

**COMMISSIONER LYNCH DISSENT ON AB 117
ENERGY EFFICIENCY REHEARING DECISION**

AB 117 (Migden, 2002) requires the Commission to open up energy efficiency program administration to all providers, including Community Choice Aggregators (CCAs), rather than confining program administration solely to the utilities. The majority decision on the rehearing of the Commission's July 2003 decision interpreting AB 117 runs afoul of the clear intent of that legislation by continuing to conflate the implementation of energy efficiency programs with program administration and by avoiding the statutory directive to make third parties eligible to apply to administer energy efficiency programs. While I supported the initial decision on this matter (D.03-07-034), upon further review of the statute I realized the error of this interpretation and thus supported the Administrative Law Judge's (ALJ) August 2003 energy efficiency decision starting the 2004-05 program solicitation. The ALJ's decision, which correctly interpreted AB 117, would have opened over \$270 million in annual energy efficiency funds for competitive solicitation. The ALJ's decision did not prevail and, ultimately, D.03-08-067 was passed, to which I also dissented. D.03-08-067 opened only \$50 million annually in program funds for competitive solicitation, while allocating the majority of the remaining funds to the utilities. The majority decision today continues to misinterpret AB 117.

The portions of AB 117 related to energy efficiency state:

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. In determining whether to approve an application to become administrators, the commission shall consider the value of program continuity and planning certainty and the value of allowing competitive opportunities for potentially new administrators. The commission shall weigh the benefits of the party's proposed program to ensure that the program meets the following objectives:

(1) Is consistent with the goals of the existing programs established pursuant to Section 381.

(2) Advances the public interest in maximizing cost-effective electricity savings and related benefits.

(3) Accommodates the need for broader statewide or regional programs.

(b) All audit and reporting requirements established by the commission pursuant to Section 381 and other statutes shall apply to the parties chosen as administrators under this section.

(c) If a community choice aggregator is not the administrator of energy efficiency and conservation programs for which its customers are eligible, the commission shall require the administrator of cost-effective energy efficiency and conservation programs to direct a proportional share of its approved energy efficiency program activities for which the community choice aggregator's customers are eligible, to the community choice aggregator's territory without regard to customer class. To the extent that energy efficiency and conservation programs are targeted to specific locations to avoid or defer transmission or distribution system upgrades, the targeted expenditures shall continue irrespective of whether the loads in those locations are served by an aggregator or by an electrical corporation. The commission shall also direct the administrator to work with the community choice aggregator, to provide advance information where appropriate about the likely impacts of energy efficiency programs and to accommodate any unique community program needs by placing

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more, or less, emphasis on particular approved programs to the extent that these special shifts in emphasis in no way diminish the effectiveness of broader statewide or regional programs. If the community choice aggregator proposes energy efficiency programs other than programs already approved for implementation in its territory, it shall do so under established commission policies and procedures. The commission may order an adjustment to the share of energy efficiency program activities directed to a community aggregator's territory if necessary to ensure an equitable and cost-effective allocation of energy efficiency program activities.

In its decisions construing AB 117, as codified in relevant part at § 381.1(a) of the Public Utilities Code, the Commission has conflated the meanings of “administration” and “implementation,” construing administration to mean implementation. In D.03-07-034, under consideration for rehearing in this order, the Commission explicitly equated “administer” as used in § 381.1, with “implement”:

The Commission’s existing policies and procedures for selecting energy efficiency programs and administrators (or “implementers” as defined by the Commission’s energy efficiency policy manual) generally fulfill those portions of AB 117 that require the Commission to permit non-utilities to apply for program funding and that articulate policy criteria for selecting programs to be funded with revenues collected pursuant to Section 381.

D.03-07-034, Finding of Fact 2, slip op. at 19. In D.03-08-067, the Commission reaffirmed this conclusion, and treated AB 117 as though the statute addressed the issue of how funding for program implementers must be allocated. *See e.g.*, D.03-08-067, Conclusions of Law 2, 3, 4, 6, slip op. at 36. The same conflation appears in the Commission’s Energy Efficiency Policy Manual, version 2, which was updated for D.03-07-034, and which states, “For purposes of implementing PU Code § 381.1, an “administrator” is any party that receives

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funding for and implements energy efficiency programs pursuant to PU Code § 381.” *Id.* at 35. This conflation of the meanings of the two terms appears to be inconsistent with the plain meaning of the statute, and with past Commission decisions.

First, “administration,” as used in PU Code § 381.1, means oversight and management, not implementation. In construing a statute, the ordinary meaning of words controls, unless the statute is ambiguous:

When looking to the words of the statute, a court gives the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.

Pratt v. Vencor, Inc., 105 Cal. App. 4th 905, 909 (2003).

Here, the meaning of “administer” in § 381.1 is clear and unambiguous – and it does not comport with the meaning the majority has ascribed to it in the underlying decision. In a similar context, the California Court of Appeal recently described the difference between those who oversee programs, and those who actually implement the programs this way:

“Administration” is commonly defined as “the act or process of administering; performance of executive duties; management.”

(Webster's New Collegiate Dictionary (9th ed.1988) p. 57.)

“Management” is defined as “the act or art of managing; the conducting or supervising of something (as a business).” (*Id.* at p. 722, 150 Cal. Rptr. 250, 586 P.2d 564.) Black's Law Dictionary (6th ed.1990) at page 44 defines “administration” as “Management or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like.” . . .

“Performance” is defined as “the execution of an action, . . . something accomplished, . . . the fulfillment of a claim, promise or

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request” (Webster's New Collegiate Dict., *supra*, at p. 873) and “[t]he fulfillment or accomplishment of a promise, contract, or other obligation according to its terms. . . .” (Black's Law Dict., *supra*, at p. 1137.)

Southern Cal. Underground Contractors, Inc. v. City of San Diego, 108 Cal. App. 4th 533, 552-53 (2003). Thus, “administration” involves oversight and management, whereas “implementation” involves actual performance.

Besides the requirement that words in a statute must be given their ordinary meaning, courts “must construe identical words in different parts of the same act or in different statutes relating to the same subject matter as having the same meaning.” *Balasubramanian v. San Diego Community College Dist.*, 95 80 Cal. App. 4th 977, 988 (2000). Here, the ordinary meaning of the word, as described above, is the only meaning that harmonizes other sections of the PU Code that use “administer” in the context of energy efficiency programs. Specifically, § 399.4 of the PU Code charges the Commission to “administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority.” Because the Commission does not implement these programs, but simply supervises them, it is clear that “administer” as used in this section entails supervision, not actual performance of the energy efficiency programs.

Second, there are apparent inconsistencies between the relevant statutes and the underlying Commission decisions in this rehearing order. Consistent with the plain meaning of the statutory terms, prior to the decision under discussion, the Commission regularly has carefully distinguished between administration and implementation of energy efficiency programs. As one example, in D.01-11-066, the initial decision in this energy efficiency rulemaking, the Commission made clear that program administration means oversight:

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[T]he IOUs will be responsible for day-to-day contract administration for all electric and gas PGC-funded energy efficiency programs. This is an interim solution while we examine a range of energy efficiency administration options during the course of this proceeding.

D.01-11-066, slip op. at 32 (Nov. 29, 2001).

In that same decision, the Commission made equally clear that implementation of specific energy efficiency programs means performance of specific programs either by the IOUs or by third parties. *See, e.g., id.* at 16 (referring to “local programs implemented by non-utilities”); *id.* at 20 (referring to “third-party program implementers”).

Additionally, this set of decisions relied on the same distinction in allocating funding. The vast majority of energy efficiency funds were allocated to program implementation. *See id.* at 31. At the same time, 5% of all funds were set aside to cover the IOUs’ cost of administering programs implemented by third parties. *See, e.g.,* D.01-05-046, slip op. at 36.

As a final example, the same distinction between implementers and administrators is embodied in the actual contracts entered into between the IOUs (as program administrators), and third parties (as implementers). *See, e.g.,* ALJ Thomas' Second Ruling Regarding Contract Template For 2002-03 Local Energy Efficiency Programs - Local Programs Attachment, http://www.cpuc.ca.gov/word_pdf/RULINGS/17058.DOC, sections 3 (Implementer’s Obligations) and 4 (Utility Obligations).

Other decisions on the same subjects include D.02-04-063; D.02-06-026; and D.02-08-076. In construing AB 117, however, the majority decision on rehearing

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continues to abandon the Commission's consistent distinction between program administration and program implementation, without explanation.¹

The distinction between administration and implementation is significant and is reflected in the legislative history of § 381.1, which reveals that the concern of all involved was administration of energy efficiency funds and programs in the ordinary sense of the term discussed above. At the time AB 117 was being considered, the Commission had already begun to make funds available to third parties to implement energy efficiency programs but the utilities were still administering all energy efficiency funding, including controlling fund disbursement and determining how program funds should be spent within guidelines established by the Commission. *See* D.01-11-060. That is, no third party program had administrative control over energy efficiency funds. The legislative history of the bill, including documents from the author's files, indicates that the concern all parties sought to address was whether entities other than the utilities should be awarded a portion of energy efficiency funds to administer themselves.

The concern was not merely with allowing third parties to receive funds as program implementers, as third parties *already* were eligible to receive such funds. Thus, for example, PG&E, which supported the bill if amended, objected to the provisions of § 381.1 that allow third parties to administer programs, noting that if the bill was aimed at ensuring third parties can share in energy

¹ Note that in many cases, these past decisions make IOUs *both* program administrators, and program implementers. That is, the IOUs run their own programs. There is nothing inconsistent about this dual role and the distinction between the terms. As the court noted in *Southern Calif. Underground Contractors*, 108 Cal. App. 4th at 553, "There is nothing in these definitions to suggest that a contractor that performs under a contract cannot, at the same time, administer the contract. In this regard, a single contractor may very well carry out both labor and management functions in the execution of a contract."

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efficiency funds if they propose cost-effective programs, the bill would be solving a problem that does not exist. Similarly, San Francisco lobbied for the bill, arguing that it needed the ability to have a sum of money that it could manage itself. San Francisco argued that while the utilities were initially selected as the administrators of the energy efficiency programs because they already had an administrative structure in place, it was expected that others could take on the responsibility of managing these programs but that the Commission had not yet developed a process for evaluating alternatives to the utility management function. In a similar vein, Local Power noted that the goal of the bill was to see that there was local control of a share of the energy efficiency funds.

The Commission's interpretation of § 381.1(a), focusing on requirements for allocating funding for implementation of energy efficiency programs, is at odds with the language of the statute, past Commission decisions on energy efficiency, and the arguments in favor on the legislation. D.03-08-067, which purports to implement § 381.1(a), merely provides that third parties can apply to be awarded energy efficiency funds as program implementers – an issue that is not, in fact, the subject of the statute. The utilities remain the sole program administrators, as reflected in the cursory update to the Energy Efficiency Policy Manual attached to D.03-07-034, which makes clear that the utilities are the administrators of any contracts that award energy efficiency funding to third parties.

The only part of the administrative structure approved by the Commission majority that appears even to partially reflect the goals of § 381.1 is the fact that the Commission has taken over from the utilities the administrative task of selecting the third party programs that actually receive funding. Section 381.1, however, goes farther than that, and requires a system in which third parties,

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such as Community Choice Aggregators, can be awarded substantial sums of energy efficiency funds to administer themselves, including choosing what energy efficiency programs to fund, within the constraints imposed by the statute, and under the oversight of the Commission.

The majority seems to believe that the language on program continuity in the statute allows the Commission to make these decisions allowing the vast majority of the energy efficiency funds to go to the utilities. However, this argument misses the point of the statutory language because the issue is whether the statute requires that energy efficiency funds are available for third parties to administer programs rather than just to implement energy efficiency. Ultimately, the Commission must choose a portfolio of such programs – programs that it believes best meet the needs of California businesses and families. However, in the underlying decision considered today, the Commission did not even grant third parties the opportunity to apply to become administrators of energy efficiency programs, as required by statute, but rather only granted them the opportunity to implement a small portion of the total funds. By denying third parties even the opportunity to administer energy efficiency funds, the majority is skirting the clear intent of the Legislature.

Ultimately, what the underlying decision does is to establish guidelines for third parties to *implement* energy efficiency funds but does not require or even allow third parties to administer such funds. This interpretation, if carried to its logical extreme, would allow guidelines to be adopted but no funds ever to be awarded to third parties. This is illogical and a clear contravention of what the Legislature intended in this bill, which was to make a variety of entities available to administer energy efficiency programs.

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Additionally, it is unfortunate that the Commission has put low on its priority list the creation of the terms and conditions necessary to allow Community Choice Aggregation, the main purpose of AB 117. This effort was officially begun by Rulemaking R.03-10-003, which was started in October of 2003, more than one year after AB 117 was signed into law. It is unfortunate that the CCA Rulemaking was slow to start and is slow to move forward, preventing CCAs from forming and from creating the infrastructure to enhance their ability to administer energy efficiency programs. This delay causes a double problem, both preventing the formation of CCAs and enabling this Commission to give the utilities most of the energy efficiency dollars and continued power over third-party energy efficiency providers.

For the reasons outlined above, I dissent.

Dated January 8, 2004, at San Francisco, California.

/s/ LORETTA M. LYNCH

Loretta M. Lynch
Commissioner