

Decision 10-05-050 May 20, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

**DECISION MODIFYING DECISION 05-12-041 TO CLARIFY THE
PERMISSIBLE EXTENT OF UTILITY MARKETING WITH REGARD TO
COMMUNITY CHOICE AGGREGATION PROGRAMS**

1. Summary

Decision (D.) 05-12-041 finalized the procedures for implementing community choice aggregation (CCA¹) programs by which local governments may offer procurement service to electric customers within their political boundaries, including the procedures for informing customers of CCA programs and of their option to take or decline service from the CCA. The City and County of San Francisco petitions to modify D.05-12-041 to, among other things, restrict utilities from marketing against CCA programs.

We modify D.05-12-041 (1) to make clear that, if utilities engage in commercial speech concerning CCA service and the utility's competing service that is untrue or misleading, they may be liable for penalties and subject to a temporary restraining order or preliminary injunction in a complaint before the Commission; and (2) to prohibit the utilities from offering alternative opt-out

¹ "CCA" also refers to a community choice aggregator, i.e., the entity providing the CCA procurement service.

mechanisms than those identified in the CCA-specific information provided by the CCA pursuant to Resolution E-4250 and revise the utilities' CCA tariffs accordingly.

2. Background

Assembly Bill 117 (2002 Stats., ch. 838) enables local governments to develop community choice aggregation (CCA) programs to offer procurement service to electric customers within their political boundaries, and confers general jurisdiction on the Commission to develop the terms and conditions for implementing CCA programs. Decision (D.) 05-12-041, issued in this rulemaking, finalized the procedures for implementing CCA programs including the procedure for informing customers of CCA programs, for informing customers of their option to opt out of service from the CCA, and for effecting the change in service provider from utility to CCA.

In the proceedings leading to the issuance of D.05-12-041, the electric utilities represented that they had no intention to engage in marketing that would disparage CCA programs or to encourage customers to opt out of CCA service. Starting in mid-2007, Pacific Gas and Electric Company (PG&E) reversed its position from supporting the implementation of CCA programs to opposing them, and began to aggressively market against their implementation and to solicit customers to opt out of them, to the effect that such programs have been, or are at risk of being, abandoned. Among other things, PG&E has made presentations to city councils to discourage their membership in a CCA program, sponsored mailers to customers to encourage them to oppose their local governments' membership in a CCA program and to opt out of any such CCA program (even before the program has been implemented), and is sponsoring a proposed initiative amendment to the California constitution that would require

a two-thirds vote before a local government could implement a CCA program or use public funds or financing, including revenues from rates, to start or expand electric delivery service.²

The City and County of San Francisco (CCSF) presents several examples of PG&E's representations regarding CCA programs that CCSF claims are deceptive, misleading or untruthful:

- In slide presentations to the City of Mill Valley and the Town of Tiburon in October 2009, PG&E stated that the Marin Energy Authority (MEA) program contained "hidden costs," "hidden greenhouse gas compliance costs," "hidden joint and several liability" and a "hidden tax on Marin taxpayers" - even though the MEA had not yet determined the rates, terms and conditions of service for customers.
- A mailer to San Francisco and Marin customers prepared by, respectively, CommonSenseSF and Common Sense Marin, the only identified member of which is PG&E, warns "don't be left in the dark," describes the CCA program as a "risky scheme" that was "[c]reated by Sacramento legislation" that "automatically enrolls you - whether you like it or not - unless you opt out" at the cost of "unspecified 'exit fees,'" and as a "costly and unnecessary energy scheme" with bills "24% higher under CCA" than from the utility.

CCSF asserts that, in view of PG&E's changed position and associated conduct, restrictions are necessary to enforce the utilities' duty under Pub. Util. Code § 366.2(c)(9) to cooperate fully with CCAs, and to mitigate utility monopoly advantage and customer confusion. Specifically, CCSF petitions to modify

D.05-12-041 to:

² The proposition, Proposition 16, has qualified for the June 8, 2010, ballot.

- bar utilities from marketing³ to retail customers related to CCA programs;
- bar utilities from engaging in conduct designed to thwart CCA programs, except when such conduct is expressly protected by the constitution;
- bar utilities from soliciting opt-out requests;
- bar utilities from dictating the opt-out mechanism;
- clarify that utilities are prohibited from making deceptive, misleading or untruthful communications regarding CCA programs; and
- provide that CCA programs may seek and, upon a proper showing, obtain a temporary restraining order or preliminary injunction against utility violations of their obligations to CCA programs.

PG&E, Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) filed responses opposing the petition, and MEA, the San Joaquin Valley Power Authority, The Utility Reform Network, and Women's Energy Matters (WEM) filed responses in support of the petition, on February 10, 2010. CCSF filed a reply to the responses on February 22, 2010.

3. Procedural Issues

3.1. Request for Summary Dismissal

CCSF petitions to modify D.05-12-041 on the basis that the decision relied on the key assumption that utilities were neutral or even supportive toward CCA programs, and that this assumption is no longer true as evidenced by PG&E's changed position and conduct in opposition to CCAs.

³ CCSF defines such marketing as communications to retail customers that discuss the rates or services of a CCA program, have the purpose or effect of discouraging customers from taking service from a CCA program, or have the purpose or effect of encouraging or facilitating the utility's retention of customers.

PG&E asserts that D.05-12-041 did not rely on utility neutrality or support toward CCA programs, as evidenced by the fact that D.05-12-041 expressly notes the potential for CCAs and utilities to compete for market share and provides that any such activity should be at shareholder expense. We agree that D.05-12-041 contemplated the potential for utilities to compete for market share by encouraging customers to opt out of service from CCAs and remain or become customers of the utility. However, we cannot conclude that D.05-12-041 contemplated utility activity to prevent the implementation of CCA programs. The undisputed facts that PG&E has engaged in conduct encouraging customers to oppose their local government's participation in a CCA program, encouraging local governments not to participate in a CCA program, and promoting a state proposition to require two-thirds' voter approval as a prerequisite to the implementation of a CCA program are changed circumstances that warrant the Commission's consideration of CCSF's petition to modify D.05-12-041.

SDG&E asserts that the petition fails to comply with Rule 16.4(b) because it is based on the broad and unsubstantiated allegation that *all* utilities are unsupportive of CCAs. SDG&E's assertion is without merit. CCSF's factual allegations are limited to PG&E's conduct and are undisputed.

PG&E also asserts that the petition should be denied for failure to timely file the petition pursuant to Rule 16.4(d), which requires a petition to be filed within one year after the decision to be modified was issued or to explain why it could not have been filed in that time. PG&E asserts that CCSF could have brought this petition, if not within one year after D.05-12-041 was issued, at least one year after the Commission issued its decision approving the settlement of Case 07-06-025, *San Joaquin Valley Power Authority v. PG&E*, which charged PG&E with similar behavior as identified in this petition. To the contrary, Rule 16.4(d)

does not impose a further requirement that a petition to modify a decision in one proceeding be filed within a year of a decision in another proceeding that may arguably raise related issues. CCSF justifies its petition on the basis of facts that did not arise until after one year of the issuance of D.05-12-041.

For these reasons, PG&E's and SDG&E's requests for summary dismissal are denied.

3.2. Request for Evidentiary Hearing and Clarification Regarding Linkage of CCAs to Energy Efficiency Funds

WEM asks the Commission (1) to conduct evidentiary hearings in order to investigate whether PG&E has engaged in improper marketing by promising energy efficiency funds to local governments on the condition that they reject CCA programs, and (2) to define what the Commission meant by prohibiting utilities from "us[ing] energy efficiency funds in any way which could discourage or interfere with a local government's [consideration or implementation of a CCA program]," as ordered in D.09-09-047, the decision in Application (A.) 08-07-021 et al. approving the electric utilities' 2010 to 2012 energy efficiency portfolios and budgets. Specifically, WEM asserts that the record in A.08-07-021 et al. includes substantial evidence that PG&E improperly promised energy efficiency funds to local governments on the condition that they reject CCA programs, and that D.09-09-047 insufficiently guards against such misuse of energy efficiency funds.

D.09-09-047 determined that the record evidence did not demonstrate improper marketing efforts by PG&E with respect to energy efficiency funds and considered WEM's comments on the proposed decision critiquing D.09-09-047 in this regard. The issues that WEM raises regarding PG&E's alleged linkage of energy efficiency funds to local governments' rejection of CCA programs have

been addressed by the Commission in A.08-07-021 et al. and Resolution E-4250, have been raised again in R.09-11-014, and are beyond the scope of this proceeding.

The pleadings present no disputed material issues of fact. Accordingly, evidentiary hearings are not needed.

4. Prohibition against Untrue or Misleading Commercial Speech

CCSF seeks modification of D.05-12-041 to clarify that utilities are prohibited from making deceptive, misleading, or untruthful communications regarding CCA programs. It is clear that commercial speech that is untrue or misleading is not protected speech. (See *Central Hudson v. Public Service Commission* (1980) 447 U.S. 557, 563; California Business & Professions Code Sec. 17500.) We modify D.05-12-041 to make clear that, if utilities engage in such improper communications, they will be subject to a complaint before the California Public Utilities Commission (CPUC), where they will be subject to penalties.

5. Temporary Restraining Order/Preliminary Injunction in Complaint

CCSF seeks modification of D.05-12-041 to clarify that the presiding officer⁴ in a CCA complaint case has the authority to hear and grant a temporary

⁴ CCSF loosely identifies the “presiding officer” as having the authority at issue. While a presiding officer, if designated, does indeed have such authority, a motion for temporary injunctive relief may arise before the issuance of a scoping memo that designates the presiding officer. (Rule 7.3(a).) Thus, the authority to rule on a request for interim relief, subject to confirmation by the full Commission, resides with the assigned Administrative Law Judge and/or the presiding officer, who may be the assigned Commissioner or the assigned Administrative Law Judge.

restraining order or preliminary injunction pending confirmation or rejection of such order by the full Commission. This procedure is fully within our authority and consistent with Pub. Util. Code § 310 and our practice under Rule 14.6(c)(1). While we agree with SCE's assertion that D.05-12-041 does not need to be modified to establish that authority, we nevertheless modify D.05-12-041 to alert stakeholders of the availability of such relief in order to provide a measure of certainty to CCA programs that they will have the opportunity to obtain prompt relief to prevent irreparable harm.

6. Solicitation of Opt-Out Requests

CCSF seeks modification of D.05-12-041 to bar utilities from soliciting opt-outs. Subsequent to the filing of this petition, the Commission approved Resolution E-4250⁵ which specifically bars utilities from soliciting or accepting opt-out requests until the CCA-specific information about the terms and conditions of service becomes available to customers when the CCA provides this information in compliance with the Section 366.2(c)(13)(A-C) notification requirement. As we explained there that this requirement is necessary and appropriate to serve the purpose of this code section to give potential CCA customers an opportunity to make an *informed* decision. With the issuance of Resolution E-4250, no further modification to D.05-12-041 is necessary to address this issue.

CCSF's petition for modification anticipated the issuance of Resolution E-4250, and nevertheless requests modification of D.05-12-041 to extend the bar on utility solicitations to bar them at any time (unless invited to

⁵ There is a pending application for rehearing of Resolution E-4250, and today's decision is not intend to act on or prejudice that rehearing application.

do so by the CCA provider). Although, in the past we have referred to utilities “soliciting” opt-out requests, we intend to avoid that terminology in the future, because it can be ambiguous. The term “soliciting” can refer (i) to a utility asking its customers to now use the utility’s mechanisms for opting out, as well as more broadly (ii) to utility marketing to encourage customers to opt out. Insofar as CCSF’s proposed further modification addresses utility marketing, it raises First Amendment issues that we address in conjunction with CCSF’s related proposed modifications in part 8, below. Insofar as CCSF’s proposed further modification concerns the narrower issue of how customers opt out, we note that we have addressed the mechanisms for opting out in Resolution E-4250 and we further address them in the next section of this decision.

7. Determination of Opt-Out Mechanisms

CCSF seeks modification of D.05-12-041 to make clear that the CCA program is solely responsible for determining which single opt-out mechanism should be offered to customers, as required by Section 366.2(c)(13)(C). Specifically, Section 366.2(c)(13)(C) provides that the CCA shall provide customers with four notifications that include a mechanism by which the customer may opt out of CCA service. CCSF asserts that this provision gives the CCA sole discretion over the form of the opt-out mechanism. CCSF specifically objects to PG&E’s Tariff Rule 23.I.1 and the language stating: “the utility shall provide an opt-out process to be used by all CCAs.” We note that PG&E’s Tariff Rule 23.I. similarly states: “[t]he CCA shall use PG&E’s opt-out process.”

The revised tariff language required by Resolution E-4250 already states that the method of opting out shall be “as prescribed in the CCA Notification.” Therefore, consistent with Public Utilities Code Section 366.2(c)(13)(C), the CCA

is free to prescribe methods that do not require the use of the utility's opt-out process.

Resolution E-4250 also provides that utilities may not "solicit" opt-outs until the CCA provides customers with CCA-specific information about the terms and conditions of service. This information reasonably should include CCA-specific information about the opt-out mechanism. Allowing the utility to offer customers an alternative opt-out mechanism other than the one presented by the CCA would create customer confusion. We modify D.05-12-041 to prohibit such action by the utilities. Accordingly, this decision directs the utilities to revise the introduction and subsection 1 of Section I of their CCA tariffs to read as follows:

I. CCA CUSTOMER OPT-OUT PROCESSES

Pursuant to Pub. Util. Code § 366.2(c)(13)(A)(i), CCA-issued Customer Notifications required for automatic enrollments into the CCA program shall include the opportunity for customers to opt out of CCA Service and continue to receive their existing service. Pursuant to Pub. Util. Code § 366.2(c)(13)(C), the opt-out may take the form of a self-addressed return postcard indicating the customer's election to remain with, or return to, electrical energy service provided by the electrical corporation, or another straightforward means by which the customer may elect to derive electrical energy service through the electrical corporation providing service in the area. Pursuant to Pub. Util. Code § 366.2(c)(13)(B), a CCA may request that the Commission approve and order the utility to provide the Customer Notifications required in Subparagraph (A). If the CCA makes this request and the Commission approves it, the CCA shall use [the utility's] opt-out process as set forth in subsection 1. below.

1. The utility shall provide an opt-out process to be used upon request by a CCA. The utility shall offer at least two (2) of the following options as a part of its opt-out process:

- a. Reply letter or postcard (postage paid) enclosed in CCA Customer Notifications.
- b. Automated phone service.
- c. Internet service.
- d. Customer Call Center contact.

PG&E and the Committee on Jobs (Committee) oppose the above revised tariff language in their Comments. PG&E argues that we should permit *and require* both utilities and the CCA to offer customers at least *two* of the four methods for opting out listed in subsection 1 of Section I, above. Both PG&E and the Committee ignore the fact, noted in the revised tariff language, that Public Utilities Code Section 366.2(c)(13)(C) specifically provides:

The opt-out may take the form of a self-addressed return postcard indicating the customer's election to remain with, or return to, electrical energy service provided by the electrical corporation, or another straightforward means by which the customer may elect to derive electrical energy service through the electrical corporation providing service in the area.

Thus, PG&E and the Committee ask us to disturb the Legislature's apparent intention that this one method of submitting an opt-out, or a similarly straightforward method, is sufficient. In support of its argument PG&E cites to the methods by which Direct Access (DA) customers indicate their election to receive their electrical energy service through a provider other than the IOU.⁶ However, the Legislature has determined that DA and CCA service are sufficiently different that customers must "opt in" to DA service while customers must opt out of CCA service. Accordingly, we are unconvinced that there are

⁶ Indeed, a number of the methods mentioned by PG&E appear to track the requirements for how customers must opt in to DA service. See Pub. Util. Code § 366.5.

sufficient reasons for disturbing the Legislature's apparent intention regarding the methods for opting out that must be provided to customers.

CCSF has suggested that we make additional changes to the CCA Tariffs. We have adopted its suggestions, as they represent the minimum additional changes necessary to conform other tariff language to the revised tariff language set out above. The precise tariff language we are adopting is contained in Ordering Paragraph 2.

8. Prohibition against Marketing to Customers Against CCA Programs

CCSF seeks modification of D.05-12-041 to prohibit utility marketing regarding a CCA program, which it defines as communications that discuss the rates or services of a CCA program or that have the purpose or effect of discouraging retail customers from taking service from a CCA program or encouraging them to remain customers of the utility.⁷ CCSF argues that the proposed restrictions are constitutionally permissible restrictions on free speech because the speech at issue is commercial speech which, as expressed in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 577 (1980) and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), may be subject to restrictions that directly advance, and are a reasonable fit with, a substantial governmental interest. CCSF argues that the proposed restrictions directly advance, and are a reasonable fit with, the substantial governmental interest in ensuring full utility cooperation with CCA programs and avoiding

⁷ CCSF's proposed bar on utility solicitation of opt-outs, discussed in part 6, would presumably fall within this class of communication.

anti-competitive leveraging of utility market power as required by Section 366.2(c)(9), and in avoiding customer confusion.

We disagree with CCSF's interpretation of Section 366.2(c)(9) as stating a governmental interest in prohibiting utilities from marketing against CCAs. There is nothing in the language of Section 366.2(c)(9) and its definition of "cooperation" that suggests a duty on the part of utilities to refrain from marketing their competing generation service or otherwise marketing against CCAs. D.05-12-041 reflects this understanding in its consideration of whether to, and determination not to, bar utilities from marketing against CCA programs as a term and condition for the implementation of Section 366.2. Specifically, although D.05-12-041 notes our concern that "there is little benefit from permitting a battle for market share between CCAs and utilities" (at p.22), and finds that "[u]tility marketing of procurement services to CCA customers and providing information about a CCA's services and rates to customer may create conflicts of interest and costs that may not be offset by benefits" (Finding of Fact no. 10), it omits the proposed decision's conclusion of law that would have barred utilities from marketing their services to CCA customers or characterizing a CCA's services or rates to customers (Proposed Decision of Administrative Law Judge (ALJ) Malcolm, issued November 2, 2005, Conclusion of Law no. 12), and inserts in its stead the conclusion of law that such activity, if done, should be at shareholder expense (Conclusion of Law no. 14).

Certainly, Section 336.2(c)(9) evidences a substantial governmental interest in encouraging the development of CCA programs and allowing customer choice to participate in them. Prohibiting utilities from engaging in commercial speech concerning CCA service and the utility's competing service that is untrue or misleading, prohibiting them from accepting opt-outs before the CCA has

informed the customer of the terms and conditions of its services, and clarifying which entity has the sole responsibility for determining the opt-out mechanism, as we provide in this decision and in Resolution E-4250, directly advance these interests. However, prohibiting utilities from marketing against CCAs would be more excessive than reasonably necessary.⁸ Moreover, a statute should generally be construed so as to avoid raising serious constitutional questions. Because a ban on all utility marketing against CCA service would raise a serious constitutional question, and because Section 366.2(c) nowhere specifically references any intent to limit speech, we construe it so as not to require an outright ban on marketing against CCA service.

In its Comments on the Proposed Decision, CCSF asserts that, in refusing to ban IOU marketing against CCAs, we have ignored the Commission's interests in (i) restraining the ability of utilities to unfairly exploit their monopoly advantages in competitive markets and (ii) preventing customer confusion. We do not doubt that these are important interests. However, CCSF contends that these interests justify a ban on even truthful IOU marketing against CCAs. We do not agree. Flat-out bans on speech are disfavored. None of the case law, or Commission precedent, cited by CCSF upholds, or orders, such a ban on commercial speech as CCSF proposes here. Each of them allowed only lesser restrictions on speech. As noted elsewhere in this decision, CCSF and others may propose, in the continuation of this proceeding, restrictions more limited

⁸ The utilities argue that some, if not all, of the speech is political, not commercial, and thus fully protected by the First Amendment. (See, e.g., *Citizens United v. Federal Election Commission*, U.S. Supreme Court, No. 08-205, January 21, 2010.) Because we find that the proposed prohibitions on (non-misrepresentative) speech are unjustified even with respect to commercial speech, we do not reach this issue.

than a ban on all IOU marketing against CCAs that may be justified by these interests.

9. Prohibition Against Conduct Designed to Thwart CCA Programs

CCSF further seeks a modification to prohibit utilities from engaging in actions or conduct that are designed to frustrate or impede the investigation, pursuit, or implementation of a CCA program, except in the limited case in which the utility can conclusively demonstrate that the actions or conduct are constitutionally protected. However, CCSF does not allege any specific behavior(s) that it wishes to prohibit, nor otherwise specify the relief it seeks. Under these circumstances, we decline to grant any relief at this time.

10. Comments on Proposed Decision

The proposed decision of Commissioner Michael R. Peevey was mailed to the parties on May 4, 2010, in accordance with Section 311 of the Public Utilities Code. The time for public review and comment was reduced to 16 days pursuant to Rule 14.6(c)(9) of the Commission's Rules of Practice and Procedure, and the time for filing comments was set for no later than May 17, 2010. The public interest in the Commission issuing a decision at its regularly-scheduled May 20, 2010, business meeting clearly outweighs the public interest in having the full 30-day period for review and comment because of the need to have clear rules in place before CCSF begins implementation of its CCA program. Comments were filed on May 17, 2010, by CCSF, PG&E, MEA, WEM, and the Committee on Jobs (Committee). We have made a number of changes in other parts of the decision to reflect these comments. To the extent we have not made other changes

requested, we have found the arguments in support of them unpersuasive. In this section of the decision we only discuss a few comments on some key issues.

PG&E argues that no restrictions should be placed on any of its speech, while CCSF and MEA argue that the IOUs should be barred from marketing against CCA service at any time (CCSF), or at least during the opt-out period (MEA). These competing arguments have not greatly helped us in considering exactly how to describe what kinds of statements the IOUs should be prohibited from making that falls short of a total ban on their marketing against CCA service.

However, upon further consideration of the language of the Proposed Decision, case law concerning free speech, and the Business & Professions Code, we have concluded that, at least for now, we should limit our prohibition to commercial speech concerning CCA service and the utility's competing service that is untrue or misleading. As such untrue or misleading commercial speech is already prohibited under Business & Professions Code Sections 17500 and 17200, our simultaneous prohibition of such speech does not limit PG&E's free speech rights.

PG&E argues that we are unfairly singling out the IOUs, because we are not providing a forum for similar complaints against the CCAs.⁹ PG&E's argument ignores the fact that the Legislature has given us general jurisdiction over public utilities (see, e.g, Public Utilities Code Section 701), in order to prevent market abuses that they might otherwise engage in, but has given us

⁹ PG&E argues that it is illegal to regulate one party's speech without regulating its competitor's speech. Here, however, its competitor's speech is already regulated by Business & Professions Code Sections 17500 and 17200.

only limited jurisdiction over CCAs. If PG&E believes that the CPUC can provide a forum for IOU complaints against CCA marketing, despite our limited jurisdiction over CCAs, it should, in this proceeding, suggest how we can lawfully do so.

For reasons explained elsewhere in this decision, we will not grant CCSF and MEA's requests to completely ban IOU marketing against CCA service. However, we would consider restrictions beyond those adopted in this decision if they fall short of a ban on marketing against CCAs, and if those parties can establish that such additional restrictions on commercial or other speech would lawfully prevent improper activity by the IOUs.

As noted above, we will entertain additional suggestions from parties to this proceeding. The assigned Commissioner may issue a ruling specifying how parties should submit these suggestions. Such a ruling may also ask the parties to comment on specific issues.

Finally, we note that this Decision does not expressly address the issue of opt-out requests where a CCA uses a phased implementation plan. If any party believes that that issue requires further consideration, given the changes to the opt-out process adopted in this decision, it should bring that matter to the Commission's attention.

11. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Amy Yip-Kikugawa and Hallie Yacknin are the assigned ALJs in this proceeding.

Findings of Fact

1. In the proceedings leading to the issuance of D.05-12-041, the electric utilities represented that they had no intention to engage in marketing that would disparage CCA programs or to encourage customers to opt out of CCA service.

2. Starting in mid-2007, PG&E has opposed local governments' participation in CCA programs and actively solicited customers to opt out of CCA programs.

3. PG&E's reversal of position from supporting the implementation of CCA programs to opposing them and associated conduct is a changed circumstance that warrants our consideration of this petition for modification.

4. Allowing the utility to offer customers an alternative opt-out mechanism other than the one presented by the CCA would create customer confusion.

Conclusions of Law

1. The petition for modification of D.05-12-041 complies with Rule 16.4.

2. The requests to dismiss the petition for failure to comply with Rule 16.4 should be denied.

3. The issues that WEM raises regarding PG&E's alleged linkage of energy efficiency funds to local governments' rejection of CCA programs have been addressed by the Commission in A.08-07-021 et al., and Resolution E-4250, have been raised again in R.09-11-014, and are beyond the scope of this proceeding.

4. The pleadings present no disputed material issues of fact. Accordingly, evidentiary hearings are not needed.

5. Untrue or misleading commercial speech is not protected speech.

Accordingly, we should now prohibit the utilities from engaging in commercial speech concerning CCA service and the utility's competing service that is untrue or misleading.

6. D.05-12-041 should be modified to make clear that, if utilities engage in such improper communications, they will be subject to a complaint before the CPUC, where they will be subject to penalties.

7. Administrative law judges and presiding officers have the authority to hear and grant a temporary restraining order or preliminary injunction pending confirmation or rejection of such order by the full Commission, consistent with Pub. Util. Code § 310 and our practice under Rule 14.6(c)(1).

8. D.05-12-041 should be modified to alert stakeholders of the availability of temporary restraining orders or preliminary injunctions in a CCA complaint case.

9. Pursuant to Resolution E-4250, utilities are specifically barred from soliciting or accepting opt-out requests until the CCA-specific information about the terms and conditions of service becomes available to customers when the CCA provides this information in compliance with the Section 366.2(c)(13)(A-C) notification requirement.

10. Information about the CCA-specific opt-out mechanism should be included with the CCA-specific information about the terms and conditions of service that, pursuant to Resolution E-4250, shall be provided by the CCA.

11. D.05-12-041 should be modified to prohibit the utilities from offering alternative opt-out mechanisms than those identified in the CCA-specific information provided by the CCA pursuant to Resolution E-4250.

12. The CCA tariffs should be modified to clarify that a CCA is not required to use a utility-provided opt-out process.

13. The governmental interests noted by CCSF do not justify a ban on all utility marketing against CCAs, including even truthful marketing.

14. CCSF has not provided sufficient detail to justify at this time an order prohibiting conduct designed to thwart CCA programs.

15. The public interest in the Commission issuing a decision on this petition as soon as possible in order to have clear rules in place before CCSF begins implementation of its CCA program clearly outweighs the public interest in having the full 30-day period for review and comment.

16. This proceeding should remain open.

17. We will entertain additional suggestions from parties to this proceeding: (A) as to how, if at all, the Commission can provide a forum for IOU complaints against CCA marketing, despite our limited jurisdiction over CCAs; and (B) what additional restrictions, if any, on utility speech the Commission should adopt, short of a ban on utility marketing against CCAs, that would lawfully prevent improper activity by the IOUs.

O R D E R

IT IS ORDERED that:

1. Decision 05-12-041 is modified as follows:
 - a. The following paragraph is inserted as the last paragraph of the discussion in Part IV on page 18:

However, we put all stakeholders on notice that utilities are prohibited from engaging in commercial speech concerning CCA service and the utility's competing service that is untrue or misleading. The Commission will entertain complaints against utilities for engaging in such improper communications where, in addition to penalties, the utility may be subject to interim relief, including a temporary restraining order or preliminary injunction, consistent with Pub. Util. Code § 310 and Rule 14.6(c)(1).
 - b. The following paragraph is inserted as the second-to-last paragraph of the discussion in Part VI on page 22:

We also direct that CCAs, and not utilities, shall determine the opt-out mechanism that will be used and include that information in the CCA-specific information provided by the CCA pursuant to Resolution E-4250. In order to avoid customer confusion, utilities are prohibited from providing alternative opt-out mechanisms to customers.

- c. The following ordering paragraphs are added:
 - 2A. PG&E, SDG&E, and SCE shall not engage in commercial speech concerning CCA service and the utility's competing service that is untrue or misleading.
 - 2B. CCAs shall determine the opt-out mechanism that will be used and include that information in the CCA-specific information provided by the CCA pursuant to Resolution E-4250. In order to avoid customer confusion, utilities are prohibited from providing alternative opt-out mechanisms to customers.
- 2. The utilities shall revise their community choice aggregation (CCA) tariffs (Rule 23 for Pacific Gas and Electric Company and Southern California Edison Company, and Rule 27 for San Diego Gas & Electric Company) as follows:
 - A. Section 1 and subsection 1.a. of Section D shall read:
 - D. BASIC COMMUNITY CHOICE AGGREGATION SERVICES
 - 1. In accordance with D.04-12-046 and D.05-12-041, the processes set forth below describe basic services provided by [the utility] to develop, implement and support CCA Service:
 - a. A standard opt-out service as defined in Section I.
 - B. Section H.1. shall read:
 - H. CCA CUSTOMER NOTIFICATION PROCESSES
 - 1. CCA Customer Notifications

A CCA must provide required CCA Customer Notifications to participating customers eligible to receive Automatic Enrollment into CCA Service during the Initial Notification Period and Follow-up Notification Period. The CCA shall be solely responsible for all obligations associated with CCA Customer Notifications and performing those obligations consistent with the requirements set forth in Pub. Util. Code § 366.2, the

CCA's Implementation Plan, Commission requirements and all applicable Commission orders. PG&E shall not be responsible for monitoring, reviewing or enforcing such obligations.

All notifications must include the necessary customer data and instructions that will allow customers to gain access to and complete the opt-out service described in Section I.

C. The introduction and subsection 1 of Section I shall read:

I. CCA CUSTOMER OPT-OUT PROCESSES

Pursuant to Pub. Util. Code § 366.2(c)(13)(A)(i), CCA-issued Customer Notifications required for automatic enrollments into the CCA program shall include the opportunity for customers to opt out of CCA Service and continue to receive their existing service.

Pursuant to Pub. Util. Code § 366.2(c)(13)(C), the opt-out may take the form of a self-addressed return postcard indicating the customer's election to remain with, or return to, electrical energy service provided by the electrical corporation, or another straightforward means by which the customer may elect to derive electrical energy service through the electrical corporation providing service in the area. Pursuant to Pub. Util. Code § 366.2 (c)(13)(B), a CCA may request that the Commission approve and order the utility to provide the Customer Notifications required in Subparagraph (A). If the CCA makes this request and the Commission approves it, the CCA shall use [the utility's] opt-out process as set forth in subsection 1 below.

1. The utility shall provide an opt-out process to be used upon request by a CCA. The utility shall offer at least two (2) of the following options as a part of its opt-out process:
 - a. Reply letter or postcard (postage paid) enclosed in CCA Customer Notifications.
 - b. Automated phone service.
 - c. Internet service.
 - d. Customer Call Center contact.

D. Subsection 6 of Section I shall read:

6. If a CCA using the utility's opt-out process pursuant to subsection 1 receives a customer request to opt out, the CCA should refer the customer to [the utility's] standard opt-out process. Otherwise, the CCA should inform the utility of such opt-out requests in a fashion that is mutually agreeable to the utility and the CCA so that the utility can update its records.
- E. Subsection 7 of Section I shall read:
7. [The utility] shall provide notice to the customer when the customer's opt-out request has been processed unless the CCA and the utility agree that the CCA shall provide such notice.
- F Subsection 8 of Section I shall read:
8. After the conclusion of the Initial Notification Period, in advance of the date of commencing Automatic Enrollment and prior to the customer's enrollment in CCA Service, [the utility] or the CCA may continue to accept customer opt-out requests and the utility and the CCA may make best efforts to process such requests before the customer's account switches to CCA Service. Opt-out requests that cannot be processed before the account switches shall be processed following the CCASR processing timing to return the customer's account to its previous service, as defined in this Rule.
- G. Subsection 11 of Section I shall read:
11. If a CCA elects to use a postcard or reply letter for the opt-out mechanism, the reply letter or postcard opt-out service must include a customer specific utility identifier preprinted on the reply letter/card if the utility makes such identifier available to the CCA.
3. The tariff changes ordered by the immediately preceding Ordering Paragraph shall be effective immediately and the utilities shall file advice letters with this language within 10 days of the effective date of this decision.

4. Rulemaking 03-10-003 remains open.

This order is effective today.

Dated May 20, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
NANCY E. RYAN
Commissioners

I reserve the right to file a dissent.

/s/ TIMOTHY ALLAN SIMON
Commissioner

I will file a concurrence.

/s/ JOHN A. BOHN
Commissioner

**Dissent of Commissioner Timothy Alan Simon
For Order Instituting Rulemaking to Implement
Portions of Assembly Bill 117 Concerning Community Choice Aggregation
R.03-10-003/ D.10-05-050**

Assembly Bill (AB) 117¹ enables local governments to develop a Community Choice Aggregation (CCA) program. This Order Instituting Rulemaking (OIR) modifies Decision (D.) 05-12-041, which finalized the procedures for implementing CCA programs by which local governments may offer procurement service to electric customers within their political boundaries, including the procedures for informing customers of CCA programs and of their option to take or decline service from the CCA.

Since we are early in the implementation of AB 117 and new CCA programs are still in the planning stages, it is conceivable and perhaps desirable to refine and improve the CCA program rules as this legislative mandate matures. However, it is also important for the California Public Utilities Commission (CPUC) to develop rules that result in a level procedural playing field for all the players – rules that don't advantage one participant over another regardless of the disparities between a publicly-traded utility and a community choice aggregator.

To provide context, when a CCA program is “certified” by the CPUC and is implemented by the CCA, customers automatically become a CCA customer, by default. If a customer wishes to return to their original status as a Investor Owned Utility (IOU) customer, the customer must take action to “opt out” of the CCA. The CCA is given the sole-governing authority to administer the “opt out” program. Or, the CCA can decide to have the IOU administer the program. It is under this framework that we are tasked with ensuring a fair and equitable process by which potential CCA customers have an opportunity to make an informed decision on the entity authorized to procure electricity in the wholesale procurement trading markets on behalf of the customers.

It is well founded that commercial speech that is untrue or misleading is not protected speech,² and the United States Constitution grants lesser protection to commercial speech than to other constitutionally guaranteed expression. The

¹ Migden, 2002 Stats., ch. 838.

² Central Hudson v. Public Service Commission (1980) 447 U.S. 557, 563; California Business & Professions Code Sec. 17500.

First Amendment nevertheless protects commercial speech from unwarranted governmental regulation. It is my belief that the governmental interests in encouraging the development of CCA programs and allowing customer choice to participate in them could be better served by a more limited and balanced bi-lateral restriction on commercial speech than the one adopted by the Proposed Decision.

Excessive unilateral restrictions on commercial speech may not pass the constitutional muster. Just as prohibiting utilities from marketing against CCA's would be more excessive than reasonably necessary, so too does an overly restrictive regulation raise serious constitutional questions. In fact, Public Utilities Code Section 366.2(c), which addressed the utilities' duty to cooperate fully with CCA's, does not specifically reference any intent to limit speech. However, the Proposed Decision is limiting the prohibition to commercial speech concerning CCA service and the utility's competing service that is untrue or misleading. We should handle these constitutional issues with care and avoid overly restrictive rules that may have a chilling effect on speech.

To be clear, I support Direct Access and Community Choice Aggregation. However, I have concerns that the rules we are adopting under this Proposed Decision may raise the issues mentioned above. It is important that the rules and restrictions on IOUs marketing to its customers or, by way of AB 117 - former customers, need not be more excessive than is reasonably necessary.

Further, there does not appear to be a forum for addressing complaints of potentially untrue and misleading information by the CCA's themselves, even as we concurrently restrict the IOU's speech. The Legislature has given us only limited jurisdiction over CCA's and general jurisdiction over public utilities. Under AB 117 CCA's are self-governing.³ However, our constitutional mandate to ensure that consumers have safe, reliable utility service at reasonable rates and to protect against fraud does grant us authority to make sure that we are giving potential CCA customers an opportunity to make an informed decision as to receiving safe, reliable utility service.

Finally, the current process may be confusing to customers. I am not convinced that the Proposed Decision offers meaningful clarification. Until the CPUC can

³ Migden, 2002 Stats., ch. 838, p. 2.

evaluate the totality of communications amongst competing interests with limited restrictions on commercial speech, can we advance direct access through, amongst other means, community choice aggregation.

It is for these reasons provided above that I must respectfully dissent on this Order.

/s/ TIMOTHY ALLAN SIMON

Timothy Allan Simon
Commissioner

D.10-05-050

R.03-10-003

CONCURRENCE OF COMMISSIONER BOHN

In this decision the Commission places restrictions on utility activities in an effort to ensure that consumers can make well informed decisions in choosing an energy provider, and to ensure that utilities do not unfairly subvert the Community Choice Aggregation (CCA) process. In particular, we clarify that the Commission will consider concerns that utilities' marketing efforts and commentary on CCAs run afoul of the State's Business and Professions Code prohibition of untrue or misleading commercial speech, and that the Commission may apply penalties or take other actions should a utility be found in violation.

We need to be careful that in our oversight of commercial speech, that we do not constrain free speech or even chill speech. It is our responsibility to ensure that utilities do not make misleading statements. That does not give us the right to dictate what speech is permissible. Utilities have the right, and some would argue the duty, to make their case to customers. We should not simply assume that any commentary on their part is misrepresentation, or that every claim by a proponent of a CCA is accurate and balanced. Where a proponent of a CCA is making inaccurate statements, the utility has an affirmative obligation to respond if it sees a problem.

I support this decision, and believe that the restrictions we adopt at this time are reasonable and should provide CCA proponents with a fair opportunity to compete for customers, without unduly restricting the reasonable activities of utilities. However, I am troubled by one aspect of this decision. I think we must be careful that in our efforts to ensure a fair opportunity for CCAs, we do not inadvertently tip the playing field. While we have in this decision clarified that

D.10-05-050

R.03-10-003

the Commission will use its regulatory authority to oversee utility commercial speech regarding CCAs, we have not applied the same regulatory oversight to the actions of CCAs.

It is within our jurisdiction, as I see it, to ensure that ratepayers are not harmed by misleading statements of any party. Rule 1.1 of the Commission's Rules of Practice and Procedure prohibit anyone, not just utilities, from making misleading or false statements to the Commission. Furthermore, in addition to the Commission's general regulatory authority under P.U. Code Section 701, P.U.Code Section 366.2(a)(14) states "The community choice aggregator shall register with the commission, **which may require additional information to ensure compliance with basic consumer protection rules and other procedural matters.**" (emphasis added.) As the Commission proceeds with refining its rules regarding CCAs, I believe that we must apply our regulatory oversight in an evenhanded manner, and provide basic consumer protections against inappropriate speech by any party.

Dated May 20, 2010 in San Francisco, CA.

/s/ JOHN A. BOHN
John A. Bohn
Commissioner