Decision 08-04-056 April 24, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition for Expedited Modification of Energy Division Resolution E-4013 Approving the Utilities' Community Choice Aggregation Service Agreements.	Application 07-12-032 (Filed December 21, 2007)

ORDER RESOLVING THE PETITION OF SAN JOAQUIN VALLEY POWER AUTHORITY FOR MODIFICATION OF RESOLUTION E-4013 APPROVING THE UTILITIES' COMMUNITY CHOICE AGGREGATION SERVICE AGREEMENTS

This decision modifies Resolution E-4013 by granting the application of the San Joaquin Valley Power Authority (SJVPA) requesting the Commission modify Resolution E-4013, by deleting Section 20 of the utilities' Community Choice Aggregation (CCA) Service Agreements relating to joint and several liabilities of members participating in a CCA program through a joint powers agency. We direct Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) to remove from their tariffs and service agreements any requirement or condition of service that imposes joint and several liabilities on the members of a CCA joint powers agency for the debts and obligations of that joint powers agency.

1. Background

The Commission issued Resolution E-4013 on November 9, 2006, approving tariffs filed by the utilities regarding their respective CCA programs. The utilities filed the tariffs in February 2006 in compliance with Decision

(D.) 05-12-041, issued in Rulemaking (R.) 03-10-003, which adopted rules and policies regarding the CCA program. Among other things, the utilities' tariff filings sought approval of a standard CCA Service Agreement. Each utility's Service Agreement included, as Section 20, a requirement that the individual members of the CCA joint powers agency would be jointly and severally liable for CCA debts and obligations. SJVPA's subject application requests that the Commission order the utilities to remove this provision imposing joint and several liabilities on the members of the joint powers agency.

SJVPA's application explains that it is a joint powers agency in accordance with the authority conferred by Assembly Bill (AB) 117, consisting of the following members: Kings County and the cities of Clovis, Corcoran, Dinuba, Hanford, Kerman, Kingsburg, Lemoore, Parlier, Reedley, Selma and Sanger. SJVPA states its intent to serve customers within the service areas of SCE and PG&E. It explains that its joint powers agreement contains a provision that specifies that the liabilities of SJVPA shall be borne by SJVPA, and not by the members of SJVPA.

Because SJVPA's joint powers agreement potentially conflicted with the utilities' CCA Service Agreement, SJVPA requested that SCE and PG&E delete Section 20 from their service agreement for a joint powers agency. The utilities informed SJVPA that they were unwilling to delete Section 20. Subsequent discussions failed to resolve the matter in a way that is satisfactory to SJVPA. SJVPA also explains that this is the first time it has formally addressed the matter before the Commission because SJVPA had not yet been established during the Commission's deliberations in R.03-10-003 or by the time the Commission was considering the utilities' CCA tariffs. The County of Marin replied to SJVPA's application, stating support for it.

On January 23, 2008, SDG&E, SCE, and PG&E filed a joint response to SJVPA's application. The response objects to the proposed modification on the basis that it would shift risk to utility customers in contradiction to AB 117, which authorized the creation of CCAs such as SJVPA. The utilities object to the filing of the application because Rule 16.4(d) of the Commission's Rules of Practice and Procedure requires that, if more than one year has elapsed since the effective date of the resolution proposed to be modified, the petitioner must explain why the petition could not have been presented within one year of the effective date of the resolution. The Commission accepted the application and herein resolves it because no party is prejudiced by its filing and the matter is one of public concern that is relevant to the ongoing oversight of the AB 117 CCA program.

Subsequently, on March 18, 2008, PG&E filed a motion seeking a hearing on the issues raised in this application and all bond and security issues the Commission agreed to consider in Resolution E-4133. This decision denies that motion on the basis that PG&E took the opportunity to address the issues in its response to the application and its motion did not make a convincing case that evidentiary hearings are required to resolve disputed issues of material facts. The Commission declines to expand the scope of this application to include all bond and security issues raised in Resolution E-4133.

2. Proposed Modification of Resolution E-4013

SJVPA's application requests the Commission modify that portion of Resolution E-4013 that approved Section 20 of the utilities' CCA tariffs and standard service agreement. SJVPA would have the Commission direct the utilities to delete Section 20 of their respective CCA service agreements relating to joint and several liabilities of members participating in a CCA program

through a joint powers agency. Section 20 of the CCA Service Agreement approved by the Commission in Resolution E-4013 provides as follows:

> If CCA is a group of cities, counties or cities and counties participating as a group in a community choice aggregation program through a Joint Powers Agency established pursuant to California Public Utilities Code Section 366.2(c)(10)(B) and Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, each such entity shall be jointly and severally liable to PG&E for the obligations under this Agreement.

SJVPA believes Section 20 is contrary to California law, which provides that, unless the Legislature expressly provides otherwise, members of a joint powers agency may avail themselves of the right under Government Code Section 6508.1 to specify in the joint powers agreement that the liabilities of the joint powers agency are not the liabilities of the members. Section 6508.1 states, in pertinent part that "If the [joint powers] agency is not one or more of the parties to the [joint powers] agreement but is a public entity, commission, or board constituted pursuant to the agreement, the debts, liabilities, and obligations of the agency shall be debts, liabilities, and obligations of the parties to the agreement, *unless the agreement specifies otherwise*." (Emphasis added.)

SJVPA argues that AB 117 could have expressly limited the ability of joint powers agencies to avail themselves of the right under Government Code Section 6508.1 with respect to joint and several liabilities of the participating members. Because AB 117 does not do that, SJVPA therefore believes the intent of AB 117 was to permit joint powers agencies operating as CCAs to avail themselves of the right under Government Code Section 6508.1 to expressly specify that the liabilities of joint powers agency are the liabilities of the joint powers agency itself, and not the joint and several liability of its members.

SJVPA also argues that Section 20 is not necessary on policy grounds, and that it will impede the creation and operation of CCAs in contravention of state policy.

The utilities respond that Section 20 is consistent with state law and is needed to protect utility customers from liabilities of a CCA and its member government agencies. The utilities believe there is no evidence to suggest the provision will impede the creation or operation of CCAs. The utilities argue that California law does not require that a joint power agency assume the debts and liabilities of the underlying members, but that the members are permitted under Government Code Section 6508.1 to assign those liabilities to the joint powers agency. The utilities argue that SJVPA's members knew or should have known of the utilities tariff requirements prior to creating their agreement and should have designed their joint powers agency agreement accordingly. The utilities dispute SJVPA's claim that Section 20 will dampen the progress of the CCA program.

Discussion. Resolution E-4013 adopted the utilities' proposed CCA tariffs with some modifications. The tariffs incorporate a standard CCA service agreement, which includes Section 20. The parties dispute the significance of this provision from the standpoint of law and policy. SJVPA believes Section 20 is unlawful and contravenes state policy to promote the development of CCA programs because local agencies are unable to take on the burden of liabilities that should be appropriately allocated to other member jurisdictions. The utilities raise concerns that limiting the liability of a CCA's members will transfer risk inappropriately to utility customers, who may ultimately have to pay for the costs of a failed CCA that does not have adequate assets to cover its debts.

The parties do not dispute that California law permits a joint powers agency to assume sole liability for its debts and obligations. The parties do not

dispute that SJVPA is a joint powers agency that was lawfully created for the purpose of implementing a CCA program and that the joint powers agency agreement specifies that, "unless otherwise agreed," its members shall not assume the liabilities of SJVPA. In creating SJVPA, its local government members have taken advantage of the discretion provided to them under Government Code Section 6508.1, which permits the members of a joint powers agency to specify that the obligations and debts of that agency shall remain with the joint powers agency. This discretion granted to local agencies in Government Code Section 6508.1 has not been modified as it might apply to a CCA.

The disagreement is whether the utilities may mandate that SJVPA members assume joint and several liabilities even though they availed themselves of Government Code Section 6508.1. The grant of discretion provided to local government agencies by the Legislature in Government Code Section 6508.1 cannot be overturned by a utility tariff. Here, the local government members elected to not assume the liabilities of SJVPA unless otherwise agreed. Section 20 of the utilities' tariffs would effectively remove this exercise of discretion by requiring joint and several liabilities unless otherwise agreed by the local government members and the utility. Section 20 of the utilities' CCA service agreements is therefore in conflict with Government Code Section 6508.1 and impedes the authority and rights of local government agencies.

We are not convinced that Section 20 is necessary to protect utility customers. While the utilities have provided a list of consequences that could occur in the event that a joint powers agency with insufficient assets were to fail, they have provided no persuasive arguments that Section 20 is necessary or why joint power agency CCAs, which are comprised of public, governmental entities,

should be considered inherently uncreditworthy. Additionally, we agree with SJVPA that the issue of whether a CCA joint power agency should be required to assume joint and several liabilities should be considered as part of the CCA's creditworthiness review.

Moreover, AB 117 and this Commission's implementation of it mitigate these risks to utility customers by, for example, specifying that bundled utility customers shall not pay higher fuel costs as a result of CCA operations, requiring a CCA to demonstrate a showing of creditworthiness, permitting the utilities to withhold payments to CCAs under certain circumstances, and requiring CCAs to post security bonds or security deposits.[1]

The utilities have not imposed the same liability on the affiliates of privately-held energy service providers (ESPs), and have not provided any justification for treating these two entities differently, although CCAs and ESPs provide substantially similar services.[2]

For all of these reasons, we herein grant SJVPA's petition to modify Resolution E-4013 and direct the utilities to eliminate the requirements

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[1] In Resolution E-4133, we required SJVPA to post an interim bond of $100,000 as part of its registration packet and stated our intent to review this issue generically in an appropriate proceeding. We further indicated our intent to review bonding issues for CCAs more generically in 2008 in D.08-03-032, and noted that a more generic finding in an overarching CCA docket "may warrant adjustment to the $100,000 interim bond level adopted for SJVPA." (D.08-03-032, p. 5 (*slip op.*).) As these statements indicate, the Commission is aware of the concerns raised by PG&E with regard to whether the interim bonding amount is sufficient to indemnify bundled customers from the cost risks associated with CCA customers being returned to bundled service. We remain committed to evaluating bonding requirements for CCAs, including whether the interim bond amount approved for SJVPA should be adjusted.

[2] SJVPA observes that PG&E thereby protected itself from the liabilities of its own ESP affiliate, PG&E Energy Services Ventures, LLC, which has since gone out of business.

articulated in Section 20 from their tariffs and CCA services agreements. However, while the utilities may not require that the members of CCA joint powers agencies assume joint and several liabilities for the debts and obligations of the joint powers agency, consideration of whether there is a need for members to assume joint and several liability should be part of the CCA's creditworthiness review.

3. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on April 15, 2008 by PG&E and SCE; SJVPA and County of Marin indicated their support of the proposed decision, but did not file comments. Reply comments were filed on April 21, 2008 by PG&E and SJVPA. This decision has been modified, as necessary, in response to these comments.

As we have stated, we intend to reconsider the bonding requirements currently approved for the utility tariffs. We may also consider other ways to protect customers from CCA failure. These issues will be addressed in the docket designed to address CCA program rules and policies.

4. Assignment of Proceeding

President Michael R. Peevey is the assigned Commissioner and Amy C. Yip-Kikugawa is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Resolving the subject application to modify Resolution E-4013 serves the interests of the public in promoting a reasonable CCA program, as envisioned by

AB 117 and the Commission's consideration of the subject application would not impose any hardship or prejudice on any party.

2. Section 20 of the utilities' tariffs and CCA service agreements, as described herein, require the members of a CCA joint powers agency to assume joint and several liability for the debts, liabilities, and obligations of the CCA joint powers agency.

3. The utilities' tariffs do not impose joint and several liability on the affiliates of ESPs and the utilities do not make a distinction between CCAs and ESPs that would justify treating the two types of organizations differently for purposes of allocating liability.

4. On balance, the provisions of Section 20, as approved in Resolution E-4133, are not necessary to protect the interests of utility ratepayers in light of other provisions of law and policy designed to protect utility customers from the failure of a CCA.

Conclusions of Law

1. The requirements of Section 20 of the utilities' CCA tariffs and service agreements, as described herein, impede the authority conferred upon local governments by Government Code Section 6508.1 to create joint powers agency agreements that relieve member agencies from liability for the debts and obligations of the joint powers agency.

2. No provision of law circumscribes the rights of local agencies to create CCA joint powers agencies under agreements that exempt the members of the joint powers agency from joint and several liability for the debts, liabilities, and obligations of the joint powers agency.

3. Utility tariffs may not impede the intent of the Legislature with regard to the rights and authority of local governments.

4. SCE, SDG&E and PG&E should be ordered to amend their tariffs and service agreements to eliminate any requirement or condition of service that impose on a CCA joint powers agency's members joint and several liability for the debts and obligations of the CCA joint powers agency.

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) shall, within 10 days of the effective date of this order, modify their tariffs to remove any requirement that imposes joint and several liability on the members of a joint powers agency for the debts and obligations of that joint powers agency that is seeking to provide Community Choice Aggregation (CCA) as described in Assembly Bill 117 and related statutes. The tariffs or service agreements of PG&E, SCE and SDG&E for CCA customers shall not unilaterally impose such liability or make it a condition of service.

2. To the extent set forth herein, the San Joaquin Valley Power Authority's application for modification of Resolution E-4133 is granted.

3. Application 07-12-032 is closed.

This order is effective today.

Dated April 24, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners