCA law AB117.[8]

In refusing to consider this ***obvious, necessary, and available remed***y, the Commission failed to effectively address the extensive record (in this and earlier EE proceedings) of IOU failures to meet their goals, mismanagement of Local Government Partnerships and Third Party programs, and misuse of EE funds.

Legal Authority and Precedent Exists for Independent (non-utility) Administration of EE

ALJ Gamson commented to members of the public at the 7-28-09 Public Participation Hearing that we couldn't have independent administration without a new state law. This is no longer true. In the late 1990s the need for a new state law was identified as the stumbling block that stopped CPUC's effort to create independent administration in the CBEE process, but much has changed since then:

1. Four years of independent programs (2002-05) were selected and overseen by CPUC with only nominal administrative duties by IOUs;
2. A state law was passed in 2002 (AB117 – Community Choice) that authorized independent administration of EE and ordered the CPUC to create a process for "any party" to apply to be an EE administrator;

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[7] It is significant that PG&E's lawyer stated at the 6-8-09 meeting with Novato Councilmembers that they would use "shareholder money" to fund the position or positions at PG&E that would interface with Novato around EE programs in their "partnership." This is an admissiom that PG&E thinks it is acceptable to put PG&E *political operatives* in charge of energy efficiency programs of local governments.

[8] R0604010, the rulemaking that preceded this application proceeding, also failed to address administration.

3. Three years of independent Evaluation, Measurement & Verification (EM&V) programs (2006-08) were administered by CPUC.

This third point is significant because it proves that CPUC *can* write and sign contracts encumbering EE funds collected by utilities without a new state law. Concern that this might not be possible led the Commission to give utilities a nominal administrative role during the 2002-05 experiment with independent programs. The Commission hoped to avoid having these programs derailed like the earlier attempt to establish independent administration in the late 1990s.

Utilities' administrative role in 2002-05 gave them no opportunity to interfere with the independent programs. It consisted of little more than writing contracts with third parties and making sure all their paperwork was submitted. It now appears that even this minimal administrative role for utilities was unnecessary.

Pursuant to D0501055, the Commission took control of EM&V administration. It now designs EM&V programs, allocates EM&V funds, writes contracts, and supervises contractors — i.e. "program choice" and "portfolio management" for EM&V.

CPUC has three options available for independent administration of EE

There is clear precedent for the Commission to administer EE portfolios in the same way it administers EM&V; or to recreate a system like it had in 2002-05, where CPUC conducted "program choice" and shared the "portfolio management" with utilities, allowing utilities only a nominal administrative role as described above.

The Commission could also utilize its legal authority under CCA to contract with another party or parties as administrators, including government entities such as the Energy Commission, local governments, a non-profit CEEA, or CCAs — the various options that parties have requested in this proceeding.

In short, the Commission has three options immediately available for creating independent administration of EE, which is necessary in order to come into compliance with Community Choice and other laws we have cited here.

In denying independent administration as an option, CPUC ignored the record in this and previous EE proceedings

Many public interest parties in this proceeding including WEM, CCSF, DRA and TURN had already filed comments and protests with extensive reasons why the Commission should establish full or partial independent administration for the next cycle of EE programs, prior to issuance of the Scoping Memo.[9] Nevertheless, it stated:

[9] WEM 8-28-08 Comment on Portfolios, p. 3.

> The general question of whether the Utilities should continue to be the administrators of energy efficiency programs from 2009 through 2011 is not within the scope of this proceeding… Instead, we will defer whether to address this issue to the new Rulemaking we expect the Commission to issue in early 2009. (Scoping Memo, 11-25-09, p. 12)

A new EE Rulemaking was indeed opened in early 2009, however Independent administration was not on the table there either: “The scope of this proceeding involves the review and reform of the Commission’s Energy Efficiency Risk/Reward Incentive Mechanism (RRIM). (R0901019 Scoping Memo, 4-24-09, p. 2)

Parties’ protests and demands for independent administration continued up through the comments on the Proposed Decision. In three rounds of comments and replies on three versions of IOU portfolios, WEM and other parties cited:

- utilities’ conflict of interest with saving energy,
- IOUs overriding concern for utility profits rather than the public benefit,
- utilities’ failure to comply with the Commission’s policies and goals, demanding instead that it change its policies and reduce its goals,
- very serious failings of utility administration during the 2006-08 program cycle, including PG&E’s failure to even sign contracts with third parties and local governments until the third and fourth quarter of 2006 — the year the programs were supposed to begin,
- unresolved problems with IOU program planning for the upcoming cycle, including a year’s delay because all three iterations of IOU plans were seriously non-compliant with the Commission’s orders and policies; at the time of this decision, many programs, including the Whole House Retrofits, still needed to be reconfigured or developed virtually from scratch,
- implementation of the Strategic Plan would cause IOUs to overstep jurisdictional boundaries, “privatizing” key government responsibilities and services,
- utilities would be likely to use their role as administrators to try to hijack federal stimulus funds flowing into cities and counties, in order to claim utility “rewards” for EE savings achieved with federal funds,
- IOUs would likely interfere with local governments’ sovereignty and money in order to leverage federal stimulus funds and AB811 funds with ratepayer funds, and
- documented misuse by PG&E of EE funds for marketing against CCAs, and the potential for the utility to further misuse EE funds to serve the statewide ballot

measure it is funding, which would make it virtually impossible to form or expand CCAs and municipal power agencies (by requiring a 2/3 vote).

Clearly, the record in this proceeding supported *and the law requires* independent administration of at least some of the programs in the 2010-12 cycle, including Local Government programs and the Strategic Plan.

Decision provided for indefinite extension of current program structure

OP 45 approves a "rolling budget trigger," so that the average monthly level of EE expenditures of the IOUs "may continue on a month-to-month basis until the next energy efficiency portfolio budget is approved…"

This would potentially tie up EE funds and postpone consideration of alternative administration even past the end of the 2010-12 cycle (which was already extended for a year beyond the original date for the cycle to end).

Community Choice law requires an opportunity for "any party" to apply to administer EE funds

The fact that the question of administration was held *off the table* throughout the process of determining portfolios and programs for the 2009-11 / 2010-12 cycle is a violation of the PUC Code 381.1, the energy efficiency portion of the Community Choice Aggregation statute (AB117) which required the Commission to establish policies and procedures for "any party" including CCAs to apply to administer energy efficiency programs.

D0310003 stated that the Commission already had such policies and procedures. At that time (July 10, 2003), it is true that there was an opportunity for local governments to apply to the Commission for EE program funds (although only 20% of the funds were available because 80% were set aside for utilities).

However, the opportunity for any party to apply to administer EE programs evaporated two years later, when D0501055 established a utility monopoly over all EE programs. Since then, local governments have not been allowed to apply to administer EE — they have only been allowed to apply to implement programs that met with utility approval, in utility-controlled Local Government Partnerships (LGP).

Important Difference between Administrators and Implementers

WEM filed an application for Rehearing of D0310003, among other things, objecting to the decision defining "Administration" as "Implementation" for the purpose of the CCA law. The rehearing was denied and the court declined to hear the appeal, but the issue is far from settled.

The first EE Policy Manual (2002) defined Administrator and Implementer as follows:

> **Administrator:** A person, company, partnership, corporation, association, or other entity selected by the Commission and any Subcontractor that is retained by an aforesaid entity to contract for and administer energy efficiency programs funded in whole or in part from electric or gas public goods charge (PGC) funds.
>
> **Implementer:** An entity or person selected and contracted with or qualified by a program administrator or by the Commission to receive PGC funds for providing products and services to Customers." (EE Manual, p. 6)

The latest EE Policy Manual (v.4), (8-6-08) defines them this way:

> **Program Administrator**
> An entity tasked with the functions of portfolio management of energy efficiency programs and program choice.
>
> **Program Implementers**
> An entity or person that puts a program or part of a program into practice based on contacts or agreements with the portfolio manager.
> (Policy Manual 4.0, Aug. 6, 2008, (R0604010) Appendix B: Glossary pp. 13-14)

Any reasonable definition of "administer" for CCAs (or "any party" as referenced in the law) would include program choice and program management; the whole purpose of AB117 is to allow local governments to leave utilities and choose their own energy future!

However, local governments are currently only allowed to "apply to *implement*" programs as Local Government Partners subservient to utility administrators. This is an untenable position for Community Choice Aggregators such as CCSF, Marin, and San Joaquin Valley Power Authority — which have encountered implacable utility opposition to their integrated resource plans, including the EE component.

It is not only illegal under AB117 for local governments to be denied their right to apply to administer EE programs in their own territories, it is also a violation of the California Constitution Article 11 Section 11 for local governments to be forced to work under utility direction, in unequal partnerships with their *competitors,* the IOUs, simply in order to participate in EE programs funded by their residents and businesses.

PG&E finally admitted in early 2008 (in documents filed in C0706025) that it opposed CCAs and "competes" with them. In fact PG&E has a motive to squelch any local government EE efforts for fear they might become interested in becoming independent entities like CCAs or munis that have the right to administer their own EE programs.

IOUs have a conflict of interest. Independent energy efficiency challenges IOU profits; any amount of independent administration of EE could reduce the profits of

PG&E and the other IOUs, who are currently the only entities allowed to claim credit for energy savings, and the only entities eligible for "shareholders incentives" based on those claims. Independent administration could further reduce utility profits by targeting EE to actually defer and displace supply side resources, which provide even more profits to IOUs.

Ratepayers would benefit as utility costs would be more just and reasonable, as PUC Code 451 requires.

Anti-Trust Violations

Anti-trust issues are raised by the CPUC's refusal to consider independent administration of EE, and PG&E's misuse of EE funds.

The Sherman Act, 15 U.S.C. § 1, declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." The U.S. Supreme Court has held that utilities are subject to Sherman Act liability, even if their actions are approved by state regulators. In ***Cantor v. Detroit Edison Co.***, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court found that no antitrust immunity was conferred when the Michigan Public Service Commission adopted a tariff allowing the utility to provide free light bulbs to some customers.

> The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

428 U.S. at 593 (citations omitted).

> This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.

428 U.S. at 600.

Likewise, ***Columbia Steel Casting Co. v. Portland General Electric Co.***, 111 F.3d 1427 (9th Cir 1997), held that the territory-allocating arrangement between two regulated private utilities was not immunized from the Sherman Act by the order of the Oregon Public Utility Commission. State action immunity against antitrust liability exists only when the state has adopted a definite policy against competition. Here, California has adopted no such policy. We are aware of no statutes that state that California wishes to supplant federal antitrust law with regimes that discourage competition in the provision of energy services or conservation services. In fact, the opposite is true. AB117 itself clearly intends that CCAs will provide competition for the private utilities.

The CPUC's failure to stop the utilities from using public purpose funds in an anticompetitive manner (to discourage the functioning of CCAs, for example) also precludes any state action immunity.

> The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As ***Parker*** teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U.S., at 351, 63 S.Ct., at 314.

California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

WEM and others have shown that the utilities are using EE funds to offer special deals to areas encompassed in CCAs in order to discourage the development of those CCAs as competitors to the utilities. Such tactics are clearly in restraint of trade and are clearly violations of the Sherman Act. They would appear, further, to be "hybrid restraints" that violate the Act.

> Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See ***Rice v. Norman Williams Co.***, 458 U.S., at 665, 102 S.Ct., at 3302 (STEVENS, J., concurring in judgment). Where private actors are thus granted "a degree of private regulatory power," *id*., at 666, n. 1, 102 S.Ct., at 3302, n. 1, the regulatory scheme may be attacked under § 1 [of the Sherman Act]. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See ***Schwegmann Bros. v. Calvert Distillers Corp.***, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); ***California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.***, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

Fisher v. City of Berkeley, 475 U.S. 260, 267-68, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986). Allowing the private utilities such overwhelming specific control of how EE funds are spent clearly imposes an unlawful hybrid restraint on the marketplace for energy services and energy efficiency services in California.

4. Decision wrongly ordered utilities to “assess” LGPs performance in certain 06-08 program components, to potentially “modify or eliminate” these programs, confiscate their funds and shift funds into utility programs.

The Decision invites IOUs to punish local governments by eliminating major portions of LGP budgets, based on alleged problems that utilities themselves have caused. The

Commission apparently failed to consider that the PRG warned that Local Government Partners were being "set up to fail" by utilities in 2006-08 programs and this would add to that abuse. (PRG report in PG&E's Advice Letter 2704-G/2786-E, 2/17/06, p. 61-62)

OP 39, 9th sub-paragraph states:

> **Utilities shall assess** and report to Energy Division on best practices and **the cost-effectiveness of local government direct install and utility core program marketing programs,** and shall modify or eliminate such programs in early 2010, as warranted;[10]

Utilities continued to mistreat LGPs, even after the PRG's warning. LGPs in PG&E territory had little more than a year to execute their entire three-year programs, since PG&E delayed signing their contracts most of the first year and quibbled over their measure lists for most of the second year.

The most active CCA jurisdictions —Marin and San Francisco — were two of the last LGPs to have their contracts signed (nine months after the programs were supposed to begin). PG&E rejected an application for a third party program by a non-profit set up by the City of Davis. No reason was given; PG&E may have been retaliating against Davis and Yolo County for having a 2006 ballot initiative to be annexed by the Sacramento Municipal Utility District (SMUD).[11]

Prior to signing contracts with Local Government Partners, PG&E slashed their budgets as much as 60% and revised their program plans, forcing them to be subcontractors for utility programs — which are at issue here.

Now the Commission invites *utilities* to "assess" LGP performance on these programs and "modify or eliminate" them — which can include *confiscating LGP funds and moving them into utilities' own programs instead*. (Decision, p. 258 doc) Among other problems, this order wrongfully put utilities in charge of EM&V functions (reviewing cost-effectiveness of past programs) that D0501055 made the province of Energy Division.

WEM finds it especially troubling that the decision ordered utilities to "assess" and potentially eliminate LGP's marketing but did not address WEM's concern about the **lack of assessment of *utilities* program-level marketing, education and outreach**

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[10] The confusing name "Utility Core Program" refers to utility-run programs that LGPs are supposed to support and/or that supposedly "support" LGPs.

[11] The City of Davis had a third party program, Davis Energy Efficiency Program (DEEP) in 2002-03, which was expanded in 2004-05 to cover all of Yolo Co. (YEEP). Both DEEP and YEEP succeeded in meeting their energy savings targets. For YEEP, Davis had restructured its EE services as a non-profit, Valley Energy Efficiency Corp. It applied to PG&E for a third party program in 2006-08 but was denied. Davis rejected the LGP model because they were mostly involved with marketing of utility-run programs, and Davis wanted its program to actually save energy. It also planned to work with residential customers, which was rare among both LGP and Third Party programs.

(MEO).[12] The decision was silent about WEM's descriptions of how PG&E was misusing MEO funds to market against local governments efforts to form Community Choice and municipal power agencies, cited above in fn.

In short, this decision allowed utility competitors to "assess" and strip away MEO funds from local governments but failed to order an independent assessment of the much larger MEO budgets for utilities' individual programs, and also failed to rein in utility misuse of those budgets.

5. **Decision encouraged utilities to interfere with local governments' ability to leverage EE funds, including federal stimulus ("ARRA") funds, AB811 funds, and ratepayer funds.**

> CA Constitution Article 1, Sec. 11. (a) The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.
>
> Article 16 Public Finance § 6. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever…
>
> PU Code §451. All charges demanded or received by any public utility, or by any two or more public **utilities**, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful…

Local government parties specifically asked the Commission to refrain from encouraging utilities to seek control over cities' federal stimulus funds (HR1 American Reinvestment & Recovery Act (ARRA).[13]

This is especially important because utilities have a motive to hijack stimulus funds to feed their EE profits (as discussed in section 6, below). However, the decision does just that in several program areas.

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[12] OP 34, subparagraph 7 authorized *utilities* to assess their own portfolio-level MEO. Self-assessment is not what WEM had in mind when we brought this to the Commission's attention.
[13] WEM 6-29-09 Comment on workshops, p. 9; 4-17-09 Protest, pp. 3-4, 8.

Statewide Streetlight Retrofits

Regarding "Streetlight Retrofits" the decision states:

> We are encouraged that PG&E has called out this technology for emphasis in its partnerships, but would like to see the development of a **statewide street light retrofit program for local governments.** We direct the **utilities** to study opportunities for such a **statewide program**, examining in particular **leverage opportunities as provided with ARRA funds**…(Decision p. 271pdf, emphasis added)

While WEM is strongly in favor of a statewide streetlight retrofit program utilizing ARRA funds as well as ratepayer funds, it is unconstitutional to put utilities in charge of this statewide effort.[14] First of all, governments with publicly owned utilities would be left out or forced to work under IOU direction (one of which is trying to undermine POUs with a statewide ballot measure).

Secondly, streetlight retrofits are one of PG&E's promises in its misuse of funds to market against Community Choice in Novato (see WEM Comment on PD, Attachment B, PG&E 6-30-09 letter to Novato, p. 4 (chart), and p. 8).

Thirdly, this wrongly put utilities in a position to control federal stimulus funds. This violates the California Constitution, Article 11, Sec. 11 and Article 16, Sec. 6, quoted above.

A Statewide Streetlight Retrofit program is exactly the type of program that the Local Government Statewide Coordinator should be funded to coordinate instead of the utilities. Local Governments should get credit for the energy savings and GHG reductions, along with the federal government. There is no need for utilities to run this program.[15]

Whole House programs

OP 21.a. put utilities in charge of a $100 million statewide "Whole House" program, despite PG&E's representative openly admitting at the All Party Meeting 9-16-09 that the company had no idea how to make Whole House programs cost-effective. (Transcript 9-16-09, p.) Awarding these programs to utility administrators is a violation of the "just and reasonable" doctrine in PU Code §451.

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[14] We note that efficient streetlights have been available for more than a decade. Why have utilities failed to conduct such a program before now?

[15] While some local governments might be willing to give control of those funds to IOUs who promise to "help" them, it is up to them, not the utilities or CPUC, to make that call. They should be informed first by CPUC that they are opening the door to utility profits on federal stimulus funds, and providing another venue for PG&E to market its ballot initiative against local governments' right to determine who controls their electricity.

Furthermore, the decision encouraged utilities to access funding for this program that is the property of local governments and not utilities:

> WHPP will include close coordination with program activities outside of traditional utility programs including a streamlined interface with municipal financing options (AB 811, Mello-Roos, PACE Bonds or other) and home efficiency retrofit efforts funded by ARRA (federal stimulus) monies. (Decision, p. 113 doc)

It is not entirely clear what the decision meant by "close coordination" or "a streamlined interface," but as a practical matter it appears certain that ratepayer funds (controlled by IOUs) would be combined with funding sources controlled by municipalities.[16]

Since IOUs control *all* ratepayer funded programs, regardless of whether the programs receive additional funding from other sources, this would create a conflict over control of these efforts, which is likely to result in utilities *controlling, supervising, or interfering with municipal money or property,* which violates the CA Constitution, Article 11 Sec. 11, as well as Article 16, Sec 6.

Most Local Government Partners have not had much opportunity to participate in residential programs in past program cycles, but local governments are about to get involved in residential EE in a big way because federal stimulus programs will focus overwhelmingly on residential retrofits, and AB811 deals only with homes.

It is not clear whether or in what role utilities will even *allow* Local Government Partners and/or other Local Governments to participate in utility-run "Whole House" programs.[17] In previous EE cycles, Local Government Partners (LGPs) have rarely been authorized to serve residential customers. This decision's limited concept of LGPs may prevent expanding their scope to implementation of residential programs:

> The majority of the proposed local government partnership programs continue 2006-2008 partnership programs. They embody Strategic Plan goals such as local government retrofits of their own buildings; support for local government adoption of Reach Codes or improved code enforcement; and, implementation of cost-effective direct install programs. (Decision, p. 255pdf)

Utilities will therefore decide whether LGPs can use ratepayer funds for residential programs or will have to fund their residential programs solely with the federal stimulus or AB811. This is illegal under the California Constitution, Article 11, Sec. 11, and is likely to create delays that could endanger cities' ARRA funding. (Utilities tend to be

[16] As explained in the section below on the federal stimulus, this may lead to utilities' claiming credit (and therefore profits) for the energy savings resulting from these other funding sources.

[17] In the Local Government breakout session of the 10-27-09 Whole House Workshop in Ontario, the utility facilitator of the meeting suggested that the utilities see the appropriate role for Local Governments as marketing of utility-run Whole House programs. Ironically, the Decision ordered utilities to "assess" and potentially eliminate LGP's marketing role. OP 39, 9th subparagraph.

very slow in making such decisions, and as noted above, they did not yet even have a Whole House program concept by the All Party meeting, a few days before the Commission approved this decision.)

The worst possible outcome (and the most likely) is that the utilities will deny LGPs the right to meaningful participation in utility-run, ratepayer-funded “Whole House” programs — but the utilities will seek to utilize cities’ federal stimulus funds and other municipal funds for those programs. (Furthermore, the Commission is poised to deny credit for those energy savings to the local governments and even the federal government, as explained in section 6, below).

Administration of the Statewide Streetlight Retrofits and Whole House programs should be entirely independent of utilities for all the reasons described above. Local Governments should be able to leverage ratepayer funds with municipal and federal funding sources to increase comprehensiveness and lower costs for their residents, without interference by utilities.

Any participation by utilities in these programs should be at the discretion of local governments, which is the opposite of the situation authorized by the Decision where utilities have discretion as to whether and to what extent local governments may participate, and *which* local governments may participate.

6. **Decision laid the groundwork for wrongfully denying credit to the federal government for the energy savings resulting from ARRA funds and for allowing utilities to claim profits based on energy efficiency achieved with federal stimulus funds.**

The Decision laid the groundwork for utilities to reap profits on some of the energy savings achieved with federal stimulus dollars from the American Recovery & Reinvestment Act (ARRA), although it appeared to deny this, as described below. *(For a brief description of the CA system for utility profits on energy efficiency programs, see footnote.[18])*

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[18] California’s four big investor-owned-utilities (PG&E, SCE, SDG&E and SoCalGas) were authorized by D0709043 to collect 9-12% profits on 2006-08 program expenditures if they came close enough to meeting energy savings Goals set by the CPUC. There has been tremendous controversy over the goals, what “counts” as energy savings, who controls EE measurement, and the final process for determining profits. The CPUC awarded utilities $82 million as a first installment on 2006-08 EE profits in Dec. 2008, even though the CPUC staff report said they didn’t come close enough to meeting their goals and therefore deserved no profits. This year, utilities demanded a settlement whereby CPUC would disregard further staff reports and award them full profits. UPG&E would receive $458 million (plus the $42 million already received).

<u>PG&E (and Sempra utilities) made it abundantly clear that they feel entitled to claim profits based on the federal stimulus</u>:

> PG&E…[argues] that to encourage continued coordination and leveraging of utility funds with ARRA funds, **<u>the Commission should explicitly confirm that utilities will receive full energy savings credit when ARRA funds are used for the customer's share of costs to participate in utility energy efficiency programs.</u>** (Decision, p. 91, emphasis added)

The Decision denied this. It stated "we see no need… to state a priori that utilities will receive full energy savings credit if ARRA funds are used in conjunction with ratepayer funds in a particular program." (Decision, p. 100)

This statement is a little slippery — the Commission might not say it up front (a priori) — *but it might still happen* because the Commission's current policies plus the Decision's interpretation of federal guidelines would justify giving utilities credit for savings resulting from the federal stimulus in this situation.

Current Commission policies award energy-savings credit *only* to utilities

The decision confirmed that ***<u>current policy will guide the attribution of EE savings,</u>*** including for the federal stimulus funds. Decision, p. 103. It is extremely important to understand that ***<u>current CPUC policy only gives credit to utilities</u>*** for energy savings from EE programs.[19]

Contributions of customers are not credited to customers, regardless of how much they contribute. Local governments *get zero energy savings credit for their contributions*. *<u>Only the utilities get credit.</u>*

The Commission *sometimes reduces the amount of credit given to utilities* when, for example, the Energy Commission or local governments provide savings through their work on codes and standards — or when customers respond in a survey that the utility programs did not influence their decision.[20] Utilities may get all the credit, partial credit,

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[19] Energy Div. confirmed to WEM that under current policies, only the utilities get credit for energy savings, and the customer contribution is credited towards utilities. WEM conversation with ED 10-19-09. The policy decision of 5-21-09 confirmed this:

> The issue of energy savings credits for actions taken by customers through existing Utility energy efficiency programs but motivated by external factors is not addressed at a detailed level in previous Commission decisions. Our basic policy is that Utility programs-funded by ratepayer dollars should be aimed at creating measurable energy savings, and *<u>Utilities should receive credit</u>* <u>toward their energy efficiency savings goals *(and in the incentive mechanism)* for energy savings associated with these programs.</u> D0905037, p. 28, emphasis added. *See also* FOF 11.

[20] The number of customers who say that they were influenced by something other than the utility programs results in a "net" figure (as opposed to "gross" savings). In part because of net-to-gross (NTG) ratios, the Energy Div. Draft and Final Verification Report on 2006-07 programs concluded that three out of four utilities deserved no profits. The IOUs hotly disputed this. In D0812059, the Commission overrode the Verification Report and awarded profits based on utilities' self-reported savings, citing the controversy and the delay of the final Report. ,

or no credit. *But nobody else is even in the picture*. Current CPUC policies award energy savings credit only to utilities.[21]

Customer contributions are credited to the utilities

Utilities only pay a fraction of the costs of an energy saving item (with ratepayer funds). Typically more than 90% of the cost of the item is borne by the customer who benefits from the program.[22] This is the "customer share of costs" (aka "customer contribution"). ***When federal stimulus funds are used as the "customer's share of costs," current policies would award credit for those savings only to the utilities.***

CPUC's interpretation of federal guidelines for ARRA funds favors utility profits[23]

According to the Decision:

> Guidelines from the U.S. Department of Energy (DOE) identify as one objective for the federal funds to leverage additional investment and ***additional energy savings activity beyond the levels that otherwise would have occurred.*** Specifically, US DOE has established a target for the minimum additional energy savings expected per dollar of ARRA funding, measured against a baseline of state-level efficiency activity. Decision, p. 106, emphasis added

The decision ordered ED to "ensure that *all* savings from ratepayer funded programs are included in the state baseline provided to DOE." Decision, p. 104, *emphasis added*.[24]

Determining the baseline is the key. How much savings would have occurred if there were no federal stimulus? This is an unknowable question.[25] However, CPUC (and CCSF) apparently interpret the "baseline" as meaning what energy savings would have

[21] WEM argued that everyone — not just utilities — should be eligible for EE "risk/rewards," and all the other benefits that stem from energy savings credits. E.g. WEM 7-24-09 Comment on Workshops, p. 13 (RRIM Matrix).

[22] EE programs generally cover just the additional expense of a more efficient item (as compared to cheaper less-efficient items that the customer could have purchased instead). For example, the rebate on an efficient washer-dryer might be $100, but the customer has to pay the other $900 to purchase the item.

[23] The Initial Guidelines stated:

H. Measures: expected quantifiable outcomes consistent with the *intent and requirements* of the legislation and the risk management requirements of Section 3.5, with each outcome supported by a corresponding quantifiable output(s) (in terms of incremental change against present level of performance of related agency programs or projects/activities specified in the plan)…. The measures currently used to report programs' performance in relationship to these goals (consistent with Administration policy) should be retained. In addition to reducing burden on grant recipients and contractors, use of existing measures will allow the public to see the marginal performance impact of Recovery Act investments. Memo from Peter Orszag, Re: Initial Implementing Guidelines for ARRA (2-18-09), p. 14

[25] Cities represented in this proceeding stated that if there were no federal stimulus, their EE programs would shut down because cities are broke and could not afford the "customer contribution." This would mean that the "baseline" for local government programs — what would have occurred without federal funding — would be at or near zero. The purpose of the federal stimulus was to prevent a total meltdown. Ironically, to the extent that the stimulus succeeds in staving this off and producing a semblance of a normal year, the feds may get no credit for their funds.

happened in a normal year — i.e. if there were no financial crisis. Clearly, this is very different from what would have happened if there were no federal stimulus.[26]

The Decision pointed out that *CCSF said utilities should get the credit* if cities use stimulus money "to cover the local government's share of project costs" (Decision, p. 98doc).

If the baseline is defined as what would happen in a normal year, there is no "additional savings" if cities substitute federal funds for the customer share of costs that cities can no longer afford. Under the Commission's interpretation of the guidelines, the federal government would get no credit in that situation.[27]

The Decision stated that CCSF went even further, saying that the federal government would only get credit when there was *no* ratepayer money involved:

> CCSF notes that local governments should **only report savings to US DOE from measures funded *solely* by stimulus money** as savings additional to the savings reported for ratepayer funded programs. (Decision, p. 108, emphasis added)

A passage in the Proposed Decision (PD) explicitly agreed with CCSF (and PG&E):

> **[I]f the local governments use ARRA funds to supplement ratepayer funded programs, they cannot claim any savings to US DOE from these expenditures**… PD p. 95 pdf, emphasis added

This passage was deleted from the final decision, which is a step in the right direction. ***However, the decision failed to say that the government would get credit when stimulus funds are used for the customer contribution.***

Why not adopt the common sense position: give credit where credit is due!

Many people would find it hard to believe that CPUC would even *think* of denying credit to the federal government! However, current Commission policies would do exactly that, and the Decision said that "no changes to our rules or procedures are warranted at this time." Decision, p. 99.

The common sense position would be to give credit where credit is due: divide up the credit based on the relative contributions of federal funds vs. ratepayer funds vs. funds from all other sources including customers.

[26] ARRA guidelines issued up to now may not be equipped to address the peculiarities of California's EE measurement policies. However, the *intent* of the legislation is clear, that the federal government should get credit for the energy savings achieved with its funds.

[27] The Assigned Commissioner remarked that there would be a "30-fold increase" in EE funding, and multiple funders. Transcript All-Party Meeting on the Federal Stimulus (3-16-09), p. 36. Local governments in Calif. are expected to get $351.5 million from ARRA for EE and renewables projects. Decision, p. 100. IOU budgets for 2010-12 Local Government Partnerships total $265 million. Ibid p. 247. Clearly, there is a need to change attribution policies.

However, the Commission could not take the common sense position without undermining the goals and the "risk/reward" incentives mechanism. This is because ***it is*** *necessary for utilities to get energy savings credit from the "customer contribution" in order to meet the goals, which is the basis for utilities to receive profits*.

The Decision is untenable because the Federal government rightfully wants and deserves credit for every dollar it spends on EE:

> Specifically, US DOE has established a target for the minimum additional energy savings expected per dollar of ARRA funding, measured against a baseline of state-level efficiency activity. (Decision, p. 89)

Local governments will be caught in the middle, because they are responsible for reporting energy savings credit to the feds.

What remedy is needed?

The decision implied that there might be another, later decision on this topic. What would that decision need to do? Would classifying federal dollars as "net" solve the problem? D0905037 reminded us that the Commission sought to encourage IOUs to work with other entities, including government entities, ***by giving IOUs credit for the work of all other entities in one part of the Risk/Reward calculations*** (the Minimum Performance Standard, or "MPS"), though at the same time *denying IOUs the credit for the work of other entities in the other part of the Risk/Reward calculations* (the Performance Earnings Basis, or "PEB"). FOF 27, D0905037, quoting D0807047, p. 19.

In other words, the MPS would use "gross" goals, but the PEB would be "net." Unfortunately, this provides little protection, *since the* ***Commission specifically overrode Net-to-Gross parameters*** — for both MPS and PEB — as a reason to deny utility profits when it awarded $82 million profits to utilities in D0812059.[28] (Having gross goals for MPS and net goals for PEB would also result in "double-counting," which the Decision said should be avoided, if the federal government demands credit for the savings achieved with stimulus funds, but the IOUs continue to receive credit for *all* savings

[28] D0812095, OP 1 authorized utility profits based on utility self-reports in part "because there are serious questions concerning the validity of *ex ante* assumptions used to validate the Investor-Owned Utilities' (IOUs) 2006-2007 interim incentive claims." The decision explained that "[T]he NTG ratio has engendered substantial controversy throughout this proceeding. This can be largely attributed to *the inherent difficulty in developing a robust number that quantifies the level of energy efficiency measure deployment that would have occurred in the absence of utility programs.*" Ibid. p. 18. The question of how much EE would have occurred in the absence of the federal stimulus will be similarly controversial — especially if the Commission attempts to credit IOUs with energy savings achieved with federal stimulus dollars. *The only reasonable way to determine the state EE "baseline" is to apportion energy savings credit according to the percent of funding for each measure or program that was provided by each funding source.* (Note that utilities would get zero credit since "utility programs" are funded by ratepayers.)

achieved by all entities.)The only way to fully avoid having utilities profit on federal stimulus funds would be for the Commission to *explicitly change its attribution policies*. This is a major undertaking, not a little tweak to the Net-to-Gross. The Commission would need to completely overhaul the risk/reward incentives mechanism (RRIM), to remove the connection between incentives and utility administrators meeting the goals. This would essentially gut the purpose of the mechanism.

A much better solution would be to establish independent administration, at least of Local government programs, and to adopt an equitable distribution of energy savings credit for all participants.

Decision mischaracterized WEM and other parties' comments

The Decision mischaracterized comments on this topic by WEM and CCSF, making it appear that we were aligned with it. For example:

> WEM requests that the Commission ensure that energy savings resulting from federally funded programs <u>alone</u> are clearly separated from accomplishments attributed to utilities from ratepayer funded programs or measures... (Decision, p. 91)

We hardly recognized these as our comments. We said nothing about "federally funded programs *alone;*" on the contrary, our concern was with the funds being combined and resulting in profits for utilities, which we found unconscionable. We wanted to make sure the feds got credit for the stimulus dollars.[29]

The Decision also selectively quoted CCSF's comments as noted above — whereas CCSF (and WEM) repeatedly demanded that CPUC allow cities to administer their own programs so that they could fully leverage federal stimulus funds with ratepayer funds and other sources — rather than be "partners" controlled by profit-hungry utilities. WEM and others also requested that local governments receive energy savings credit for their "partnerships" so that they could meet AB32 requirements and benefit from carbon offsets and cap and trade.

7. Decision failed to coordinate energy efficiency with procurement

> PU Code §453(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Finding of Fact 1 cites PUC Code § 454.5(b)(9)(c), which states:

> 454.5(b) An electrical corporation's proposed procurement plan shall include, but not be limited to, all of the following:
> (9) A showing that the procurement plan will achieve the following:

[29] E.g. WEM 9-21-09 Reply, pp. 4-5, 4-17-09 Protest, p. 8, 6-29-09 Comment, pp. 8, 11.

> (C) The electrical corporation will first meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible.

The decision allowed utilities to continue to perpetrate energy efficiency (EE) programs that sidestep and ignore the basic purpose of EE – to defer/displace supply side resources. There is little relationship — and no attempt to create one — between EE programs and the "unmet resource needs" of the utilities. For example, OP33.b. ordered utilities to establish "internal Integration Teams with staff from EE, DR, DG, marketing, and delivery channels." Procurement staff was not included in these teams.

The decision failed to require utilities or EM&V contractors to identify the location of energy savings or EE spending. Location of energy savings is required in order to qualify EE as viable grid resources, according to *The New England ISO Manual for Measurement and Verification of Demand Reduction Value from Demand Resources (April 13, 2007) requires the address of the Project Location* (p. 2-2) which WEM attached to our 5-5-09 Reply Comments and asked the Commission to consider.

WEM has frequently raised questions about the lack of a relationship between EE and procurement in procurement proceedings as well as EE proceedings. In response to WEM's cross-examination in June 2007 hearings in R0602013 (the Long Term Procurement Proceeding) PG&E procurement planners, including witness Luis Alvarado testified that they did not communicate with their EE planners, and they did not believe they could use EE measures to reduce peak load. *Almost all of PG&E's "unmet need" at the time was for peak resources.*[30]

Mr. Alvarado even rejected the idea that they could utilize more efficient air conditioning or "shell measures" such as insulation to reduce the peak. PG&E was only willing to address the peak with supply side resources.

For these and other reasons, WEM has argued in this and other proceedings that EE did not actually "defer or displace" any specific "unmet need." WEM has urged the Commission to coordinate EE with procurement, and has provided tools to do this.

III. Conclusion

For all the reasons described above, Women's Energy Matters requests that the Commission rehear D0909047, and provide the relief requested herein.

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[30] The procurement decision, D0712052, credited only 20% of the EE goals as actually available to reduce load, because of confusion about how much EE might still be "embedded" in the demand forecast. D0712052, p. 46. [The decision spoke of an "overlap" factor of 80%, meaning that 80% of the goals are assumed to be embedded, and only 20% are available to serve load.]

Dated: November 2, 2009

Respectfully Submitted,

/s/ Barbara George

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CERTIFICATION OF SERVICE
A0807021 et al.

I, Barbara George, certify that on this day November 2, 2009 I caused copies of the attached **WOMEN'S ENERGY MATTERS APPLICATION FOR REHEARING OF D0909047** to be served on all parties by emailing a copy to all parties identified on the electronic service list provided by the California Public Utilities Commission for this proceeding, and also by efiling to the CPUC Docket office, with a paper copy to Administrative Law Judge David Gamson and Presiding Commissioner Dian Grueneich.

Dated: November 2, 2009 at Fairfax, California.

/s/ Barbara George
____
DECLARANT

(Electronic service List attached to original only)

Service List A0807021 et al.

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