

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



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Order Instituting Rulemaking Pursuant to
Senate Bill No. 790 to Consider and Adopt a
Code of Conduct, Rules and Enforcement
Procedures Governing the Conduct of
Electrical Corporations Relative to the
Consideration, Formation and Implementation
of Community Choice Aggregation Programs.

Rulemaking 12-02-009
(Filed February 16, 2012)

PETITION FOR MODIFICATION OF DECISION 12-12-036 OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39-E),
SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) AND
SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)

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**PETITION FOR MODIFICATION OF DECISION 12-12-036 OF PACIFIC GAS AND
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**BEFORE THE PUBLIC UTILITIES COMMISSION
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Order Instituting Rulemaking Pursuant to Senate Bill No. 790 to Consider and Adopt a Code of Conduct, Rules and Enforcement Procedures Governing the Conduct of Electrical Corporations Relative to the Consideration, Formation and Implementation of Community Choice Aggregation Programs.

Rulemaking 12-02-009
(Filed February 16, 2012)

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Pursuant to Rule 16.4 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Pacific Gas and Electric Company (“PG&E”), San Diego Gas & Electric Company (“SDG&E”), and Southern California Edison Company (“SCE”) (each a “utility” and collectively, the “Joint Utilities”) respectfully submit this Petition for Modification of Decision (“D.”) 12-12-036.

I.

EXECUTIVE SUMMARY

The Joint Utilities ask the Commission to allow electrical corporations (“utilities”) to communicate with local governments regarding Community Choice Aggregators or Aggregation (“CCAs”). In D.12-12-036, the Commission adopted a Code of Conduct that imposes substantial restrictions on such communications, which the Code classifies as “lobbying.” Modifying these restrictions would advance the public interest, would be consistent with California law, and is

necessary to ensure that the Code complies with the United States Constitution. For these same reasons, the Joint Utilities also request that the Commission confirm that the Code of Conduct does not restrict the Joint Utilities' right to communicate with the press—newspapers, television stations, and radio stations—regarding CCAs.¹

The Joint Utilities' goal in filing this petition is not to prevent CCA formation. To the contrary, the Joint Utilities support customers' right to choose CCAs, as long as bundled service customers are not allocated costs that should be borne by CCA customers. Accordingly, in this petition, the Joint Utilities do not seek any changes to the Code of Conduct's "marketing" provisions, which restrict their ability to communicate with customers "regarding the [utility's] and community choice aggregators' energy supply services and rates."² Instead, this petition concerns only communications with local governments and the press.

Modifying the Code of Conduct's lobbying restrictions is in the public interest. Utility customers are not well served if localities make uninformed decisions because they have been able to hear only from certain constituencies. Without complete information regarding CCA formation and operation, localities may adopt or implement CCA programs without a full understanding of the benefits, risks, and costs of their decisions. This could result in unintended negative consequences for utility customers served by the CCA, as well as for bundled service customers who may face additional costs as a result of a CCA program's flaws or the return of customers to bundled service. In both cases, the Joint Utilities' customers would be negatively affected.³

¹ This petition does not seek any change the Code's marketing restrictions on a utility's ability to communicate with customers through paid advertising. *See* Code of Conduct Rule 1(a).

² The Joint Utilities do not believe that the Code's "marketing" restrictions, by their terms, prohibit utilities from communicating with customers or correcting misleading statements about the utilities' *own* services and rates (so long as such communications do not reference CCA services and rates). But to the extent the Code is interpreted otherwise, it would raise significant free speech concerns.

³ CCA customers are also utility customers because they continue to receive transmission, distribution, and other services from a utility.

Allowing the Joint Utilities to communicate with local governments regarding CCA programs is particularly important with respect to localities' decisions to form or join CCAs. CCA formation involves numerous complex issues, including Commission-approved tariff rules that govern utility services to CCAs, the rules and obligations governing procurement by load serving entities in California (including CCAs), resource planning, long-term planning assumptions (e.g., forecasting market conditions and resource costs), rate-setting issues (such as the status of default time-of-use (TOU) rate implementation for residential customers), cost recovery, the operation of departing load charges such as the Power Charge Indifference Adjustment ("PCIA") or its successor, and the need for adequate financial security requirements for involuntary returns of CCA customers to utility service.

It appears, however, that localities in SCE's and SDG&E's service areas are not always receiving the necessary information, and in some instances have received information that is incomplete, inaccurate, and potentially misleading. Indeed, some local public officials have expressed frustration to the Joint Utilities about their inability to more fully comment on the benefits and costs of proposed CCA programs.⁴ Absent access to information from the utility, local governments' primary source of information is often external advisory firms that potentially anticipate having a role in implementing the CCA entity after the feasibility study.

Allowing the Joint Utilities to communicate with local governments in connection with their deliberations on CCA formation will promote informed decision-making by these governments and mitigate the risk of unanticipated costs and outcomes that customers may incur resulting from CCA formations based on incomplete or inaccurate information.

The PG&E-area situation is somewhat different. PG&E already serves over 1.1 million CCA customers today, and by January 2019, approximately half of PG&E's electric customers will likely be served by CCAs. Accordingly, as compared to the SCE-area and SDG&E-area, PG&E has less of a need to discuss CCA-related issues with communities that are deciding

⁴ See, e.g., Declaration of J. Christopher Thompson ¶ 8.

whether to adopt CCA programs. Nevertheless, PG&E is interested in discussing CCA-related issues with local government officials of the communities it serves even after CCAs begin service.

The Code of Conduct's restrictions on CCA-related communications between the Joint Utilities and local government officials appear to be an outlier. Although some states impose certain limits on marketing to CCA customers, the Joint Utilities are not aware of any jurisdiction that restricts a utility from communicating with local government officials regarding CCAs.

The Commission also should confirm that the Code of Conduct does not restrict the Joint Utilities' right to communicate with the press regarding CCA-related issues. The Code currently does not directly address such communications, but the Joint Utilities are concerned that some may allege that communications with the press could be deemed to constitute prohibited "lobbying" or "marketing." Just as local governments will benefit from receiving information from utilities regarding the issues surrounding CCA formation and operation, so too will the press for its communications with the public at large. Preventing the Joint Utilities from commenting on or providing the press with the Joint Utilities' perspective on these issues is not in the public interest because it would result in these discussions being informed only by certain constituencies and by incomplete information.

In addition, the Commission should grant the relief requested in this petition to avoid a violation of the Joint Utilities' First Amendment rights to communicate on a matter of public concern and to be free of content-based restrictions on their speech. The restrictions on lobbying also violate the Joint Utilities' right to communicate with local government representatives.

The relief requested in this petition is consistent with California law, which does not require the Commission to retain the Code of Conduct's lobbying restrictions or restrict the Joint Utilities' communications with the press. California Public Utilities Code § 707, the statute that requires the Commission to adopt a Code of Conduct, directs the Commission to "[e]nsure that an electrical corporation does not *market* against a community choice aggregation program,

except through an independent marketing division.”⁵ Section 707 does not mention lobbying communications with local government officials, or communications with the press.

Because many local governments in the Joint Utilities’ service areas are currently considering CCA programs, the Commission should act promptly on this petition so that the Joint Utilities can communicate with these governments in a timely manner and so that local government officials will have access to as much information as possible to help them make informed decisions on issues that impact CCA formation and operation. Accordingly, the Joint Utilities respectfully request that the Commission decide this petition by June 1, 2018, in accordance with the Proposed Schedule described in Part IV, below.

II.

BACKGROUND

Public Utilities Code § 707 (a) directs the Commission to adopt a “code of conduct” to “govern the conduct of the electrical corporations relative to the consideration, formation, and implementation of community choice aggregation programs.” As relevant here, this code of conduct must:

Ensure that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation’s shareholders and that is functionally and physically separate from the electrical corporation’s ratepayer-funded divisions.⁶

The code must also “limit” the independent marketing division’s “use of support services from the electrical corporation’s ratepayer-funded divisions”; require that this division be allocated any costs of any permissible support services from the “ratepayer-funded divisions on a

⁵ Cal. Pub. Util. Code § 707 (a) (emphasis added). All subsequent statutory references in this petition are to the California Public Utilities Code.

⁶ Cal. Pub. Util. Code § 707 (1).

fully allocated embedded cost basis”⁷; and require that this division not have access to competitively sensitive information.⁷

In D.12-12-036, the Commission adopted the Code of Conduct. Rule 2 of the Code states:

No electrical corporation shall market or lobby against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation’s shareholders and that is functionally and physically separate from the electrical corporation’s ratepayer-funded divisions.⁸

Rule 2 largely tracks § 707(a) (1), except that it applies to both “market[ing]” and “lobby[ing],” while the statute mentions only “market[ing].” The Code of Conduct defines “lobby” as communicating “with public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a [CCA] program.”⁹ Lobbying does not include the following:

- i) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to questions from a government agency or its representative.
- ii) Provision of information to potential Community Choice Aggregators related to Community Choice Aggregation program formation rules and processes.¹⁰

The Code of Conduct defines “[m]arket” to mean “communicate with customers . . . regarding the electrical corporation’s and community choice aggregators’ energy supply services and rates.”¹¹ Marketing does not include the following:

- i) Communications provided by the electrical corporation throughout all of its service territory to its retail electricity customers that do not reference community choice aggregation programs.

⁷ § 707(a) (2)-(3). As an alternative, section 707 also allows the Commission “to require that any marketing against a community choice aggregation plan shall be conducted by an affiliate of the electrical corporation . . . subject to affiliate transaction rules to be developed by the Commission.” § 707(c). The Commission has not taken any actions pursuant to this provision.

⁸ Code of Conduct Rule 2.

⁹ Code of Conduct Rule 1(b).

¹⁰ *Id.*

¹¹ Code of Conduct Rule 1(a).

ii) Communications that are part of a specific program that is authorized or approved by the California Public Utilities Commission (CPUC), . . . renewable energy rebate, or tariffed programs

iii) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to the questions of individual customers.¹²

The Code of Conduct also imposes various restrictions on any independent marketing division that is created by a utility to conduct marketing and lobbying in compliance with Rule 2. The independent marketing division shall not have access to a utility's "competitively sensitive information." Nor may the division access the utility's "market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports."¹³ Apart from shared support services, utility employees may not be employed by the independent marketing division¹⁴ and may not speak on behalf of the independent marketing division.¹⁵

The formation of an independent marketing division also is subject to other significant restrictions. The independent marketing division must be physically separated from the utility.¹⁶ The independent marketing division may not share equipment, services, and systems (including information technology systems) with the utility, except as necessary to perform corporate support services.¹⁷ Transfers of employees between the utility and the independent marketing division are restricted and subject to a transfer fee.¹⁸

The utility and the independent marketing division are subject to audits for compliance with the rules.¹⁹ And the Code also provides an expedited complaint procedure that generally

¹² *Id.*

¹³ Code of Conduct Rules 5, 8.

¹⁴ Code of Conduct Rule 15.

¹⁵ Code of Conduct Rule 9.

¹⁶ Code of Conduct Rules 2, 11.

¹⁷ Code of Conduct Rule 11.

¹⁸ Code of Conduct Rule 16.

¹⁹ Code of Conduct Rule 23.

requires any complaints filed against utilities by CCAs to be resolved in no more than 180 days.²⁰

The combined effect of these restrictions is to discourage the utility from communicating to localities, unless specifically asked, crucial information—including information about market structure and challenges, impacts of future market conditions, rate-setting and cost recovery issues, and rules and policies applicable to CCAs—that is understood by utility employees who are subject-matter experts on these issues but who cannot speak for (and are restricted from transferring relevant information to) an independent marketing division.

III.

JUSTIFICATION FOR PETITION FOR MODIFICATION

The Commission has broad authority to “amend any order or decision made by it” at “any time, upon notice to the parties[] and with opportunity to be heard.”²¹ In compliance with Rule 16.4 (b) of the Commission’s Rules of Practice and Procedure, Section A, below, proposes the specific wording to carry out the Joint Utilities’ requested modifications to the Code of Conduct.

Sections B, C, D, and E, below, provide a concise justification for the requested relief. Section B explains why § 707 does not require the Commission to restrict the Joint Utilities’ communications with local governments or the press. Section C explains why the requested modifications to the Code of Conduct would improve local governments’ access to information regarding CCA programs and promote more informed decision-making, which would be in customers’ interest. Section D explains why allowing the Joint Utilities to communicate with the press regarding CCA-related issues is in the public interest. Section E explains why the relief requested in this petition is necessary to comply with the First Amendment.

²⁰ Code of Conduct Rule 24.

²¹ §1708; *see also* D.12-04-012 at 3 (“Pursuant to [§ 1708], the Commission has broad authority to modify decisions after notice to parties to the prior proceeding.”)

Finally, in compliance with Rule 16.4 (d), Section F explains why this “petition could not have been presented within one year of the effective date of” D.12-12-036.

A. Description of the Requested Modifications

1. Modifying the Code of Conduct’s Lobbying Restrictions

The Joint Utilities request that the Commission eliminate the restrictions on lobbying from the Code of Conduct. Consistent with Rule 16.4 (b), Exhibit A to this Petition shows the requested modifications to the Code of Conduct in the form of a markup to the existing Code. As a result of these modifications, a utility’s communications with local government officials regarding CCA-related issues would be treated on the same footing as a utility’s communications with this Commission regarding CCA-related issues; on the same footing as a utility’s communications with local government officials regarding any other issue or concern; and on the same footing as CCA consultants’ communications with local government officials about CCA formation.

If the Commission declines to eliminate the restrictions on lobbying in their entirety, SCE and PG&E submit that the Commission should at a minimum narrow these restrictions to allow utilities to share useful and timely information with localities. SCE and PG&E ask the Commission to clarify that the lobbying restrictions encompass only express advocacy against CCA programs. Such a clarification would provide at least incremental certainty that the Joint Utilities can communicate important information to local governments without running the risk that they will later be deemed to have had the “purpose” of dissuading CCA participation. SDG&E does not believe that this narrowing solves the constitutional problems with the Commission’s lobbying restrictions and does not support this approach.

No specific changes to the language of the Code are necessary in order for the Commission to clarify that the Code’s lobbying restrictions apply only to express advocacy. Rather, the Commission could simply issue a decision containing the following language or its

equivalent: “An electrical corporation shall not be deemed to have the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a Community Choice Aggregation program unless the electrical corporation expressly advocates against participation in such a program.”

While no change to the wording of the Code is necessary to address utility communications with the press, the Joint Utilities ask the Commission to issue a decision that confirms that such communications are not restricted. The Joint Utilities propose that the Commission use the following language: “Nothing in the Code of Conduct is intended to restrict an electrical corporation’s right to communicate with the press, including newspapers, television stations, and radio stations.”

B. Section 707 Does Not Require the Commission to Restrict the Joint Utilities’ Communications with Local Governments or the Press

Section 707(a) requires the Commission to “[e]nsure that an electrical corporation does not *market* against a community choice aggregation program, except through an independent marketing division.”²² Section 707(a) does not mention lobbying or communications with local government officials. Accordingly, § 707(a) neither instructs nor requires the Commission to adopt any rules regarding an electrical corporation’s communications with local government officials. Nor does § 707(a) mention communications with the press.

No other provision of § 707 prevents the Commission from granting the requested modification to the Code’s lobbying provisions or confirming that the Code does not apply to communications with the press. Section 707(a) (5) states that the Commission may adopt any rules it finds “necessary or advisable to protect a ratepayer’s right to be free from forced speech.” But this provision does not mandate the adoption of any specific rules regarding communications with local government officials or the press. In particular, it does not mandate that the

²² § 707(a) (emphasis added).

Commission require that any communications with local government officials or the press be conducted solely through an independent marketing division. And in any event, as further described in Section E, below, a utility's communications with local government officials or the press would not infringe upon a "ratepayer's right to be free from forced speech," and the Code of Conduct's existing restriction on utility lobbying is not necessary to prevent any such infringement.

In addition, in § 707(a) (4)(B) the Legislature expressed its "intent" that the Code of Conduct "include, in whole or in part, the rules approved by the commission in D.97-12-088 and D.08-06-016." Again, this provision does not mandate the adoption of any specific rules regarding communications with local government officials or the press. Indeed, the Legislature expressly provided that this provision "does not limit the authority of the commission . . . to modify any rule adopted in those decisions."²³ Nor do the Decisions referenced by the Legislature impose any requirement that an electrical corporation conduct all communications with local government officials or the press through an independent marketing division or affiliate.²⁴

Because § 707 does not require the Commission to allow utilities to communicate with local government officials or the press only through an independent marketing division or affiliate, the Joint Utilities' request that the Commission exempt communications with local

²³ § 707(a) (4)(C).

²⁴ In D.97-12-088 the Commission adopted standards of conduct governing relationships between utilities and their affiliates. These standards of conduct limit a utility's ability to share certain services and engage in certain transactions with an affiliate, but they do not restrict a utility's ability to engage in lobbying activities or communicate with the press. *See* D.97-12-088, Appendix A. In D.08-06-016, the Commission adopted a settlement between a CCA, the San Joaquin Valley Power Authority ("SJVPA"), and PG&E. The settlement required both parties to limit themselves to truthful marketing and lobbying, and required functional separation of PG&E's marketing division, but it did not require PG&E to engage in lobbying or communications with the press solely through this marketing division. D.08-06-016 at 5-7. Indeed, the settlement expressly did not prevent PG&E "from timely communicating with the city and county governments participating in SJVPA's CCA program." *Id.* at 6.

government officials or the press from the scope of the Code of Conduct is permissible under § 707.

C. Modifying “Lobbying” in the Code of Conduct Will Inform Local-Government Decision-Making

1. Local governments do not always have complete information about CCA programs

Many localities in California have recently considered or are currently considering taking on electrical power procurement obligations through a CCA program, including the cities of Long Beach, Huntington Beach, Laguna Beach, Palmdale, Murrieta, Wildomar, and Desert Hot Springs, in SCE’s service area. The County of Los Angeles and cities of Rolling Hills Estates and South Pasadena are in the process of implementing Los Angeles Community Choice Energy (LACCE), and are inviting other localities to consider joining LACCE.²⁵

A CCA formation decision involves important complex questions, including whether the CCA can deliver lower cost and/or greener power over time, operate independent of system planning requirements and existing utility commitments, and what risks the CCA and its sponsoring locality must undertake in attempting to do so. Among these complex issues are the following:

- Procurement:

CCAs will be required to deliver a significant amount of the energy required by the Renewables Portfolio Standard (“RPS”) from long-term contracts (i.e., contracts with terms of ten year or longer) to comply with Senate Bill (SB) 350.²⁶ CCAs also have to meet Local and

²⁵ LACCE submitted a supplemental implementation plan on December 29, 2017, to add 21 jurisdictions: Agoura Hills, Alhambra, Arcadia, Beverly Hills, Calabasas, Carson, Claremont, Culver City, Downey, Hawaiian Gardens, Hawthorne, Malibu, Manhattan Beach, Ojai, Paramount, Santa Monica, Sierra Madre, Temple City, Thousand Oaks, West Hollywood, and County of Ventura.

²⁶ See § 399.13(b).

Flex Resource Adequacy (“RA”) requirements, which may become more challenging (particularly for Local) as additional load serving entities are created and enter the market seeking to purchase a limited amount of Local and Flex RA supply. Utility personnel can identify questions and issues that localities should raise with their CCA consultants in order to ensure that they have a broad understanding of the benefits and risks associated with long-term resource procurement and Resource Adequacy requirements.

For example, some of the feasibility studies presented to localities by consultants do not appear to address risks associated with the need to enter into long-term supply contracts, such as credit and collateral requirements, or the ability of the CCA to recover above-market costs of long-term contracts from customers that depart CCA service for other procurement options.²⁷ Some studies mention the need to enter into long-term supply contracts only in passing; others mention that the CCA can and should enter into such contracts for a term, but do not address the risk to the CCA associated with changes in market conditions or credit requirements.²⁸

- Resource Mix:

Utilities have contracted resources that provide important reliability services to the electric grid, such as Local Capacity Requirements and New Generation resources. The current electric grid cannot be reliably and safely operated with only RPS and short-term spot resources. Local government officials should have a full understanding of the need for integration services, ancillary services, voltage and short circuit duty, black start, and energy supply for hours in which renewables generation is insufficient, which will create additional system costs for localities that only consider the purchase cost of renewables and short-term spot markets in their CCA formation decisions.²⁹

²⁷ Declaration of Colin E. Cushnie ¶ 8.

²⁸ *Id.*

²⁹ Declaration of Colin E. Cushnie ¶ 9.

The Joint Utilities have observed a number of representations that CCAs will be greener than utilities.³⁰ This representation may be incomplete if it is not also explained that the utilities will also have portfolios that exceed 50% RPS consistent with the requirements of SB 350.³¹

- Projected Cost Savings:

Projected cost savings from CCA formation are often based on a comparison of the utility's generation rate, which is based on a portfolio of resources contracted over time, to current market prices. Based on current market conditions, such comparisons will show lower potential direct costs for the CCA as compared to the utility's legacy portfolio costs. But these comparisons should also account for the fact that, in order to ensure that the utility's remaining bundled service customers are indifferent to CCA formation—as is required by California law—the PCIA (or successor charge) will need to account for the difference between legacy costs and current market costs.³² This topic is discussed in further detail below.³³ Additionally, such comparisons should also reflect that utilities will be purchasing in the same market environment as a newly formed CCA and all other CCAs, and therefore it is not reasonable to expect a meaningful cost difference for new procurement.

- Customer Migration:

Local government officials also may not fully understand the potential migration of customers and the impact of such migration on their ability to recover costs, or the rules regarding the return of customers to the utility's procurement service. In addition, § 394.25(e) requires CCAs to post a bond or demonstrate sufficient insurance to cover the costs resulting from an involuntary return of customers to bundled service. The consultants' feasibility studies

³⁰ Declaration of Colin E. Cushnie ¶ 9.

³¹ § 399.15(b)(2)(B). Additionally, some utilities have large hydroelectric resources that do not produce GHG emissions, but which are not included in RPS-eligible energy procurement results.

³² See § 366.2(a)(4), (c)(5).

³³ See pp. 18-21, below (discussing the Cost Responsibility Surcharge).

that SCE has reviewed generally do not address—or address only in passing—potential changes to the bond requirement and the impact of these changes on the locality and the CCA.³⁴

- Cost Responsibility Surcharge:

A CCA’s customers must pay a Cost Responsibility Surcharge (“CRS”) sufficient to ensure that the utility’s remaining customers are indifferent to the departure of the customers who will be served by the CCA.³⁵ The current CRS is established through a Commission-adopted methodology, and is recovered through the PCIA and the CTC rates.³⁶ The Commission recently opened a docket to consider modifications to the current methodology for calculating the CRS in order to more accurately implement this statutory directive.³⁷

It is critically important that localities accurately and completely understand this statutory requirement and its implications for CCA customers. To the extent there is currently an opportunity for a CCA to underprice a utility’s generation rate, that difference may be due in whole or in part to the PCIA’s failure to capture accurately the difference between market prices and the cost of the utility’s legacy generation portfolio. When the Commission addresses that issue in its Order Instituting Rulemaking to Review, Revise, and Consider Alternatives to the PCIA (Rulemaking (R.)17-06-026), the CCA’s opportunity to underprice the utility’s generation rate may change.

Localities apparently are not being fully informed on these issues. In its recent comments in R.17-06-026, The Utility Reform Network (“TURN”) noted:

Many municipalities and Joint Powers Authorities are currently considering whether to pursue CCA formation. Unfortunately, local public officials may not be aware of the possible impact of changes to the PCIA on the total costs of service to be offered by a new CCA. Given the Code of Conduct prohibition on marketing or lobbying by an IOU, local governments are forced to rely almost exclusively on the representations of CCA proponents when attempting to

³⁴ Declaration of Colin E. Cushnie ¶ 7.

³⁵ See § 366.2(c)(5), (d)-(i) (AB 117); D.05-12-041 at 23-25.

³⁶ The CTC rates recover competition transition costs. See § 367.

³⁷ See Order Instituting Rulemaking to Review, Revise, and Consider Alternatives to the Power Charge Indifference Adjustment, R.17-06-026 (July 10, 2017).

understand the role of the PCIA in assessing the competitiveness of alternative service that may be offered to their businesses and residents.³⁸

In addition, some consultant reports have told localities to expect a declining PCIA, which is inconsistent with their simultaneous predictions of declining market prices.³⁹ Because the PCIA is calculated to recover the above market costs of a fixed vintaged portfolio,⁴⁰ the PCIA generally varies inversely to current market prices. In a declining market price environment, the PCIA will increase as the difference between market value and the cost of the above-market, long-term commitments in the vintaged portfolio(s) applicable to the CCA customers increases. However, at least one consultant report SCE has reviewed suggests that a CCA could obtain savings through lower market energy prices, but fails to note that lower market prices would typically correspond with a higher PCIA for the CCA's customers (and other departing load).⁴¹

The relationship between current market prices and the PCIA can be complicated, and it is important that utilities be allowed to engage officials of localities considering CCA formation to discuss these issues to allow for more informed decision-making.

All of the foregoing examples, and other important issues relating to CCA formation, operation, and procurement, involve core aspects of the utility business that directly affect utility customers.

³⁸ Comments of The Utility Reform Network on the Order Instituting Rulemaking, R.17-06-026 (July 31, 2017).

³⁹ Declaration of Colin E. Cushnie ¶ 6.

⁴⁰ Pursuant to D.08-09-012, departing load customers are only responsible for the above-market costs of the resources that were procured on their behalf. As such, customers are subject to a "vintaged" PCIA rate that corresponds with the "vintaged portfolio" that was procured prior to their departure. See D.08-09-012, at 4, n. 8.

⁴¹ Declaration of Colin E. Cushnie ¶ 6.

2. Eliminating the Code of Conduct’s “lobbying” restrictions would allow the Joint Utilities to provide local governments with information relevant to their decisions about CCA programs

The Joint Utilities have significant expertise regarding many of the issues relevant to CCA programs and would like to share that information with local governments. For example, the Joint Utilities could explain the bond requirement to local governments and explain how the Commission’s actions could affect that requirement. Similarly, by providing local governments with specific comments on a feasibility analysis conducted by a consultant, the Joint Utilities could identify inaccuracies, inconsistent or flawed assumptions, or unidentified risks. And the Joint Utilities could provide local governments guidance on how the PCIA is calculated, how changes in market prices affect the PCIA, and how the utilities’ proposals and Commission’s actions could affect the PCIA.

By considering the information provided by the Joint Utilities—along with all the information provided by consultants and others—local governments will be in a better position to critically and carefully evaluate their assumptions and models regarding CCA programs and to assess the benefits and risks of any particular option. The Joint Utilities’ communications with local governments about CCA-related issues would benefit potential CCA customers and remaining bundled service customers. Local governments can be more fully informed with utility engagement in their deliberations on CCA programs, and use that knowledge to construct their CCA programs in a manner intended to increase the likelihood of success. More informed decision-making should reduce the risk that a CCA program fails or elects to terminate service to all or a substantial portion of its customers. A failing CCA program creates a high risk of cost-shifting to bundled service customers under the current, inadequate interim CCA bond requirement because bundled service customers may be forced to subsidize the reentry costs of the CCA customers who are involuntarily returned to a utility’s procurement service.

The Joint Utilities have restricted their communications with local government officials because of the broad sweep of the Code of Conduct's restrictions on lobbying and the risk that any communications with such officials regarding CCA formation may be deemed to violate the Code. Initially, the Code of Conduct defines "lobby" as communication "for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program."⁴² The Joint Utilities' goal in providing information to localities is not to persuade localities not to form CCAs; rather, the Joint Utilities' goal is to ensure that localities have relevant information the utility can provide. But to the extent the Joint Utilities provide information that describes the risks associated with a CCA program, the Joint Utilities run the risk under the Code that a party will claim that the true motivation was to convince the locality not to participate in the program. Given the difficulty associated with proving state of mind, any communication regarding CCA programs is, as a practical matter, fraught with peril.

This is not a hypothetical concern. Even where the Joint Utilities have engaged in speech that is plainly permissible under the Code, certain CCA proponents have complained to the Commission about such speech and have requested that the Commission initiate burdensome and expensive investigations and audits. Recently, California Choice Energy Authority ("CCEA"), submitted a letter (attached as Exhibit B) to the Commission accusing SCE of violating the Code of Conduct by communicating with community leaders and others regarding certain issues pending before this Commission. Specifically, SCE communicated with these leaders to encourage them to support SCE's efforts to reform the PCIA in the pending rulemaking before the Commission.⁴³ Nothing in the Code of Conduct prohibits such communications, which were made to draw attention to a current regulatory issue and encourage participation in the Commission's pending rulemaking. Nevertheless, CCEA requested that the Commission initiate

⁴² Code of Conduct Rule 1(b).

⁴³ See generally R.17-06-026.

an “audit” and “thorough review” of SCE’s speech, suggesting that it might violate the “letter” or “spirit” of the Code. Even meritless complaints can create a chilling effect on protected utility speech.

As a result of the risk of being accused of violating the Code, the Joint Utilities have self-censored their communication to localities regarding CCA programs based on their legitimate concern that these communications might be deemed a violation of the Code of Conduct.

For example, SCE has not answered certain CCA-related questions from local government officials due to the risk that an answer could be alleged to violate the Code’s lobbying restrictions.⁴⁴ Similarly, SCE has generally been unable to comment on the substance of the CCA feasibility studies submitted to local governments because of the risk that any comments might be alleged to run afoul of the Code.⁴⁵ As a result, SCE employees have not told local government officials about information that was inaccurate or incomplete that these officials were provided or were considering.⁴⁶ Some localities have expressed to SCE that they would like more information and the perspective of the utility on CCA formation, including specific feedback on the feasibility studies that localities receive from CCA consultants.⁴⁷

The two express exceptions to the definition of “lobby” in the Code of Conduct do not ameliorate the risk utilities face when communicating with local government officials regarding CCA-related issues because they do not provide adequate safe harbors from the chilling effect of the Code’s “lobbying” restriction. The first exception to the definition of “lobby” is limited to providing “factual answers about utility programs or tariffs” in response to “questions from a government agency.”⁴⁸ This exception is of limited use because local governments may not ask a utility for its comments for numerous reasons, including because they are not aware that they have received incomplete or inaccurate information or that the utility could provide useful

⁴⁴ Declaration of J. Christopher Thompson ¶ 8.

⁴⁵ *Id.*; Declaration of Colin E. Cushnie ¶ 10.

⁴⁶ Declaration of J. Christopher Thompson ¶ 8; Declaration of Colin E. Cushnie ¶ 10.

⁴⁷ Declaration of J. Christopher Thompson ¶ 8.

⁴⁸ Code of Conduct Rule 1(b)(i).

information. In addition, even in response to a question, the Joint Utilities are limited to providing information regarding “utility programs or tariffs.” And the Code of Conduct also does not provide any guidance on what would constitute a “factual answer” that could qualify for this exception as opposed to a non-factual opinion that would not qualify.

Similarly, the information that may be provided under the second exception to the definition of “lobby” is limited in scope: a utility may provide information regarding “[CCA] formation rules and processes.”⁴⁹ Accordingly, this exception does not create a safe harbor that would allow the Joint Utilities to provide local officials with a more complete set of information relevant to decisions regarding CCA programs.

Finally, the Code’s exemption for communications by an independent marketing division does not avoid the Code’s significant burden on the Joint Utilities’ communications with local government officials. The Joint Utilities would need to endure the burdens associated with an independent marketing division or an affiliate in order to communicate with local governments, even though the risk that the Joint Utilities would be seeking to address is a customer-related risk, and not a shareholder risk.⁵⁰ Nor are these burdens minor. To the contrary, an independent marketing division would create significant financial and logistical burdens. To speak to local officials, a utility would have to create the division, hire additional employees for the division, and maintain and operate additional office space. The utility would also have to comply with the extensive regulations that apply to independent marketing divisions and affiliates.

And even if the utility were to attempt to create an independent marketing division or affiliate, it would still obtain only a limited ability to communicate with local government officials. Utility employees with the most knowledge and understanding of issues related to

⁴⁹ Code of Conduct Rule 1(b)(ii).

⁵⁰ CCA formation creates opportunities and risks for the customers that take service from the new CCA, and introduces re-entry and cost allocation risk for remaining bundled service customers. Generally, the Joint Utilities do not have cost recovery risk for their approved contract resources, and therefore can focus on providing important information to help local governments make more informed CCA-related decisions.

CCAs and energy procurement contracts would remain unable to speak to local government officials or provide relevant information to the independent marketing division or affiliate.

3. Modifying the Code of Conduct’s lobbying restrictions would still promote the dissemination of useful information to local governments

In light of the benefits of allowing utilities to communicate with local governments regarding CCA programs, and taking into account the constitutional concerns raised by the Code’s lobbying restrictions, the Commission should eliminate the Code’s lobbying restrictions in their entirety.

Absent a complete elimination of the lobbying restrictions, SCE and PG&E (but not SDG&E) submit that the Commission should clarify that these restrictions apply only to *express advocacy* against CCA programs. As noted above, the Joint Utilities are concerned that the Code’s lobbying restrictions turn on whether a communication is “for the purpose of convincing” a local government not to participate in a CCA program. A purpose-based test is inherently fraught with peril because of the subjectivity of such a test and the difficulty in discerning an entity’s state of mind. Even where communications are factually accurate and helpful to the local government, a party could claim that the utility’s true motivation was to convince the locality not to participate in a CCA program. Clarifying that the Code applies only to express advocacy would incrementally lessen this risk while still preventing a utility from advocating against CCA formation.⁵¹

⁵¹ See e.g., *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (narrowly construing a statute that applied to expenditures of money for the purpose of influencing the nomination or election of candidates for federal office to apply only to “expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate”); also *Yamada v. Snipes*, 786 F.3d 1182, 1188 (9th Cir. 2015) (narrowly construing a similar state campaign finance statute to apply only to “communications or activities that constitute express advocacy or its functional equivalent”); also *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 833 (7th Cir. 2014) (narrowly interpreting a similar statute to apply only to “express advocacy” for or against a candidate).

D. Utility Communications with the Press Regarding CCA Issues Are in the Public Interest

The Code of Conduct does not prohibit the Joint Utilities from communicating with the press regarding CCA-related issues. There is no express provision in the Code that addresses such communications.⁵² Nor would such communications fall within the Code’s definition of “market” or “lobby.” The definition of “market” covers only direct communications with customers, such as “letters, delivery of printed materials, phone calls, spoken word, emails, and advertising,” not communications with the press.⁵³ The definition of “lobby” is similarly limited to communications with the “public” or with “public officials,” and is also limited to communications that have the purpose of “convincing a government agency not to participate in, or to withdraw from participation in, a [CCA] program.”⁵⁴ A communication with the press cannot reasonably be construed as “lobbying,” regardless of its content or purpose. Moreover, given the serious free speech issues at stake, the Code should not be construed to limit communications with the press absent an unmistakably clear statement to that effect, which does not exist.

Nevertheless, the Joint Utilities are concerned that they could be accused of violating the Code of Conduct by communicating with the press regarding CCA-related issues. Given the Code of Conduct’s expedited enforcement procedure, burdensome audit rules, and penalty provisions, the Joint Utilities seek confirmation that communications with the press are not covered by the Code of Conduct.

Allowing the Joint Utilities to communicate with the press regarding CCA-related issues is in the public interest. As noted above, CCA-related issues, particularly concerning formation,

⁵² While nothing in the Code prohibits communications with the press, the Code’s marketing restrictions do restrict a utility’s ability to communicate with customers through paid advertising. *See* Code of Conduct Rule 1(a). This petition does not seek any change to that provision of the Code.

⁵³ Code of Conduct Rule 1(a).

⁵⁴ Code of Conduct Rule 1(b).

procurement, and the PCIA are complex. These issues are also currently matters of significant public concern, and they are being examined and debated by the Legislature, before the Commission, and in local communities. The Joint Utilities can help inform this debate with their perspective, which is based on decades of experience in California's energy markets, and by providing more complete information regarding these issues. By contrast, to the extent the Joint Utilities are unable to communicate with the press, the public debate on CCA-related issues may be informed by the unchallenged views of only some constituencies.

E. The Requested Relief Is Necessary to Comply with the First Amendment⁵⁵

1. The Code of Conduct is subject to “strict scrutiny” under the First Amendment

The Free Speech clause of the First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, “guarantee[s] that no State shall abridge the freedom of speech.”⁵⁶ Because the Supreme Court has “rejected the argument” that a speaker’s “status as a regulated utility company lessens its right to be free from state regulation that burdens its speech,” the Joint Utilities are entitled to the full protection of the First Amendment.⁵⁷

⁵⁵ To the Joint Utilities’ knowledge, the Commission has not previously considered whether the Code’s restrictions on lobbying or similar restrictions are consistent with the First Amendment. As noted in footnote 24, above, in D.08-06-016, the Commission adopted a settlement between SJVPA and PG&E. Although that settlement did address lobbying activities, it was primarily aimed at PG&E’s marketing activities. The settlement did not require PG&E to engage in lobbying solely through an independent marketing division. D.08-06-016 at 5-7. And the settlement expressly did not prevent PG&E “from timely communicating with the city and county governments participating in SJVPA’s CCA program.” *Id.* at 6.

⁵⁶ *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 534 (1980) (internal quotation marks and alterations omitted).

⁵⁷ *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of California* (“PG&E I”), 475 U.S. 1, 17, n. 14 (1986) (plurality opinion); see *Consolidated Edison*, 447 U.S. at 534 n.1; *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n* (“PG&E II”), 85 Cal. App. 4th 86, 93 (2000).

Although the Code of Conduct permits lobbying and other speech by a utility's independent marketing division, it is nonetheless subject to scrutiny under the First Amendment because it burdens the Joint Utilities' ability to speak—"[i]t is of no moment that the [Code] does not impose a complete prohibition" on speech.⁵⁸ Financial, logistical, or administrative burdens on speech are all sufficient to trigger First Amendment scrutiny.⁵⁹

In *Citizens United*, for example, the Supreme Court struck down certain campaign finance laws applicable to corporations as inconsistent with the First Amendment "notwithstanding the fact that a PAC [(a Political Action Committee)] created by a corporation can still speak."⁶⁰ The Supreme Court noted that the financial and logistical burdens associated with PACs would burden a corporation's speech because PACs are "expensive to administer and subject to extensive regulations."⁶¹ Like the campaign finance restrictions at issue in *Citizens United*, the Code of Conduct burdens the Joint Utilities' ability to communicate. Not unlike PACs, independent marketing divisions and affiliates create financial and logistical burdens. As noted above, to speak to local officials a utility would have to create the division, hire additional employees for the division, lease additional office space, and comply with the extensive regulations that apply to such divisions, or address the burdens associated with affiliates. These burdens are especially acute given that the utility's goal is to improve the quality of CCA-related decisions on behalf of all utility customers, including CCA customers.

Not only is the Code of Conduct subject to scrutiny under the First Amendment, it is subject to "strict scrutiny"—the most searching standard of review available—because it regulates speech based on its content. "Content-based laws—those that target speech based on

⁵⁸ *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000).

⁵⁹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010); see e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 154 (2002) (requirement that canvassers obtain a permit was subject to First Amendment scrutiny, even though the permit was free and issued routinely); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (requirement that publisher of book deposit money due to author in escrow account under certain conditions).

⁶⁰ *Citizens United*, 558 U.S. at 337.

⁶¹ *Id.*

its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”⁶²

A regulation is “content based” if it “applies to particular speech because of the topic discussed or the idea or message expressed.”⁶³

The Commission’s Code of Conduct is unquestionably a content-based restriction on the Joint Utilities’ communications. Because the Code applies only to communications that “lobby against a community choice aggregation program,” it applies “different restrictions” based on the “topic discussed . . . or message expressed.”⁶⁴ Communications lobbying for or against non-CCA-related issues are not subject to the Code. Nor are non-lobbying communications and non-marketing communications subject to the Code.

In addition, the Code of Conduct is subject to strict scrutiny for a second reason: it restricts the Joint Utilities’ ability to communicate regarding a matter of public concern. “[S]peech on matters of public concern is at the heart of the First Amendment’s protection.”⁶⁵ “The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁶⁶ In *Consolidated Edison*, for example, a public utility’s bill inserts that discussed topics of public concern, such as “the benefits of nuclear power,” were accorded full protection under the First Amendment and a regulation prohibiting them was subject to strict scrutiny.⁶⁷ Similarly, a court would accord full protection under the First Amendment to speech regarding the benefits, costs, and risks of CCA programs.

⁶² *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁶³ *Id.* at 2227.

⁶⁴ *Id.*

⁶⁵ *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (citation, internal quotation marks and alterations omitted).

⁶⁶ *Id.* at 452 (citation and internal quotation marks omitted).

⁶⁷ *See Consolidated Edison*, 447 U.S. at 532, 535, 540-41 (internal quotation marks omitted).

Because the Code of Conduct is subject to strict scrutiny, it can be upheld only if it is “narrowly tailored to serve compelling state interests.”⁶⁸ As discussed below, the Code does not survive this demanding test.

Finally, as relevant to the Joint Utilities’ communications with local government officials, the First Amendment protects not only speech, but also the right to “petition the Government for a redress of grievances.” As the Supreme Court has described it, lobbying the government is a “fully protected” right under the First Amendment.⁶⁹ The Supreme Court has explained that providing “information upon which government must act” is protected petitioning activity.⁷⁰ Accordingly, the Joint Utilities’ communications with local government officials are protected not only by the Free Speech clause of the First Amendment, but also by the Right to Petition clause.

2. The Code of Conduct is not narrowly tailored to serve a compelling government interest

As discussed above, the Code of Conduct cannot be upheld unless it is narrowly tailored to serve a compelling government interest.⁷¹ At a minimum, for a regulation to meet this standard, “the curtailment of free speech must be actually necessary” to solve an “actual problem.”⁷² And the restriction must be the “least restrictive means to further” the government’s asserted interest.⁷³ In describing this “demanding standard,” the Supreme Court has explained

⁶⁸ *Reed*, 135 S. Ct. at 2226. Nor is the Code subject to a more relaxed level of scrutiny reserved for certain kinds of commercial speech. Commercial speech is speech that “does no more than propose a commercial transaction.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (internal quotation marks omitted). The Joint Utilities’ speech does “more than propose a commercial transaction” because it is directed at government officers in their policy-making capacity. Instead of proposing a transaction with the government, the Joint Utilities’ speech provides information relevant to a policy choice that affects the residents and businesses in the government’s jurisdiction.

⁶⁹ *F.T.C. v. Superior Court Trial Lawyers Ass’n* 493 U.S. 411, 426 (1990).

⁷⁰ *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

⁷¹ *Reed*, 135 S. Ct. at 2226.

⁷² *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 799 (2011).

⁷³ *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006) (internal quotation marks omitted); *Sable Communications of California, Inc. v. FCC.*, 492 U.S. 115, 126 (1989).

that it is “rare that a regulation restricting speech because of its content will ever be permissible.”⁷⁴

The Commission has noted that the Code of Conduct is designed to prevent utilities from using their “structural advantages” to influence decisions regarding CCA adoption.⁷⁵ These structural advantages are purported to be: (1) the “inherent market power” that utilities have, including, (2) their “well-developed relationship with customers in their service territories,” (3) their “name recognition,” and (4) their “access to competitive customer information.”⁷⁶ According to the Commission, by limiting utility marketing and lobbying activities the Code of Conduct will provide CCAs “with the opportunity to compete on a fair and equal basis” with investor-owned electric utilities.⁷⁷

The “structural advantages” identified by the Commission appear to relate solely to speech between utilities and their customers. A utility’s alleged market power might give it certain marketing advantages, but those advantages – if they exist at all – would potentially affect its communications with customers, not its speech to government officials or the press.⁷⁸ Similarly, even assuming that a utility’s “well-developed relationship” with customers or its “name recognition” would give it an advantage in influencing customers selecting between the utility and a CCA, that consideration does not justify restricting its communications with government officials or the press. Although access to customer information may allow a utility to better target its messages to customers, the Commission did not identify how this information would unduly affect the utility’s communications with local government officials or the press.

Indeed, many local governments have significant resources and market power of their own. For example, in addition to its regulatory powers, Los Angeles County manages a budget

⁷⁴ *Brown*, 564 U.S. at 799 (internal quotation marks omitted).

⁷⁵ D.12-12-036, at 8-9, 37.

⁷⁶ *Id.* (internal quotation marks omitted).

⁷⁷ *Id.*

⁷⁸ While local governments are, of course, customers of the utility, communications regarding CCA formation are directed to governments in their capacity as policymakers for their residents and businesses.

of \$25.44 billion.⁷⁹ By contrast, Edison International, the parent holding company of SCE, had total revenues of \$11.69 billion.⁸⁰ Even assuming that the Joint Utilities have certain structural advantages, it is unclear how these advantages could overwhelm a local government's independent decision-making abilities.

In any event, neutralizing the Joint Utilities' "structural advantages" is not a cognizable interest that can justify restrictions on the Joint Utilities' speech. The Supreme Court has squarely rejected the notion that government has a compelling interest in "leveling the playing field" in the context of free speech.⁸¹ As the Court has explained, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁸²

The Commission has also justified the Code of Conduct on the basis that "[i]t is reasonable and consistent with [§ 707] to require that marketing or lobbying against CCAs is supported by shareholder funds, not ratepayer funds."⁸³ This statement appears to be a reference to § 707(a)(5), which instructs the Commission to adopt any rules it determines to be necessary or advisable to "protect a ratepayer's right to be free from forced speech."

But utility communications with local government officials or the press would not constitute forced speech for two reasons. First, "[t]he United States Constitution protects individual rights only from *government* action, not from *private* action."⁸⁴ For purposes of constitutional analysis, government-regulated utilities like the Joint Utilities are generally treated

⁷⁹ <http://budget.lacounty.gov/#!/year/default>.

⁸⁰ Edison International and Southern California Edison, 2016 Annual Report at 1, *available at* <https://www.edison.com/content/dam/eix/documents/> <https://www.edison.com/content/dam/eix/documents/investors/corporate-governance/2016-annual-report.pdf>.

⁸¹ *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011) (internal quotation marks omitted).

⁸² *Citizens United*, 558 U.S. at 350 (internal quotation marks and citation omitted).

⁸³ D.12-12-036 at 39.

⁸⁴ *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 746 (9th Cir. 2003).

as private actors, not government actors.⁸⁵ Accordingly, the United States Court of Appeals for the Ninth Circuit has held that an electric and natural gas utility did not violate customers' First Amendment rights by lobbying for deregulation.⁸⁶

Second, even if the Joint Utilities' speech were assumed to be state action, expenditures of money for speech that is "germane" to a utility's mission would not infringe on a customer's right to be free from forced speech.⁸⁷ "Expenditures are 'germane' to an organization's purpose where they 'are necessarily or reasonably incurred for the purpose' of the organization."⁸⁸ Communicating with local governments or the press on CCA-related issues is germane to a utility's organizational mission. Such communications mitigate the risk of cost-shifting to a utility's remaining bundled service customers, may involve questions about how to maintain the reliability of the statewide grid, and promote understanding of the relationship between the CCA and the utility. Additionally, CCA customers continue to receive their electric distribution services from the utility, including metering and billing. As such, CCA formation and operations involve operating concerns of the utility, and communicating regarding such concerns is therefore germane to the utility's mission. Indeed, issues regarding the procurement of electricity, including costs, supply mix, resource adequacy, and the like go to the very heart of what utilities do for their customers. It is difficult to imagine any topic more "germane" to the mission of a utility.

In any event, the Code of Conduct's restrictions go well beyond regulating the source of funding for CCA-related speech. In particular, the Code's burdensome regulations regarding the use of information, employees, and facilities are not narrowly tailored to address any potential concern regarding the source of funding for CCA-related speech.

⁸⁵ See *id.*; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974).

⁸⁶ See *Single Moms*, 331 F.3d at 746.

⁸⁷ *Braintree Elec. Light Dep't v. F.E.R.C.*, 550 F.3d 6, 14 (D.C. Cir. 2008); see also *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990).

⁸⁸ *Braintree Elec. Light Dep't*, 550 F.3d at 14.

F. This Petition for Modification Could Not Have Been Presented Within One Year of the Effective Date of D.12-12-036

This Petition for Modification is being filed more than one year after the effective date of D.12-12-036. But this post-one-year filing is justified by significant changed circumstances. When D.12-12-036 was adopted, relatively few localities were considering CCA formation.⁸⁹ Now, five years later, dozens of localities have recently considered or are considering adopting CCA programs. As localities have begun to consider this option, the Joint Utilities have become aware that localities may not be receiving complete or accurate information regarding CCA formation. These changed circumstances have convinced the Joint Utilities that they should communicate with local governments to ensure that they have more complete and accurate information relevant to their decisions on CCA formation and operations. But, at the same time, the Joint Utilities have come to understand that, as a practical matter, the Code of Conduct effectively prohibits them from providing such information to local government officials.⁹⁰

Moreover, the Code of Conduct was the Commission's first attempt to craft a comprehensive set of rules to satisfy § 707. When first adopted, these rules were untested and their impact uncertain. Indeed, the Commission phrased its understanding of the impact of these rules in tentative terms: "[W]e *believe* that such a Code of Conduct *should* benefit customers by preserving their ability to make educated choices among authorized electric providers."⁹¹ It is only natural that, over time, the effect of the Code of Conduct would become more certain and additional clarification or refinement would become necessary.⁹²

As shown above, this petition's proposed refinements to the Code of Conduct are both narrow and necessary.

⁸⁹ Declaration of Colin E. Cushnie ¶ 4; Declaration of J. Christopher Thompson ¶ 3.

⁹⁰ Declaration of Colin E. Cushnie ¶¶ 4-10.

⁹¹ D.12-12-036 at 6 (emphasis added).

⁹² Additionally, it has recently become clear that the effects of the PCIA will become increasingly problematic as departing load increases, and that the Commission will need to address the current PCIA methodology, which it is currently doing in R.17-06-026.

IV.

PROPOSED SCHEDULE

Many localities in the Joint Utilities' service areas are currently in the process of considering forming or joining CCAs, including Long Beach, Huntington Beach, Laguna Beach, Palmdale, Murrieta, Wildomar, and Desert Hot Springs, in SCE's service area; and Solana Beach in SDG&E's service area.⁹³ To ensure they have an opportunity to communicate with these localities before they make a final decision, the Joint Utilities respectfully request that the Commission take prompt action on this petition and set the following schedule:

- **Responses to Petition Due:** March 1, 2018.⁹⁴
- **The Joint Utilities' Reply Due:** March 12, 2018, if permission to file a reply is granted.⁹⁵
- **Proposed Decision Issued:** June 1, 2018.

As required by Rule 16.4 (c) of the Commission's Rules of Practice and Procedure, the Joint Utilities have served this petition on all parties to R.12-02-009, the proceeding that resulted in D.12-12-036. The Joint Utilities have also served all parties to R.03-10-003 and R.17-06-026.

⁹³ Declaration of J. Christopher Thompson ¶ 4.

⁹⁴ Thirty days from the filing of this Petition, as required by Rule 16.4 (f) of the Commission's Rules of Practice and Procedure.

⁹⁵ Ten days from the date Responses to this Petition are due, as set forth in Rule 16.4 (g) of the Commission's Rules of Practice and Procedure.

Respectfully submitted,

JANET S. COMBS
FADIA RAFEEDIE KHOURY
HENRY WEISSMANN
KURUVILLA J. OLASA

/s/ Janet S. Combs

By: Janet S. Combs

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

STACY VAN GOOR
E. GREGORY BARNES

/s/ Stacy Van Goor

By: Stacy Van Goor

Attorneys for
SAN DIEGO GAS & ELECTRIC COMPANY

RANDALL J. LITTENEKER

/s/ Randall J. Litteneker

By: Randall J. Litteneker

Attorney for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: January 30, 2018

EXHIBIT A

Proposed Revisions to D.12-12-036

PROPOSED REVISIONS TO D.12-12-036

8.1 Rules of Conduct for Electrical Corporations Relative to Community Choice

Aggregation Programs

- 1) The following definitions apply for the purposes of these rules:
 - a) “Market” means communicate with customers, whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), regarding the electrical corporation’s and community choice aggregators’ energy supply services and rates. Marketing under this definition does not include the following:
 - i) Communications provided by the electrical corporation throughout all of its service territory to its retail electricity customers that do not reference community choice aggregation programs.
 - ii) Communications that are part of a specific program that is authorized or approved by the California Public Utilities Commission (CPUC), including but not limited to customer energy efficiency, demand response, SmartMeter™, and renewable energy rebate, or tariffed programs such as the California Solar Initiative and other similar CPUC-approved or authorized programs. (See Decision (D.) 08-06-016, Appendix A.
 - iii) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to the questions of individual customers.
 - ~~b) “Lobby” means to communicate whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), with public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.~~

~~(Cf. D.08-06-016, Appendix A.)¹ Lobbying under this definition does not include~~

- ~~i) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to questions from a government agency or its representative.~~
- ii) Provision of information to potential Community Choice Aggregators related to Community Choice Aggregation program formation rules and processes.

- e) b) "Promotional or political advertising" means promotional or political advertising as defined in 16 U.S.C. Sec. 2625(h).
 - d) c) "Competitively sensitive information" means non-public information and data specific to a utility customer which the utility acquired or developed in the course of its provision of utility services. This includes, without limitation, information about which customers have or have not chosen to opt out of community choice aggregation service. (See D.97-12-088, App. A, Part I.D.)
- 2) No electrical corporation shall market ~~or lobby~~ against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions.² (See Pub. Util. Code § 707(a)(1).)
- 3) [No Change]
 - 4) [No Change]
 - 5) [No Change]
 - 6) [No Change]
 - 7) [No Change]
 - 8) [No Change]

¹ The language from D.08-06-016, Appendix A has been modified to cover the conduct of electrical corporations relative to consideration and formation of community choice aggregation programs, as required by Cal. Pub. Util. Code § 707(a). All statutory references are to the California Public Utilities Code unless otherwise stated.

² In the case of a holding company that owns two or more regulated utility entities (e.g., Sempra Energy), one regulated utility cannot market ~~or lobby~~ against a CCA in the service area of the other utility, except as provided for in this paragraph (e.g., through an independent marketing division funded exclusively by shareholders and separate from ratepayer-funded divisions).

- 9) [No Change]
- 10) [No Change]
- 11) [No Change]
- 12) [No Change]
- 13) As a general principle, an electrical corporation may share with its independent marketing division joint corporate oversight, governance, support systems and support personnel; provided that support personnel shall not include any persons who are themselves involved in marketing ~~or lobbying~~. Any shared support shall be priced, reported and conducted in accordance with applicable Commission pricing and reporting requirements. As a general principle, such joint utilization shall not allow or provide a means for the transfer of competitively sensitive information from the electrical corporation to the independent marketing division, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the independent marketing division. (See D.97-12-088, App. A, Part V.E.)
- 14) [No Change]
- 15) [No Change]
- 16) [No Change]
- 17) [No Change]
- 18) [No Change]
- 19) [No Change]
- 20) [No Change]
- 21) No later than March 31, 2013, each electrical corporation that intends to market ~~or lobby~~ against a CCA shall submit a compliance plan demonstrating to the Commission that there are adequate procedures in place that will preclude the sharing of information with its independent marketing division that is prohibited by these rules, and is in all other ways in compliance with these rules. The electrical corporation shall submit its compliance plan as a Tier 1 advice letter to the Commission's Energy Division and serve it on the parties to this proceeding. The electrical corporation's compliance plan shall be in effect between the submission and Commission disposition of the advice letter.
 - a) An electrical corporation shall submit a revised compliance plan thereafter by Tier 2 advice letter served on all parties to this

proceeding whenever there is a proposed change in the compliance plan for any reason. Energy Division may reject the Tier 2 advice letter and require resubmission as a Tier 3 advice letter if Energy Division believes the change requires an additional level of review.

- b) An electrical corporation that does not intend to ~~lobby or~~ market against any community choice aggregation program shall file a Tier 1 advice letter no later than March 31, 2013, stating that it does not intend to engage in any such ~~lobbying or~~ marketing.
 - (i) If such an electrical corporation thereafter decides that it wishes to ~~lobby or~~ market against any community choice aggregation program, it shall not do so until it has filed and received approval of a compliance plan as described above, with its compliance plan filed as a Tier 2 advice letter with Energy Division. (See D.97-12-088, App. A, Part VI.A.)
 - c) Any CCA alleging that an electrical corporation has 1) violated the terms of its filed compliance plan or 2) has engaged in ~~lobbying and/or~~ marketing after filing an advice letter stating that it does not intend to conduct such activities, may file a complaint under the expedited complaint procedure authorized in § 366.2(c)(11).
- 22) [No Change]

8.2 Rules Regarding Enforcement Procedures

[No Change]

EXHIBIT B

Copy of CCEA's September 25, 2017 Letter



R. Rex Parris	Chair
Marvin E. Crist	Vice Chair
Ken Mann	Authority Member
Angela E. Underwood-Jacobs	Authority Member
Raj Malhi	Authority Member
Mark B. Bozigian	Executive Director

September 25, 2017

Assigned Commissioner Michael Picker
Assigned Commissioner Carla Peterman

Dear Commissioners Picker and Peterman:

I am writing to you in your respective roles as assigned commissioners over two rulemaking proceedings involving issues central to Community Choice Aggregation (CCA) programs. This letter briefly describes recent actions by Southern California Edison Company (SCE) raising questions that should be examined openly before the California Public Utilities Commission (CPUC), since the questions involve industry-related rules pertaining to all CCA programs. I am also copying other CPUC commissioners and the service lists in the two rulemaking proceedings.

I serve as Executive Director for the California Choice Energy Authority (CCEA). CCEA is a joint powers authority among several cities in southern California. CCEA was formed for the purpose of providing support services for cities considering CCA programs. Under the model established by CCEA, individual cities maintain the role of Community Choice Aggregators, ensuring local control and governance, with CCEA providing various back-office, regulatory and procurement services.

SCE has initiated a formal campaign, known as *Equitable Energy Choice for Californians* (EECC Coalition), to lobby the CPUC on matters affecting CCA programs, principally the Power Charge Indifference Adjustment (PCIA). SCE's government affairs representatives are actively communicating with local government and community leaders, urging these leaders to support regulatory reform needed to address the rise of CCA programs. In certain situations, SCE is communicating with local government officials who will be making decisions on CCA programs. I have attached sample documents. The primary message in this round of lobbying is that "the rise in California customers served by Community Choice Aggregators" has created problems with cost allocation mechanisms – problems that jeopardize "California's progress in meeting [] clean energy and environmental goals" that were "kick-started" by SCE and the other utilities. SCE's communications and its efforts are problematic on several levels, and emblematic of key concerns.

First and foremost, SCE's communications and its lobbying efforts appear to be funded exclusively by SCE's ratepayers, including customers receiving or expected to receive service from Community Choice Aggregators. In similar contexts, SCE has stated that its regulatory and government affairs costs are allocated predominantly (84%) to the distribution function. Since CCA customers pay distribution rates, SCE's allocation methodology results in CCA customers paying for SCE's lobbying activities. This is problematic, and raises broader questions on the appropriateness of using SCE's resources and attributes (including SCE's name-recognition) for lobbying and competition-related activities. The California Legislature expressed similar

Assigned Commissioner Michael Picker
Assigned Commissioner Carla Peterman
September 25, 2017
Page 2

concerns about the utilities' use of their "*inherent market power* derived from, among other things, name recognition among customers, longstanding relationships with customers, . . . and the potential to cross-subsidize competitive generation services." (Senate Bill 790 [2011]; Sec. 2(c).) CCEA urges the CPUC in the context of its two rulemaking proceedings to broadly examine cost-allocation issues and the appropriateness of CCA customers funding SCE's activities and attributes that principally benefit competitive generation services, including SCE's lobbying and regulatory campaigns.

Second, although SCE's communications are squarely aimed at CCA programs and implicate a host of lobbying issues, the communications appear to be unrestricted and lacking in regulatory oversight. If not violative of the *letter* of the CCA Code of Conduct, these activities appear to implicate the *spirit* of the code. Adopted in CPUC Decision (D.)12-12-036, the CCA Code of Conduct sets forth requirements for utility actions vis-à-vis CCA programs. For utility communications that are considered marketing or lobbying in nature, funding should be exclusively provided by the utility's shareholders, and the utility would additionally need to form an independent division and be subject to further regulatory oversight. Even *non*-marketing utilities, however, are subject to audit requirements. If nothing else, SCE's actions with respect to the EECC Coalition warrant particular scrutiny as part of a formal audit. In light of SCE's role in the EECC Coalition and the model that could be set for future CCA-related lobbying by other utilities, CCEA specifically requests that the SCE's audit under D.12-12-036 be initiated immediately, and that the scope of the audit include a thorough review of SCE's involvement in the EECC Coalition. (See D.12-12-036; Ordering Paragraph 4.)

Thank you in advance for your consideration of these matters, and your ongoing efforts to ensure that the utilities' inherent market power does not unfairly thwart the development of CCA programs.

Respectfully,

/s/ Mark Bozigian

Mark Bozigian
Executive Director
CALIFORNIA CHOICE ENERGY AUTHORITY

Attachments: Sample SCE and EEUC Coalition lobbying material
 (See also <http://equitablechoice.com>)

Copy: CPUC Commissioner Martha Guzman Aceves
 CPUC Commissioner Liane Randolph
 CPUC Commissioner Clifford Rechtschaffen
 Service Lists: R.17-07-026 and R.03-10-003

----- Forwarded message -----

From: Salvador Ramirez <Salvador.Ramirez@sce.commailto:Salvador.Ramirez@sce.com>>

Date: Tue, Sep 19, 2017 at 12:25 PM

Subject: Equitable Energy Choice for Californians (EECC)

To: [REDACTED] g>>

Dear [REDACTED],

It was great speaking with you last night. Specifically, I'm following up on the discussion we had regarding the CPUC Proceeding on the Power Charge Indifference Adjustment (PCIA), and to obtain your organizations support.

This is an energy issue that will likely be of interest to you and your organization. If no changes are made to current regulations, hundreds of thousands of electricity customers could end up paying extra in their monthly bills for clean energy contracts and other power that was purchased for other customers. The CPUC recognizes that the current cost-allocation mechanism isn't working so they have opened up a formal proceeding.

We have formed a coalition called Equitable Energy Choice for Californians (EECC) to engage at the CPUC and in other efforts to ensure cost equity among all customers. The attached fact sheet provides additional information on the PCIA. We are approaching you and other organizations to alert you to the issue and encourage you to support the coalition.

If you are in support of joining the EECC coalition please fill out the attached EECC Coalition Sign-up Form and return it to Salvador.Ramirez@sce.commailto:Salvador.Ramirez@sce.com>.

Attached is the current list of the organization who have signed on to the Equitable Energy Choice for Californians (EECC) coalition. Please share with other organizations you believe may be interested in joining this list.

Thank you for your continual support. Should you have any questions feel free to call me at (626) 320-9845<tel:(626)%20320-9845>.

Sincerely,

Sal Ramirez
Government Affairs Manager
Local Public Affairs and Government Affairs
Phone: 626-320-9845<tel:(626)%20320-9845>
1000 Potrero Grande Drive, Monterey Park, CA 91755

[REDACTED]

Fact Sheet

Tell the CPUC you believe all energy consumers should share equitably in the cost of investments in clean energy and other resources

California is a leader in clean energy and environmental climate change goals. We are on track to meet our mandated goal of 50% renewable energy by 2030, thanks to the leadership of our state's elected officials and regulators, and in large part to the long-term investments in renewable energy made by customers of the state's investor-owned utilities. These investments helped kick-start renewable energy technologies to make them far more affordable and accessible today than when the legislature first mandated utilities purchase increasing amounts of clean energy.

However, the way people buy energy is changing and more customers are buying power from sources other than their utility. If we are to continue California's progress in meeting our clean energy and environmental goals, we must ensure that all customers continue to contribute equitably in the costs of clean energy and other resources purchased on their behalf.

Current law requires that no customer be required to pay for power purchased for other customers. However, the mechanism established to protect customers is not working. As a result, some are paying more than they should. To address this problem, the CPUC recently opened a formal proceeding to review the mechanism often referred to as the Power Charge Indifference Adjustment or PCIA.

As part of this announcement, the CPUC acknowledged that:

- "Investor-owned utilities and Community Choice Aggregators both have stated that the current cost allocation is inequitable."
- "The rise in California customers served by Community Choice Aggregators makes the cost allocation more important to customer bills."
- "...stakeholders have identified cost allocation issues as the most urgent topic in electric retail choice in California."

Urge the CPUC to create rules that ensure all customers equitably share in the cost of clean power

The CPUC needs to hear from diverse constituencies that want to preserve customer choice, while ensuring all customers equitably contribute to meeting our renewable energy and climate action goals. Please consider signing on to the attached letter so we can tell the CPUC:

Current laws to protect customers from paying for power investments made on behalf of others are not working.

- It has been estimated that some customers who now receive power through an alternative energy provider may on average only pay roughly 65% of the cost of clean energy that was purchased on their behalf.
- As a result, some customers who do not use an alternative energy provider could end up paying roughly \$150 extra per year to pay for power purchased for others.
- This is not sustainable. In all cases, as more alternative energy providers form, there are going to be fewer remaining utility customers left paying an increasing cost for power purchased for others.

The CPUC must establish rules to ensure all customers share equitably in the costs of renewable and other energy.

- To ensure that the move to more customer choice is both sustainable and equitable, the CPUC must reform the current mechanism, including the PCIA, to ensure all customers share equitably in the costs of the long-term investments in renewable and other resources that were purchased on their behalf when they were a utility customer.
- That means all customers – whether they move to an alternative power provider or stay with the utility – will share equitably for past purchases made on their behalf, and no customer shall be left paying for power purchased for others.
- We all benefit from the clean energy investments that have been made to improve our air quality and environment, so no customers should be forced to pay more than their fair share.

EXHIBIT C

Supporting Declarations

**Declaration of Colin E. Cushnie In Support Of The Joint Utilities' Petition For
Modification Of Decision 12-12-036**

1. I, Colin E. Cushnie, make this declaration to state new and changed facts in support of the Joint Utilities' Petition for Modification of Decision (D.) 12-12-036. The statements in this declaration are true and correct to the best of my knowledge.

2. I am currently Vice President, Energy Procurement & Management at Southern California Edison Company (SCE). My responsibilities include overseeing SCE's wholesale energy contracting and management activities and wholesale energy market operations. Before my current position, I was Director of Portfolio Planning & Analysis in SCE's Power Supply Unit. In that position, my responsibilities included energy portfolio analysis and risk assessment and demand and price forecasting. I have also served as Director of Regulatory Affairs for SCE and, in that capacity, I represented SCE before the California Public Utilities Commission on energy procurement and market design issues.

3. Based on my decades of experience at SCE, I am very familiar with energy procurement, long-term energy contracts, demand and price forecasting, resource planning, the Commission's Resource Adequacy rules, the Renewables Portfolio Standard, and other procurement compliance obligations. I believe that my expertise on these topics and the expertise of other subject matter experts on my team at SCE on these and other topics could be helpful to localities in SCE's service area considering the costs and benefits of, and procurement and other obligations associated with, forming a Community Choice Aggregator ("CCA"), or considering the feasibility of implementing a CCA program.

4. My team and I are aware of the significant increase over approximately the last eighteen months in localities' interest in CCA programs as compared to five years ago, when D. 12-12-036 was adopted. At least some of this interest appears to be spurred by consulting firms

that are in the business of providing localities with analyses, reports, or feasibility studies that promote the benefits of CCA programs.

5. In my experience, the information received by local governments from consultants or from other sources regarding the costs and benefits of CCAs is not always accurate or complete.

6. In some cases, local governments receive inaccurate or incomplete information regarding the Power Charge Indifference Adjustment (“PCIA”) or other departing load customer obligations. I have reviewed reports in which consultants have told localities to expect both the PCIA and market prices for energy to decline over time. But this is unlikely because the PCIA generally varies inversely with market prices. Similarly, at least one report suggested that a CCA could obtain savings through lower market costs, but failed to note that lower market costs would lead to higher PCIA charges. In addition, some reports assume a locked-in PCIA rate, assume the Commission will stabilize the PCIA rate, or do not mention the fact that the Commission could modify the PCIA in response to arguments made by SCE and others that the PCIA does not adequately ensure indifference for bundled service customers.

7. My team and I have also reviewed reports or analyses that do not address the re-entry bond or insurance requirements that apply to CCAs pursuant to Public Utilities Code Section 394.25(e). The Commission currently requires CCAs to pay an interim bond amount, but the Commission in Rulemaking 03-10-003 is currently evaluating how to implement the requirements of Section 394.25(e). A change in the interim bond requirement could affect the cost of forming a CCA, but many of the feasibility reports I have reviewed do not discuss this issue, at all.

8. Some of the feasibility studies that I have reviewed do not disclose that CCAs will need to enter into long-term contracts to comply with the Renewables Portfolio Standard pursuant to Senate Bill 350 (2015), and some do not consider the price differential between “brown” and renewable power in estimating savings for the CCA. Other reports mention the need to enter into long-term contracts, but do not address the financial risks associated doing so. Some studies do not address the credit requirements for entering into long-term contracts.

9. I have also reviewed reports that state that CCAs will be “greener” than investor owned utilities, but that do not provide additional context for this claim. Some CCAs may ultimately achieve lower greenhouse gas emissions on a MWh-served basis, but these reports often compare what a CCA could achieve in the long term with what the investor owned utility has achieved today. They do not account for the fact that utilities will also increase their relative use of renewables over time to comply with the Renewables Portfolio Standard. And many studies that I have reviewed do not consider some of the other costs associated with renewable energy, including for integration services, ancillary services, voltage and shortage circuit duty, black start, and energy supply for hours in which renewables generation is insufficient. Nor do many of these studies address the obligations that CCAs have, or should expect to have, with respect to supporting the Commission’s Integrated Resource Planning (IRP) process.

10. Although I have seen inaccuracies and omissions in the information received by local governments, my team and I have generally not affirmatively approached local governments to discuss these concerns, or provided comments or additional information to local governments even though some local government officials have sought our views on certain issues or feasibility studies, due to the concern that any such communications could be deemed to violate the Code of Conduct established by D. 12-12-036.

11. Because CCA formation has considerable financial implications, and will impact resource development and grid operations, it is important that knowledgeable SCE personnel have more ability to communicate with local government officials as part of their CCA formation deliberations.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 24, 2018, at Rosemead, California.



COLIN E. CUSHNIE

**Declaration of J. Christopher Thompson In Support Of The Joint Utilities' Petition For
Modification Of Decision 12-12-036**

1. I, J. Christopher Thompson, make this declaration to state new and changed facts in support of the Joint Utilities' Petition for Modification of Decision (D.) 12-12-036. The statements in this declaration are true and correct to the best of my knowledge.

2. I am currently Vice President, Local Public Affairs for Southern California Edison Company ("SCE"). My responsibilities include staying apprised of developments at the local government level in SCE's service area that could impact SCE's operations or customers and, where appropriate, communicating with local government officials regarding these developments. Based on my work at SCE, I am aware that certain local governments in SCE's service area are considering or have recently considered forming or joining a Community Choice Aggregator ("CCA").

3. I am informed by my team and believe that in 2012, when D.12-12-036 was adopted by the California Public Utilities Commission, there was a comparatively lower level of interest in CCA formation.

4. Today, there appears to be a significantly greater interest in CCA formation or adoption. Many localities in California, including in SCE's service area, are considering whether to form or join CCAs. These localities include the cities of Long Beach, Huntington Beach, Laguna Beach, Palmdale, Murrieta, Wildomar, and Desert Hot Springs, in SCE's service area.

5. Recently, SCE's Local Public Affairs staff have observed a growing cottage industry of consultants and advisors advocating in favor of CCAs. I am informed that, in some cases, the information presented to local governments by these consultants is not accurate or complete.

6. When a locality is considering an issue that could significantly affect SCE's customers or its operations, SCE will often proactively engage with the locality to provide local government officials with information and resources, including access to subject-matter experts from SCE. But, with respect to CCA formation or adoption, the Code of Conduct adopted by D.12-12-036 has curtailed SCE's ability to provide local governments with information regarding the costs and benefits of CCA programs or to correct inaccurate or incomplete information provided to local governments.

7. Because of the breadth of the Code of Conduct and the risk that any communications with local governments regarding CCA issues could be alleged to violate the Code, SCE has limited its communications with local governments regarding CCA formation or adoption. As a result of the Code of Conduct, SCE has instructed its Local Public Affairs staff to avoid providing information on the veracity of a prospective CCA's or CCA consultant's representations about the CCA's services, its rates, and its feasibility.

8. SCE has limited its communications with local governments regarding CCA formation or adoption even when local government officials have asked SCE for additional information. For example, when one local government official asked SCE how a CCA could procure energy at cheaper rates than SCE, my staff declined to respond to avoid any perceived violation of the Code. Similarly, when officials from one locality asked my staff questions regarding the benefits of adopting a CCA, we did not comment and, instead, directed the officials to speak to the prospective CCA. That locality also invited SCE to present at a meeting at which the prospective CCA planned to present, but SCE declined this invitation to avoid being accused of a Code of Conduct violation. And when one city manager asked SCE detailed questions regarding CCA energy procurement and whether a CCA could offer power at a lower cost than

SCE, SCE declined to answer the city manager's questions. Some local government officials have asked SCE for its views on CCA consultants' representations, or for comments on CCA feasibility studies, but SCE has declined or limited the scope of its responses because of the Code of Conduct. Several local government officials have expressed concerns to my team regarding the limitations on SCE's ability to communicate with them about CCA adoption. Others have stated that they would like SCE to share its views on CCAs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2018, at Rosemead, California.


J. CHRISTOPHER THOMPSON

**Declaration of Mitch Mitchell In Support of Petition for Modification of
Decision 12-12-036 Of Pacific Gas and Electric Company (U 39-E), San
Diego Gas & Electric Company (U 902-E) and Southern California Edison
Company (U 338-E)**

1. I, Eugene "Mitch" Mitchell, make this declaration to state new and changed facts in support of the above-referenced Petition for Modification. The statements in this declaration are true and correct to the best of my knowledge.

2. I am currently Vice President, State Governmental Affairs and External Affairs for San Diego Gas & Electric ("SDG&E") and Southern California Gas Company ("SoCalGas"). I am responsible for state governmental affairs for both companies and I oversee all external affairs activities for SDG&E. Based on my work at SDG&E, I am aware that certain local governments in SDG&E's service area are considering or have recently considered forming or joining a Community Choice Aggregator ("CCA").

3. I am informed by my team and am aware that many localities in California, including in SDG&E's service area, are considering or have recently considered whether to join or form CCAs. These localities include the City of San Diego, County of San Diego, City of Del Mar, City of Chula Vista, and City of Encinitas. The City of Solana Beach has submitted a formation plan to the Commission.

4. Increasingly since 2015, city, county, and state representatives have communicated to SDG&E asking for information to help inform their decision on whether to adopt or join a local CCA. For example, in September 2017, the San Diego Associations of Government ("SANDAG") contacted SDG&E's Public Affairs team requesting to discuss 100% renewable energy goals. In October 2017, the San Diego County Taxpayers Association contacted SDG&E Public Affairs requesting to discuss "renewable energy options" and the city's

Climate Action Plan. These examples reflect a broader local government sentiment of wanting to hear about issues that also bear on CCAs matters.

5. There have been discussions like these in which members of SDG&E's Public Affairs team declined to speak to avoid any perceived violation of the Code of Conduct adopted in D.12-12-036 ("Code of Conduct").

6. Local media sources have also implicated SDG&E in their discussions of CCAs, largely advocating for adoption of CCAs. In some cases, the information disseminated through these media sources is not accurate or complete.

7. When the local press comments about or discusses SDG&E, SDG&E has provided information to correct or complete the messaging and avoid the spread of misinformation. But SDG&E has not talked broadly about CCA issues to the press, even when asked by reporters about issues relating to CCA. SDG&E does not believe that correcting misstatements made by the media is within the scope of the Code of Conduct, but out of an abundance of caution, has self-regulated its communications with the press to the detriment of the public's understanding of the topic.

8. Third, there have been instances where local government could substantively benefit from the insight and input of the utility, but SDG&E has been prevented from providing information out of cautious regard for the Code of Conduct. When a locality is considering an issue that could significantly affect SDG&E's customers or its operations, SDG&E would normally engage with the locality to provide local government officials with information and resources, including access to subject-matter experts from SDG&E. But, with respect to CCA formation or adoption, the Code of Conduct has curtailed SDG&E's ability to provide local

governments with information regarding the costs and benefits of CCA programs or to correct inaccurate or incomplete information provided to local governments.

9. For example, the City of San Diego prepared a CCA feasibility study in July 2017. SDG&E determined internally on review that the study contained questionable assumptions and relied on poorly chosen sources. To avoid alleged violations of the Code of Conduct, SDG&E did not bring these study flaws to the attention of the City.

10. The utility's insights would be substantively valuable to local governments' assessments of CCA-related issues and to the benefit of ratepayers. SDG&E has been constrained as to its perspective and insights because of the Code of Conduct. The Code of Conduct has also caused SDG&E to forgo rectifying misinformation spread through various media.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2018, at San Diego, California.


EUGENE "MITCH" MITCHELL