

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4250

April 8, 2010

R E S O L U T I O N

RESOLUTION E-4250: This Resolution has been initiated by the Commission's Energy Division Staff. It has not been issued in response to an advice letter filing.

PROPOSED OUTCOME:

This Resolution directs Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) to modify their CCA tariffs and clarifies rules that are intended to:

1. Describe when customers may opt out of Community Choice Aggregation (CCA) service.
2. Prevent utilities from refusing to sell electricity to CCAs simply because they are CCAs.
3. Prevent utilities from offering goods, services, or programs as an inducement for a local government not to participate in a CCA.

ESTIMATED COST: No impact on utilities' revenue requirements.

SUMMARY

Assembly Bill (AB) 117 enables cities and/or counties to implement a Community Choice Aggregation (CCA) program which allows communities to offer procurement service to electric customers within their political boundaries. The CCA rules include a process that allows customers to opt out of the CCA-provided service in order to remain a utility bundled service customer. This Resolution clarifies that the utilities should not solicit or accept opt-out requests until the necessary information for an informed decision is made available to customers through the initiation of the notification period provided by Public

Utilities (P.U.) Code Section 366.2 (c)(13)(A-C). This Resolution also promulgates rules preventing utilities from (i) refusing to sell electricity to CCAs and (ii) offering goods, services, or programs as an inducement for a local government not to participate in a CCA.

BACKGROUND

The CCA program rules include a process that allows customers to opt out of CCA-provided service in order to remain a utility bundled service customer. P.U. Code Section 366.2 (c)(13)(A-C) states that CCAs shall provide customers with at least two notices during a 60-day period prior to the commencement of CCA service and at least two additional notices within a 60-day period following the customers' automatic enrollment into the program. These notices must inform customers that they are automatically enrolled into CCA service and that they can opt out of CCA service without penalty beginning on the first day customers receive their initial notices until 30 days after the customers receive their last notice pursuant to P.U. Code Section 366.2 (c)(13)(A-C). Pursuant to this code section, customers must also receive the "terms and conditions of the services offered" by the CCA with each of the (at minimum) four customer notices, which will enable customers to make an informed decision to either opt out of CCA service or to take no action and receive procurement service from the CCA.

P.U. Code Section 366.2 (c)(13)(A) states:

The community choice aggregator shall fully inform participating customers at least twice within two calendar months, or 60 days, in advance of the date of commencing automatic enrollment. Notifications may occur concurrently with billing cycles. Following enrollment, the aggregated entity shall fully inform participating customers for not less than two consecutive billing cycles. Notification may include, but is not limited to, direct mailings to customers, or inserts in water, sewer, or other utility bills. Any notification shall inform customers of both of the following:

- i. That they are to be automatically enrolled and that the customer has the right to opt out of the community choice aggregator without penalty.
- ii. The terms and conditions of the services offered.

San Joaquin Valley Power Authority (SJVPA) was the first CCA in California to have its Implementation Plan (IP) certified by the California Public Utilities Commission (Commission). SJVPA¹ was established in order to implement a CCA program in the Central Valley and has expressed concerns to the Energy Division regarding PG&E's CCA-dedicated webpage and PG&E's marketing trifolds that include a return mailer, which enable potential SJVPA customers to opt out of CCA service at anytime prior to its commencement.

In Marin County the Marin Energy Authority (MEA) is in the process of implementing a CCA program, and has voiced concerns to the Energy Division about PG&E's website which provided PG&E customers with an opportunity to opt out of any future CCA service to be offered in the PG&E service area.² MEA is concerned that potential CCA customers will seek to opt out of the CCA program before they are fully informed of the pertinent information concerning the terms and conditions of CCA service to be offered in Marin County. Accordingly, SJVPA and MEA request that PG&E stop this early opt-out process.

PG&E believes that its actions related to the early opt-out process are consistent with Commission rules. PG&E contends that Rule 23 I.3. of PG&E's electric tariffs enables it to process opt-out notices prior to the CCA formal notification period described in P.U. Code Section 366.2 (c)(13)(A-C). Therefore, PG&E believes that it is acting in accordance with the Commission's established rules pertaining to the CCA program.

A first draft of this Resolution (the "First Draft Resolution") was issued on August 7, 2009. A second draft of this Resolution (the "Second Draft

¹ As of the latest SJVPA Implementation Plan certified by the Commission on April 30, 2007, SJVPA consists of Kings County and the cities Clovis, Corcoran, Dinuba, Reedley, Selma, Kingsburg, Lemoore, Parlier, Hanford, Kerman, and Sanger. On June 25, 2009, SJVPA temporarily suspended its efforts to implement the CCA program, stating that resource constraints, market conditions, and the continued marketing against the CCA program by PG&E led to the temporary suspension.

² Municipalities within Marin County have created the Marin Energy Authority (MEA), which includes Belvedere, Fairfax, Mill Valley, San Anselmo, San Rafael, Sausalito, Tiburon, and Marin County. MEA plans to commence the first phase of its CCA program in May of 2010. MEA began its phase one notification process, pursuant to P.U. Code Section 366.2(c)(13)(A-C), on February 5, 2010.

Resolution”), which incorporates important changes, was issued on December 22, 2009.

NOTICE

The Commission is issuing this Resolution on its own motion. Notice of this Resolution has been provided by distributing the Resolution to all persons or entities³ served with Resolution E-4013 (which approved the current CCA tariffs of the three utilities) and any additional persons or entities listed on the current R.03-10-003 service list for the CCA proceeding. In this manner PG&E, SCE, SDG&E, SJVPA, Novato, and MEA are among those served with this notice.

DISCUSSION

P.U. Code Section 366.2 (c)(13)(A-C) establishes an orderly process that CCAs must follow when informing customers of their CCA service option. During the CCA program’s formal customer notification periods ordered in P.U. Code Section 366.2 (c)(13)(A-C), potential customers receive at least four notices regarding the CCA service being rendered by their community including information about rates and terms and conditions of service. After receiving this information, individual customers may make a decision to either: 1) take no action and therefore be automatically enrolled in CCA service, or 2) opt out of CCA service and remain a bundled service customer of the utility. Thus, the purpose of this code section is that potential CCA customers be given an opportunity to make an *informed* decision.

PG&E, SCE and SDG&E (the “utilities”) must not solicit or accept opt-out requests until the necessary information is made available to customers through the initiation of the notification periods provided by P.U. Code Section 366.2 (c)(13)(A-C). CCA-specific information about the terms and conditions of service becomes available to customers when the CCA provides this information in compliance with the P.U. Code Section 366.2 (c)(13)(A-C) notification requirement. Accordingly, to further the statutory purpose of allowing customers to make an informed decision, we direct the utilities not to

³ Both the First Draft Resolution and the Second Draft Resolution have been distributed to these persons or entities.

solicit or accept opt-out requests until the necessary information is made available to customers through the initiation of the notification periods provided by P.U. Code Section 366.2 (c)(13)(A-C). In addition, we direct the utilities to modify their CCA tariffs to be consistent with this limitation to the opt-out period; this will require changes to two subsections of the CCA tariffs.⁴ First, the utilities shall revise subsection B.22 to read as follows:

B.22. GENERAL TERMS: Opt-Out of Automatic Enrollment

The term "opt-out" or "opt out" is the customer's election not to be served under CCA Service and to continue to receive its existing service. In order to exercise its right not to participate in CCA Service, a customer must request to "opt out" of CCA Service through the required action as prescribed in the CCA Notification. A customer may exercise its opt-out right at any time during a 60-day notification period prior to Automatic Enrollment through the end of the second 60-day notification period subsequent to the Automatic Enrollment of a customer's account to CCA Service. The terms and conditions of CCA service will be made available by the CCA. This CCA-specific information will be provided to customers pursuant to P.U. Code Section 366.2 (c)(13)(A-C) - either directly by the CCA or by [the utility] pursuant to the provisions set forth in Section H - and will enable customers to make an informed decision whether or not to opt out of CCA service. Customers receiving section 366.2(c)(13)(A-C) notices regarding a CCA with more than one planned CCA phase-in date will be provided the required 60-day notices based around the date their particular phase-in commences.

PG&E, SCE, and SDG&E shall also modify subsection I.3 of the CCA tariffs by deleting the bolded language below:

I.3. CCA CUSTOMER OPT-OUT PROCESSES

A customer opting out of CCA Service **before or** during the Initial Notification Period shall be removed from the Automatic Enrollment process.

So that subsection I.3 shall read:

I.3. CCA CUSTOMER OPT-OUT PROCESSES

A customer opting out of CCA Service during the Initial Notification Period shall be removed from the Automatic Enrollment process.

⁴ The CCA tariffs are Electric Tariff Rule 23 for PG&E and SCE and Electric Tariff Rule 27 for SDG&E.

The electric utilities shall not make available to their customers any mechanism for opting out of CCA service before the initiation of the statutory notification periods provided by P.U. Code Section 366.2 (c)(13)(A-C). However, so long as PG&E does not know which customers are in MEA's phase one, it may make opt-out mechanisms available to customers throughout MEA's service territory, and then once it receives the list of MEA's phase one customers it shall cease providing these opt-out opportunities to MEA customers not in phase one and take the further steps described below.⁵ Customers receiving section 366.2(c)(13)(A-C) notices from a CCA with more than one planned CCA phase-in date will be provided at least two notices during a 60-day period prior to the date their particular phase-in commences and at least two more notices during the 60-day period immediately following the commencement of their particular phase-in. These customers cannot be opted-out prior to the notification associated with their planned phase-in.

Moreover, PG&E shall post the following language on its CCA dedicated webpage:

"You have the right to opt out of Community Choice Aggregation (CCA) procurement service during the CCA program's two formal notification periods. If you opt out, PG&E will continue to procure electricity for you. If you do not opt out during these two notification periods (or any intervening time between them), you will be automatically enrolled in CCA procurement service. In either event, PG&E will continue providing transmission and distribution services to you. Regardless of whether or not you opt out of CCA service, you will continue to be eligible for ratepayer-funded programs, such as the California Solar Initiative and energy efficiency programs, that are funded by distribution surcharges.

As part of the CCA notification process, you will receive at least two notices during a 60-day period prior to CCA service commencement and at least two additional notices during a 60-day period after CCA service commencement. These notices will describe the terms and conditions of the CCA service made available to you by the CCA formed in your community and will inform you as to how you may opt out of the program if you choose to do so.

⁵ MEA is implementing its CCA service in phases. It has already sent out the first statutory notification to its phase one customers, but has not yet informed PG&E as to which customers are in phase one.

You also have the right to return to PG&E's bundled service after the two 60-day notification periods end; your options for returning during this later period are:

1) You can notify PG&E at least six months before the date you want to return to PG&E bundled service that you wish to return to bundled service. When you return to bundled service six months later, you will pay PG&E's then-existing bundled electric generation rate, which will be identical to similarly situated PG&E customers in your customer class.

2) If you do not provide PG&E with a full six-months notice, you can return to PG&E bundled service at any time, but you will pay the then-existing transitional electric generation rate - which may be higher or lower than PG&E's then existing bundled electric generation rate - until six months after you first gave PG&E notice; thereafter, your bundled electric generation rate will be identical to similarly situated PG&E customers in your customer class.

Whichever option you choose to exercise in order to return to bundled service anytime after the two 60-day notification periods end will require you to make a three-year commitment to PG&E's bundled electric service.

For additional information concerning customer rights, obligations, and updates regarding the CCA program you may visit:

http://www.cpuc.ca.gov/PUC/energy/Retail+Electric+Markets+and+Finance/070430_ccaggregation.htm

If SCE and SDG&E already have information on their websites regarding the CCA program (including a CCA dedicated webpage, but excluding the posting of tariff pages) this content shall be forwarded to Energy Division for review at this time. Whenever the utilities modify their websites to include new or revised language, illustrations, or images regarding the CCA program, they shall notify the Energy Division on the same day they make the modification. This will allow staff to review the utilities' webpages to ensure that the information included is consistent with the orders contained in this Resolution and is not misleading (either by inclusion or omission of content). The Energy Division will direct the utilities to make changes to any information it finds incorrect or misleading.

PG&E - and SCE and SDG&E to the extent necessary - must take the following actions to address the situation that PG&E's early CCA opt-out option has created.

- 1) Any customer who has previously chosen to opt out of the CCA program through any means whatsoever, including PG&E's website, any opt-out form, or by telephone (except for any customer included in MEA's phase one who opted-out after February 5th, 2010)⁶ shall not be removed from the list of potential CCA customers that will be provided to a community implementing a CCA program. All customers need to understand the terms and conditions of the CCA service being offered in order to make an informed decision as to whether or not to opt out of CCA service.
- 2) PG&E shall send a letter, with a copy to the Energy Division, to any customer who prior to the date of this Resolution has opted out of CCA service using any means whatsoever, including PG&E's website, any opt-out form, or telephone service, explaining that the opt-out request will not take effect in light of the changes this Resolution makes to the CCA tariffs. (However, PG&E shall follow the procedure set forth in paragraph 3b, below, for sending letters to customers in MEA's service territory and therefore this letter shall not be sent to anyone in MEA's service territory who opted-out after February 5th, 2010.) This letter shall be sent to the Energy Division for review and approval within 10 days of the effective date of this Resolution and shall be mailed to customers within 5 days of Energy Division's approval.

We encourage PG&E to use the following language in this letter:

"Your opt-out request will not take effect because the community your account is located in has not initiated the statutorily-mandated CCA opt-out notification process.

You will receive at least two notices during a 60-day window period before CCA service commencement and at least two additional notices during a 60-day

⁶ Under MEA's Implementation Plan, customers will be phased-in to CCA service in no more than three phases. MEA sent the first opt-out notice to those customers who are in its phase one on February 5, 2010. Consistent with the policy set forth in this Resolution, customers who have received their first opt-out notice from MEA can chose to opt-out of MEA's CCA program.

window period after CCA service commencement containing the terms and conditions of CCA service that will be provided to you by the CCA program in your community. If you seek to opt out of CCA service, you will be able to do so during these two separate 60-day notification periods (and any intervening time between them) at no additional cost to you.

If you do not opt out of the CCA program during this designated time, you still have the right to return to PG&E's bundled service after this designated time by providing PG&E with a six-month advance notice requesting to have your account return to PG&E bundled service. If you do not provide PG&E with a full six-month advance notice when returning to PG&E bundled service, you will pay the then-existing transitional electric generation rate - which may be higher or lower than PG&E's then existing bundled electric generation rate - until six months after you first gave PG&E notice. Regardless of when you give notice of your return to PG&E bundled service, you will be required to make a three-year commitment to PG&E's bundled electric service.

For additional information concerning customer rights, obligations, and updates regarding the CCA program you may visit:

http://www.cpuc.ca.gov/PUC/energy/Retail+Electric+Markets+and+Finance/070430_ccaggregation.htm

- 3) a) Any opt-out request that PG&E receives after the date that this Resolution is effective, and before a CCA issues to that customer the first of the statutorily mandated opt-out notifications, shall not become effective. PG&E shall send the same letter discussed in listed item 2), above, to those customers (and also send a copy to the Energy Division), and those customers shall not be removed from the list of potential CCA customers that will be provided to a community implementing a CCA program.
- b) With regard to MEA, because MEA began sending opt-out notices to its phase one customers before the effective date of this resolution and because MEA has not informed PG&E as to which customers are in its phase one, PG&E shall do the following: PG&E shall send a letter as described in paragraph 2, above, modified appropriately to reflect the specific situation of these customers, to all customers in MEA's service territory who elected to opt out but who were not part of MEA's phase one. PG&E shall submit the text of this letter to the Energy Division for review and approval within 10 days of the effective date of this Resolution and send it to the affected customers, with a copy to the Energy Division, within 10 business

days after PG&E receives from MEA the list of MEA's phase one customers.

We have not addressed here how to deal with opt-out requests for subsequent phases of MEA's implementation plan or for other CCAs that choose to use a phased implementation plan. We intend to deal with these and other issues in response to the CCSF Petition for Modification of Decision 05-12-041 filed in R.03-10-003.

COMMENTS

P. U. Code Section 311(g) (1) generally requires resolutions to be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Accordingly, this Draft Resolution was placed on the Commission's agenda no earlier than 30 days after it was made available for comment and distributed to the service list in R.03-10-003 and to all persons/entities served with draft resolution E-4013.

Comments on the First Draft Resolution

In response to the First Draft Resolution, comments were provided by PG&E, SCE, SDG&E, the Local Governments⁷, Marin Energy Authority (MEA), and The Utility Reform Network (TURN), and reply comments were provided by PG&E, SCE, the Local Governments, TURN, and the Division of Ratepayer Advocates (DRA). Some of the changes included in the Second Draft Resolution were made in response to this first round of comments.

First Amendment Issues

The utilities argue, to varying degrees, that the First Draft Resolution violates or potentially violates the First Amendment of the United States Constitution. The focus of the utilities' concerns seems to be with the First Draft Resolution's

⁷ The Local Governments consist of the City and County of San Francisco and the San Joaquin Valley Power Authority.

requirement for the inclusion of specific content on opt-out procedures in shareholder-funded communications.⁸

In addition to their First Amendment arguments, the utilities maintain that requiring utilities to include specific content in their communications with customers is (a) unnecessary given the First Draft Resolution's changes to the CCA opt-out procedures and (b) impractical to implement (e.g., with respect to certain marketing media) and that (c) it should be sufficient for the Commission to give clear direction to the utilities on when customers may be permitted to opt out of automatic enrollment in a CCA program and allow the utilities reasonable discretion in implementing this requirement in the most efficient and cost effective way possible.

In contrast, TURN, the Local Governments, and MEA not only believe that the First Draft Resolution is consistent with the First Amendment,⁹ but some of these parties seek even greater restrictions on utilities and, in their comments, ask the Commission to restrict utilities from marketing against CCA programs until after the initial notification has been provided. In their reply comments, the utilities object on First Amendment grounds to these proposals.

Having reviewed these comments, we agree that a number of the requirements proposed in the First Draft Resolution are not strictly necessary at this time. These modifications to the Resolution are reflected in the Discussion section above. If First Amendment or other constitutional issues arise in the future, we will address them at that time, as necessary.

Use Of The Term "Error"

⁸ Also, SDG&E claims that the First Draft Resolution's requirement that SDG&E place certain information relating to CCAs on its websites also violates the First Amendment and the Fifth Amendment Takings Clause. This requirement has been omitted from the Second Draft Resolution and, therefore, we no longer need to consider SDG&E's concerns.

⁹ For example, TURN argues that "if the government can require tobacco companies to include very specific warning labels on their products" the utilities incorrectly maintain that the "Commission cannot direct a regulated utility to provide a certain form of notice to its customers".

PG&E disagrees with the proposed language included in the First Draft Resolution which would have ordered PG&E to send a letter to customers that have opted-out of CCA service, stating in part that "PG&E solicited your CCA opt-out request in error." PG&E states that it has not committed an error in allowing customers to opt out early, since the current CCA tariffs, to date, have allowed early opt-out requests from the CCA program. We have addressed PG&E's concern by omitting the word "error".

Issues Involving The Opt-Out Notices

The utilities raise various objections and suggest revisions to the First Draft Resolution's proposed requirement that utilities post CCA program terms and conditions on opt-out forms posted on utility websites. This requirement in the First Draft Resolution has been omitted and therefore we no longer need to consider arguments raised with respect to this matter.

In its reply comments to the First Draft Resolution, the Local Governments point out that no party objected to the revision of the CCA tariffs that prohibit the utilities from soliciting customer opt-out requests of CCA service until after the CCA has provided the formal notification pursuant to P.U. Code Section 366.2 (c)(13)(A-C).

Moreover, The Local Governments and MEA recommend that the Commission, through this Resolution, require that the list of customers that opted-out prior to receiving their first opt-out notice be made available to them. Regarding this request, SCE states that the utilities cannot provide this information without the customers' consent, as customers' names and addresses are confidential. Given that all customers will receive official notification of the CCA services being offered in their communities even if they have attempted to opt out before receiving their first opt-out notice, we need not decide the issue raised by SCE, as the Local Governments and MEA should not need a list of customers who have attempted to opt out but whose opt-outs will not be processed.

In its reply comments, SCE agrees with several issues raised by PG&E and SDG&E in their respective comments. Unlike PG&E however, SCE states that it does not intend to market against the CCA program. In its comments, SDG&E acknowledges that "the Commission may have a substantial interest in ensuring that customers receive fair, accurate, and balanced information regarding CCA services."

Public Purpose Program Funds

The Local Governments and MEA argue that this Resolution should clarify that it is improper for the utilities to link receipt of ratepayer funded public program funds to a locality's decision not to pursue a CCA program's implementation. The Local Governments attached a letter dated June 30, 2009, sent by Joshua Townsend, PG&E Public Affairs Manager, to Michael Frank, City Manager of Novato.

PG&E denies that it has or will link, or make conditional, any local government's receipt of public goods charge funds on the local government's decision whether or not to participate in a CCA program. PG&E believes this allegation made by the Local Governments and MEA is outside the scope of the CCA proceeding and that any such complaints or issues should be addressed in the Commission's 2009-2011 Energy Efficiency Programs proceeding in A.08-07-031.

In its comments on the First Draft Resolution, TURN urges the Commission to adopt the Draft Resolution as written. In its reply comments on the First Draft Resolution, TURN generally supports the recommendations made by the Local Governments and MEA in their opening comments. TURN notes it is disturbed by at least one utility's (i.e., PG&E's) apparent use of energy efficiency funds in an attempt to dissuade communities from supporting CCA program implementation. TURN reminds the Commission that when the CCA program rules and tariffs were developed, all the utilities claimed they did not intend to actively market against the formation of CCAs. TURN states that the intent of at least one utility (i.e. PG&E) "to oppose the formation of CCAs in their service territory by any and all available means...suggests that there may be a need for this Commission to reopen R.03-10-003 to consider more specific rules and regulations to control such activity and ensure that fair competition is preserved."

In DRA's reply comments on the First Draft Resolution, DRA supports the request made by City and County of San Francisco and MEA to modify the Draft Resolution in order to clarify that it is inappropriate for the utilities to link receipt of ratepayer-funded public program funds to a community's decision not to pursue CCA program implementation. DRA recommends that this Resolution should expand the CCA rules in order to ensure that energy efficiency funds cannot be misused by the utilities. DRA also recommends that this Resolution ensure that any category of ratepayer funds may not be withheld from

communities investigating CCA program implementation in a manner that could discourage CCA formation.

We address these issues in the section immediately below.

Prohibition on Providing Goods or Services for the Purpose of Inducing a Local Jurisdiction Not to Participate in a CCA.

The Local Governments attached to their opening comments a letter dated June 30, 2009, addressed to Michael Frank, Novato City Manager, from Joshua Townsend, PG&E Public Affairs Manager. In this letter, PG&E outlines a proposed collaboration between PG&E and the city of Novato.¹⁰ Contained in this proposal are the following commitments made by PG&E:

“We reiterate our commitment to Novato to provide, free of charge, a one-half time equivalent staff to support the City in the implementation of this Collaboration, AB 32, SB 375, AB 811 and other related programs and efforts”. (p2)

"PG&E will partner with the City and Novato residents and businesses to expand PG&E's existing Energy Efficiency programs with energy savings achieved through Mass Market, Target Market, and Third-Party channels. Through a PG&E point person, approved by the city, a task force will be created to help navigate through the utilization of existing opportunities and the creation of new programs". (p6)

“If created, this LGP [Local Government Partnership] would provide Novato with additional resources to drive significant energy savings through energy efficiency”. (p8)

“We believe that our Collaboration Proposal provides a pathway for Novato to meet its climate change objectives faster, cheaper and with better results without exposing itself, the City, our customers and taxpayers to the uncertainty and risk of a Community Choice Aggregation scheme”. (p16)

This letter raises the appearance that a utility is seeking to link the utility's provision of services to a decision by a local government not to participate in a CCA. We want to promote a level playing field in competition between the investor owned utilities and CCAs. Accordingly, we will take this opportunity

10 The city of Novato was initially mentioned as part of Marin County's CCA efforts in its "Final Report - CCA Business Plan" issued April 2008. The city of Novato has not joined Marin County's CCA program per the December 4, 2009 filing of Marin Energy Authority's CCA Implementation Plan submitted to the CPUC for review.

to provide direction to the utilities. The utilities cannot offer to provide, or provide, any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a CCA, or for the purpose of inducing the local government not to participate in a CCA. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. (This restriction would also apply to any plan whereby the utility would pay someone else to provide such goods, services or programs.)

In its comments on the Second Draft Resolution, PG&E contends that the Commission lacks authority to oversee the utility's use of shareholder funds for competitive activities. In support of this contention, PG&E argues that the activities prohibited by Ordering Paragraph 5 of the Second Draft Resolution (now Ordering Paragraph 4 of this Resolution) are not "utility-related." We are not persuaded.

Pursuant to P.U. Code Section 218(a) an "'electrical corporation' includes every corporation . . . owning, controlling, operating, or managing any electric plant for compensation within this state". Accordingly, PG&E is an "electrical corporation." Pursuant to P.U. Code Section 216(a) every "electrical corporation," including PG&E, is a "public utility." Under the Public Utilities Act, public utilities are subject to the general regulatory jurisdiction of this Commission. As provided by P.U. Code Section 701:

The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

The Commission does not lose its authority to regulate a public utility's activities, merely because the utility accounts for the expense of conducting those activities "below the line", i.e., as a shareholder expense.¹¹

¹¹ What is now Ordering Paragraph 4 of this Resolution regulates neither speech nor political activity; it prohibits the provision of goods and services by the utility under specified circumstances.

Furthermore, we do not understand PG&E's argument that providing goods and services to a local jurisdiction, or the customers within that jurisdiction, for the purpose of keeping those customers as bundled customers of the utility is not "utility-related." Accordingly, we conclude that the Commission has jurisdiction to order utilities to refrain from that activity, in order to promote a level playing field in competition between the investor owned utilities and CCAs, regardless of whether the goods or services are shareholder funded, or, as in the case of certain energy efficiency and other customer programs, are ratepayer funded.

Intending Not to Sell Electricity to CCAs

Energy Division has also been provided a copy of a letter sent by Joshua Townsend of PG&E to the members of Marin Energy Authority, dated February 3, 2009. In that letter, PG&E makes the following statement:

"...as PG&E has made clear, we intend to continue to provide safe and reliable electric service at reasonable cost to our retail customer in Marin, and we do not intend to respond to requests to supply electricity to Marin Energy Authority or to participate in any way in supplying electricity to a Community Choice Aggregation program in Marin."

This statement appears to conflict with our existing rules that require each utility to dispatch its resources on a least cost basis for the benefit of its bundled customers' electric procurement portfolio. Accordingly, and to promote a level playing field in competition between the utilities and CCAs, we reiterate here that utilities may not refuse to make economic sales of excess electricity to a CCA, or refuse in advance to deal with any CCA in selling electricity, as there is no way of determining in advance, without analysis of the specific facts, whether such a sale would benefit the utility's remaining bundled electric customers.

In its comments on the Second Draft Resolution, PG&E characterizes its February 3rd letter to MEA as responding "to MEA's invitation to PG&E to respond to MEA's request for bidders willing to provide full requirements electricity to supply MEA's load under its CCA program." (Emphasis omitted.) Taken as a whole, it is clear that the purpose of PG&E's February 3rd letter was not to respond to a request for bidders, but rather, as stated in the letter, to persuade MEA to "reconsider your decision to enter into the electricity business in Marin

County.” Thus, PG&E’s letter said that PG&E did not intend (i) to respond to requests to supply electricity to MEA or (ii) “to participate in any way in supplying electricity to a Community Choice Aggregation program in Marin” (emphasis added). Accordingly, we find the only plausible interpretation of this language from PG&E’s letter is to state PG&E’s intention to never supply energy to MEA, no matter the circumstances. Accordingly, the Second Draft Resolution properly concluded that PG&E’s letter “appears to conflict with our existing rules that require each utility to dispatch its resources on a least cost basis for the benefit of its bundled customers’ electric procurement portfolio.”¹² This rule requires not only that PG&E purchase electricity at least cost, but that it dispose of excess electricity at the best price.

PG&E further objects to the language contained in Ordering Paragraph 6 of the Second Draft Resolution (now Ordering Paragraph 5 of this Resolution) on the grounds that it intrudes on the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) over wholesale sales of electricity under the Federal Power Act. We do not intend to dispute the FERC’s jurisdiction over wholesale sales of electricity. Nor does PG&E appear to challenge our jurisdiction to impose a disallowance on a utility that fails to dispatch its resources on a least cost basis for the benefit of its bundled customers’ electric procurement portfolio.

We note that under Section 205(b) the Federal Power Act,

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the [Federal Energy Regulatory] Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, (16 USC sec. 824d(b)).

It appears to us that any refusal to sell wholesale electricity to a CCA because it is a CCA would violate this provision. We also note that this Commission or a CCA can file a complaint at the FERC if it believes that one of the utilities that we regulate has violated the Federal Power Act.

¹² For these existing rules, see D.02-10-062, at Section XI, “Standards for Utility Behavior”, numbered paragraph 4, and at Ordering Paragraph 15.

COMMENTS ON THE SECOND DRAFT RESOLUTION

Comments on the Second Draft Resolution were provided by PG&E, SCE, SDG&E, City and County of San Francisco (CCSF), and DRA; reply comments were submitted by PG&E, SCE, CCSF, MEA and SJVPA.

Shareholder funded Marketing Against CCAs

Some of the entities providing comments requested that the Commission review utility marketing materials and not just the materials posted on the utilities' websites. We believe the procedures we have adopted in this Resolution are adequate and will not adopt any additional procedures at this time. However, anyone who believes that any of the utilities' marketing materials are incorrect or misleading may bring their concerns to the attention of Energy Division.

IOU soliciting customer opt-out requests

In its comments on the Second Draft Resolution, which PG&E submitted on January 11, 2010, PG&E stated:

“Prior to the issuance of the First Draft Resolution, after consultations with the Energy Division, PG&E ceased providing the opportunity to its customers to opt out of a CCA program before the program's Initial Notification Period.”

However, in its comments CCSF notes the existence of a toll free number under which customers can contact PG&E to opt out. Commission staff called this number and verified that it still provides an opportunity for a customer to opt out of CCA service even though that customer is located in a jurisdiction that has not yet sent any of the statutorily mandated notices. PG&E is required to stop offering an opportunity to opt out via telephone, or other means, to customers who have not yet received the first of the statutorily mandated notices from their CCA, and take the remedial steps specified in Ordering Paragraph 2.D.

In its comments CCSF asks the Commission to bar utilities “from soliciting opt-outs at any time unless expressly invited to do so by the CCA program.” While the four statutory opt-out notices are only to be sent out by the CCA, unless the CCA requests that the utility send them out, we will not now prohibit the utilities from providing truthful information about how customers can opt out. We note that this issue has also been raised by CCSF in a Petition to Modify (PTM) D.05-12-041, filed in R.03-10-003 on January 11, 2010.

MEA and CCSF raise concerns about the opt-out process for new or relocated customers in a CCA service area. We agree that modification of the tariff rule that applies in this situation is desirable. Furthermore, we are of the view that customers who are unaware of the terms and conditions of the CCA service should be informed of those terms and conditions before being given the opportunity to opt out. CCSF has also raised this issue in its recently filed PTM.¹³ We will direct staff to convene an informal meeting of the interested parties to see if consensus can be reached on the specific tariff language needed. If consensus cannot be reached, and if the issue is not resolved in the resolution of the CCSF PTM, staff should prepare a resolution for our consideration.

PG&E requested a change in the wording of Rule 23/27.B.22 to clarify the period during which a customer may opt out. We have modified B.22 to incorporate the thrust, but not the exact wording, of PG&E's request.

PG&E also requested a change to the language we are requiring it to post on its website. Specifically, it requested a change to the paragraph that began: "The terms and conditions provided to you during a CCA's formal notification period..." PG&E sought to emphasize that a CCA may impose a fee for, or limit the ability of a customer to, return to utility bundled service. CCSF objected on the grounds that PG&E was seeking to scare customers with speculative possibilities. Other portions of the material we are requiring PG&E to post on its website already note that the CCA will notify customers of the terms and conditions of CCA service. Accordingly, we delete the paragraph that PG&E sought to modify, rather than try to determine how much detail this website language should provide about terms and conditions that may or may not apply to any particular CCA.

FINDINGS AND CONCLUSIONS:

1. No CCA has commenced CCA service in California, pursuant to AB 117.
2. Until MEA sent out its phase one notices on February 5, 2010, no CCA had provided information about the terms and conditions of its service through

¹³ See CCSF PTM, footnote 54.

the process mandated by P.U. Code Section 366.2 (c)(13)(A-C); such information is necessary in order for customers to make an informed decision as to whether they should opt out of CCA service.

3. PG&E posted an electronic opt-out form on its website, offering PG&E's bundled electric customers an opportunity to opt out of future CCA service that might be offered anywhere in PG&E's service territory.
4. PG&E circulated marketing trifolds to customers within SJVPA's service territory offering them the opportunity to opt out early from CCA service.
5. The purpose of P.U. Code Section 366.2 (c)(13)(A-C) is to provide potential CCA customers with an opportunity to make an informed decision as to whether to opt out of CCA service. Customers cannot make an informed decision at least until they receive the first of the statutorily mandated opt-out notices.
6. PG&E should cease soliciting customers to opt out of CCA service before the statutory notification period provided by P.U. Code Section 366.2 (c)(13)(A-C). However, as long as PG&E does not know which customers are in MEA's phase one, PG&E is not prohibited from soliciting customers throughout MEA's service territory.
7. Any other information that PG&E, or the other utilities, provide describing customers' ability to opt out of CCA service should be consistent with the statutory purpose of P.U. Code Section 366.2 (c)(13)(A-C), the CCA tariffs, the orders contained in this Resolution, and should not be misleading either by inclusion or omission of content.
8. We have not addressed here how to deal with opt-out requests for subsequent phases of MEA's implementation plan or for other CCAs that choose to use a phased implementation plan. We intend to deal with these and other issues in response to the CCSF Petition for Modification of Decision 05-12-041 filed in R.03-10-003.
9. PG&E has sent at least one letter to Novato's City Manager, appearing to link the utility's provision of services to a decision by a local government not to participate in a CCA.

10. The utilities cannot offer to provide, or provide, any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a CCA, or for the purpose of inducing the local government not to participate in a CCA. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. (This restriction would also apply to any plan whereby the utility would pay someone else to provide such goods, services or programs.)
11. The Energy Division has also been provided a copy of a letter sent by Joshua Townsend of PG&E to the members of Marin Energy Authority, dated February 3, 2009. In that letter, PG&E makes the following statement:

“...as PG&E has made clear, we intend to continue to provide safe and reliable electric service at reasonable cost to our retail customer in Marin, and we do not intend to respond to requests to supply electricity to Marin Energy Authority or to participate in any way in supplying electricity to a Community Choice Aggregation program in Marin.”
12. The utilities may not refuse to make economic sales of excess electricity to a CCA, or refuse in advance to deal with any CCA in selling electricity because it is a CCA, as there is no way of determining in advance, without analysis of the specific facts, whether such a sale would benefit the utility’s remaining bundled electric customers.
13. In the future, anyone who believes that any of the utilities’ marketing materials are incorrect or misleading may bring their concerns to the attention of Energy Division.
14. CCSF notes the existence of a toll free number under which customers can contact PG&E to opt out. This number still provides an opportunity for a customer to opt out of CCA service even though that customer is located in a jurisdiction that has not yet sent any of the statutorily mandated notices.
15. PG&E requested a change in the wording of Rule 23/27.B.22 to clarify the period during which a customer may opt out. We have modified B.22 to incorporate the thrust, but not the exact wording, of PG&E’s request.

THEREFORE IT IS ORDERED THAT:

1. PG&E, SCE, and SDG&E shall modify two subsections of their CCA tariffs – Electric Tariff Rule 23 B.22 and I.3 for PG&E and SCE and Electric Tariff Rule 27 B.22 and I.3 for SDG&E – as follows: The modified tariff language pursuant to this Resolution shall be filed within 10 days of the effective date of this Resolution, and shall be effective as of the effective date of this Resolution.

A. Subsection B.22 shall be revised to read:

B.22. GENERAL TERMS: Opt-Out of Automatic Enrollment

The term “opt-out” or “opt out” is the customer’s election not to be served under CCA Service and to continue to receive its existing service. In order to exercise its right not to participate in CCA Service, a customer must request to “opt out” of CCA Service through the required action as prescribed in the CCA Notification. A customer may exercise its opt-out right at any time during a 60-day notification period prior to Automatic Enrollment through the end of the second 60-day notification period subsequent to the Automatic Enrollment of a customer’s account to CCA Service. The terms and conditions of CCA service will be made available by the CCA. This CCA-specific information will be provided to customers pursuant to P.U. Code Section 366.2 (c)(13)(A-C) – either directly by the CCA or by [the utility] pursuant to the provisions set forth in Section H – and will enable customers to make an informed decision whether or not to opt out of CCA service. Customers receiving section 366.2(c)(13)(A-C) notices regarding a CCA with more than one planned CCA phase-in date will be provided the required 60-day notices based around the date their particular phase-in commences.

B. Subsection I.3 shall be revised to read:

I.3. CCA CUSTOMER OPT-OUT PROCESSES

A customer opting out of CCA Service during the Initial Notification Period shall be removed from the Automatic Enrollment process.

2. PG&E – and SCE and SDG&E to the extent necessary – shall take the following actions to address the misunderstanding that PG&E’s early CCA opt-out option has created:
 - A. Any customer who has previously chosen to opt out of the CCA program through any means whatsoever, including PG&E’s website, any opt-out form, or by telephone (except for any customer included in MEA’s

phase one who opted-out after February 5th, 2010) shall not be removed from the list of potential CCA customers that will be provided to a community implementing a CCA program.

B. PG&E shall modify the language currently posted on its CCA dedicated webpage. PG&E shall notify the Energy Division on the same day it makes this modification; the modified language shall state the following:

“You have the right to opt out of Community Choice Aggregation (CCA) procurement service during the CCA program’s two formal notification periods. If you opt out, PG&E will continue to procure electricity for you. If you do not opt out during these two notification periods (or any intervening time between them), you will be automatically enrolled in CCA procurement service. In either event, PG&E will continue providing transmission and distribution services to you. Regardless of whether or not you opt out of CCA service you will continue to be eligible for ratepayer-funded programs, such as the California Solar Initiative and energy efficiency programs, that are funded by distribution surcharges.

As part of the CCA notification process, you will receive at least two notices during a 60-day period prior to CCA service commencement and at least two additional notices during a 60-day period after CCA service commencement. These notices will describe the terms and conditions of the CCA service made available to you by the CCA formed in your community and will inform you as to how you may opt out of the program if you choose to do so.

You also have the right to return to PG&E’s bundled service after the two 60-day notification periods end; your options for returning during this later period are:

1) You can notify PG&E at least six months before the date you want to return to PG&E bundled service that you wish to return to bundled service. When you return to bundled service six months later, you will pay the then-existing bundled electric generation rate, which will be identical to similarly situated PG&E customers in your customer class.

2) If you do not provide PG&E with a full six-months notice, you can return to PG&E bundled service at any time, but you will pay the then-existing transitional electric generation rate – which may be higher or lower than the then existing bundled electric generation rate – until six months after you first gave PG&E notice; thereafter, your bundled electric generation rate will be identical to similarly situated PG&E customers in your customer class.

Whichever option you choose to exercise in order to return to bundled service anytime after the two 60-day notification periods end will require you to make a three-year commitment to bundled service.

For additional information concerning customer rights, obligations, and updates regarding the CCA program you may visit:
http://www.cpuc.ca.gov/PUC/energy/Retail+Electric+Markets+and+Finance/070430_ccaggregation.htm

C. If SCE and SDG&E already have information on their websites regarding the CCA program (including a CCA dedicated webpage, but excluding the posting of tariff pages) this content shall be forwarded to Energy Division, to allow for staff review at this time. In the future, whenever any of the utilities modify their websites to include new or revised language, illustrations, or images regarding the CCA program they shall notify the Energy Division on the same day they make the modification. The Energy Division will direct the utilities to make changes to any information it finds incorrect or misleading.

D. PG&E shall send a letter, with a copy to the Energy Division, to any customer who prior to the date of this Resolution has opted-out of CCA service using any means whatsoever, including PG&E's website, any opt-out form, or telephone, explaining that the opt-out request will not take effect in light of the changes this Resolution makes to the CCA tariffs. (However, PG&E shall follow the procedure set forth in paragraph F, below, for sending letters to customers in MEA's service territory and therefore this letter shall not be sent to anyone in MEA's service territory who opted-out after February 5th, 2010). This letter shall be sent to the Energy Division for review and approval within 10 days of the effective date of this Resolution and shall be mailed to customers within 5 days of Energy Division's approval.

We encourage PG&E to use the following language in this letter:

"Your opt-out request will not take effect because the community your account is located in has not initiated the statutorily mandated CCA opt-out notification process.

You will receive at least two notices during a 60-day window period before CCA service commencement and at least two additional notices during a 60-day

window period after CCA service commencement containing the terms and conditions of CCA service that will be provided to you by the CCA program in your community. If you seek to opt out of CCA service, you will be able to do so during these two separate 60-day notification periods (and any intervening time between them) at no additional cost to you.

If you do not opt out of the CCA program during this designated time, you still have the right to return to PG&E's bundled service after this designated time by providing PG&E with a six-month advance notice requesting to have your account return to PG&E bundled service. If you do not provide PG&E with a full six-month advance notice when returning to PG&E bundled service, you will pay the then-existing transitional electric generation rate - which may be higher or lower than PG&E's then existing bundled electric generation rate - until six months after you first gave PG&E notice. Regardless of when you choose to return to PG&E bundled service, you will be required to make a three-year commitment to PG&E's bundled electric service.

For additional information concerning customer rights, obligations, and updates regarding the CCA program you may visit:

http://www.cpuc.ca.gov/PUC/energy/Retail+Electric+Markets+and+Finance/070430_ccaggregation.htm

E. Any opt-out request that PG&E receives after the date that this Resolution is effective, and before a CCA issues to that customer the first of the statutorily mandated opt-out notifications, shall not become effective. PG&E shall send the same letter discussed in Ordering Paragraph 2.D to those customers (and also send a copy to the Energy Division), and those customers shall not be removed from the list of potential CCA customers that will be provided to a community implementing a CCA program.

F. With regard to MEA, PG&E shall do the following: PG&E shall send a letter as described in Ordering Paragraph 2, as modified appropriately to reflect the specific situation of these customers, to all customers in MEA's service territory who elected to opt out but who were not part of MEA's phase one. PG&E shall submit the text of this letter to the Energy Division for review and approval within 10 days of the effective date of this Resolution and send it to the affected customers, with a copy to the Energy Division, within 10 business days after PG&E receives from MEA the list of MEA's phase one customers.

3. Electric utilities shall not make available to their customers any mechanism for opting out of CCA service before the commencement of the statutorily mandated notification period.
4. Electric utilities cannot offer to provide, or provide, any goods, services, or programs to a local government, or to the electricity customers within that jurisdiction, on the condition that the local government not participate in a CCA, or for the purpose of inducing the local government not to participate in a CCA. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. (This restriction also applies to any plan whereby the utility would pay someone else to provide such goods, services, or programs.)
5. Electric utilities may not refuse to make economic sales of excess electricity to a CCA, nor refuse in advance to deal with any CCA in selling electricity because it is a CCA.
6. Staff shall convene an informal meeting of the interested parties to see if consensus can be reached on the tariff language needed to specify how the opt-out process for new or relocated customers in a CCA service area will work. This tariff language shall ensure that customers who are unaware of the terms and conditions of the CCA service will be informed of those terms and conditions before being given the opportunity to opt out. If consensus cannot be reached, and if the issue is not resolved in the resolution of the CCSF Petition To Modify D.05-12-041 in R.03-10-003, staff should prepare a resolution for our consideration.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on April 8, 2010, the following Commissioners voting favorably thereon:

/s/ Paul Clanon
Paul Clanon
Executive Director

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

I will file a dissent.

/s/ Timothy Alan Simon
Commissioner

I will file a concurrence.

/s/ John A. Bohn
Commissioner

**Dissent of Commissioner Timothy Alan Simon
April 8, 2010 Commission Meeting**

1. Introduction

Before the CPUC April 8 , 2010 meeting, I asked for the support of Energy Division and Legal Divisions to update the Resolution on one narrow issue. However, the Resolution was not changed and the majority of the CPUC voted in favor of that proposed Resolution. [*Item 3 on the April 8, 2010 Agenda*].

As a result of that vote in favor of the Resolution, I submit the following Dissent, to that portion of the Resolution which invalidates customer choices to opt out before the date this Resolution is effective.

3. Background and Discussion

AB 117 enables cities and/or counties to implement a Community Choice Aggregation or CCA program. I support Community Choice Aggregation and I support the bulk of the Resolution for this item.

However, I do not support one narrow area of the Resolution. To date the law and regulations do not prohibit the utility from accepting a customer's decision to "opt out" of a CCA before the CCA initiates its own Opt Out. This Resolution updates the rules to prohibit a customer from accepting "opt-out" customer choice until the CCA terms and conditions are known. I strongly support this updated rule on a going forward basis. However, this Resolution would also invalidate customer decisions to opt out – that is, it would invalidate the decisions of those customers who have already "opted out" of a CCA. This is the narrow piece that I oppose.

As mentioned above, I did work with Energy and Legal Divisions to try to obtain an alternative process proposal which would prohibit early "opt out" on a going forward basis but which would Grandfather decisions by customers who have opted out early under the Commission's existing Tariff Rule.

I don't make this decision lightly because, as I said, I support Community Choice Aggregation and support strong rules going forward. However, I believe from a freedom of contract basis and from a perspective of customer choice, I would have preferred the process I just outline and cannot support the current Resolution.

4. Conclusion

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

/s/ TIMOTHY ALAN SIMON
Timothy Alan Simon
Commissioner

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CONCURRENCE OF COMMISSIONER BOHN

In this resolution 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. While I support 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.

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 resolution, 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 resolution. Pacific Gas and Electric Company's (PG&E) past efforts to have customers opt out of CCA services prior to the Initial Notification Period were allowed under the Commission's rules, prior to the changes we adopt in this decision. While some may question the content of PG&E's communications, the resolution does not demonstrate or find that PG&E's activities were inappropriate under the rules then in place. Since these actions were allowed at the time, I do not believe it is necessary nor appropriate that we are retroactively negating the choice of those customers contacted by PG&E to opt out.

/s/ JOHN A. BOHN

John A. Bohn
Commissioner

San Francisco, CA
April 8, 2010