Procedural History regarding Energy Efficiency and Community Choice

Introduction: Commission promised to make EE consistent with other CCA policies

The Commission's decision on energy efficiency for Community Choice Aggregators, D0307034, recognized that the rules it was creating might need to be modified to make them consistent with rules governing other CCA issues, which would be decided later:

> AB 117 requires the Commission to conduct a broader inquiry in order to develop rules by which cities and counties may aggregate local load and purchase power as CCAs. The initiation of that broader inquiry is imminent. ***Today's order addressing energy efficiency program funding precedes our order adopting broader rules for cities and counties to become CCAs because the statute requires our attention to this narrower issue no later than July 15, 2003. In the meantime, we interpret the statute narrowly and adopt rules here that do not presume any particular outcome in the broader inquiry. We do so recognizing that the skeletal rules adopted here today may require modifications to make them consistent with the policy direction and rules the Commission ultimately adopts on the broader issues.*** D0307034, pp. 3-4.

Overall CCA policies were subsequently established in D0412046 and D0512041, in the CCA proceeding R0310003. D0512041 recognized that the Commission's jurisdiction was very limited regarding CCAs, which were sovereign governmental entities providing energy for their local residents and businesses. D0512041, p. 2. As California requires all load-serving entities to provide energy efficiency *first* in the energy "loading order," it follows that a CCA should have full administrative control over EE, if it chooses to exercise it.

AB117 addressed an ongoing debate over independent administration of EE

At the time AB117 was making its way through the legislature in 2001 and 2002[1], the Commission was attempting to move towards independent administration of energy efficiency, albeit cautiously. It was trying to avoid another setback like it experienced in the late 1990s, when a variety of challenges derailed an 18-month effort to create an independent administrator pursuant to AB1890.

[1] AB117 passed the legislature twice, in 2001 and also in 2002, when it was finally signed by the Governor.

The OIR for R0108028 announced that the Commission was taking practical steps to provide opportunities for non-utilities to apply for energy efficiency funding, and would take up the question of administration after that:

> In the short term, we wish to encourage utilities and non-utilities to propose energy efficiency programs for 2002 and beyond… For the longer term, we also plan in this proceeding to settle on the appropriate administrator(s) of Commission-ordered energy efficiency programs…
> Decision (D.) 99-03-056 created the expectation that such [utility] administration for energy efficiency would not continue into 2002, stating, "Interim utility administration of energy efficiency programs should not continue past December 31, 2001."[2] However, there is insufficient time to change the basic structure of administration before the beginning of 2002. Therefore the IOUs should continue, until we notify them of a change, to assume responsibility for energy efficiency program administration.

AB117 set a firm deadline of July 15, 2003 for the Commission to set up procedures by which CCAs could apply to administer EE programs. The broader CCA proceeding had not even begun at that time.

It was therefore in the context of the cautious approach to EE administration in the energy efficiency rulemaking R0108028 that D0307034 concluded:

> AB 117 requires the Commission to permit parties other than utilities to apply for energy efficiency program funding authorized in Section 381. Conclusion of Law #2, emphasis added.

D0307034 pointedly stated that it did not address the question of administration, which would be addressed later in the CCA rulemaking. D0307034, p. 5.

However, the decision *did* in fact address EE administration, in an odd way, by interpreting "administer" as "implementer" when it comes to CCAs.[3] It took pains to point out that this definition differed from the one in the Policy Manual:

> We interpret "administrator" in this context to mean any entity implementing an energy efficiency program which is the subject of Section 381, which authorizes the expenditure of certain funds on energy efficiency programs. This contrasts with the Commission's energy efficiency policy manual, which distinguishes "administrators" from "implementers." Ibid, fn. 2 p. 7.

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[2] D.99-03-056, 1999 Cal. PUC LEXIS 327, at *50 (Conclusion of Law 2).

[3] This caused Women's Energy Matters to file an Application for Rehearing, which was denied in D0401032. Commissioner Lynch filed a dissent, as described below. WEM appealed to the Supreme Court, which declined to hear the case.

D0307034 clearly meant this to be a short-term, quick and dirty solution. As noted above, it promised to consider modifications once broader policies regarding CCAs were established. It also stated:

> While we may ultimately find that CCAs are appropriately independent agencies that should have considerable deference to use Section 381 funds, we leave the issue of CCA's role and discretion to our broader rulemaking… [in other words, the CCA Rulemaking R0310003] D0307034, p. 10, emphasis added.

No preconditions before a CCA may apply for EE funds

D0307034 established that cities do not have to be full-fledged CCAs before they apply for EE funding. On the contrary:

> AB 117 does not prescribe any preconditions before a CCA may apply for energy efficiency program funding or implementing energy efficiency programs. Further evidence that the Legislature intended the energy efficiency program move forward expeditiously is the legislative deadline of July 15, 2003 for the Commission to develop procedures under which CCAs may apply for energy efficiency program funding. ***For purposes of AB 117, CCAs may apply for energy efficiency program funding beginning with the first solicitation for proposals following issuance of this order.***[4]

The next month, August 2003, the Commission decided (in D0308067) to hold another solicitation, but there were no CCAs prepared to step up and ask for their funds that fall. *That did not happen until now, seven years later in 2010.*

D0307034 described the CPUC solicitations being held at that time, explaining how they were already consistent "in some respects" with AB117:

> In some respects, the Commission already conducts its energy efficiency program solicitations in ways that are consistent with AB 117. Specifically, it solicits proposals and allocates program funds to any party, including cities and counties, that presents a proposal that is compelling and complements other programs. It selects programs to recognize local system needs, equity and cost-effectiveness, among other things.
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> Section 381.1(a) also requires the Commission's process for allocating funding to various energy efficiency programs to consider certain criteria and outcomes. The Commission's existing rules explicitly or implicitly consider "program continuity" and "planning certainty" when the Commission considers the length of program funding, the types of programs to fund and the appropriate administrators. It has recognized the "value of competitive opportunities for

[4] Section 381.1 provides that CCAs may apply for funds subject to Section 381, which are collected from electric customers. We limit the scope of this inquiry to those funds collected pursuant to Section 381 and do not address energy efficiency programs funded by revenues collected from jurisdictional gas utilities.

> potentially new administers" by allocating some funds to third parties. It has emphasized the need for cost-effective programs and creating a portfolio of statewide and local programs that are complementary. The Commission will continue to consider these program objectives and those set forth in Section 381, consistent with AB 117. This is also consistent with Section 381.1((c)) which provides that CCAs proposing energy efficiency programs shall do so "under established Commission policies and procedures." D0307034, p. 8.

It went on to affirm that AB117 "encodes the Commission's current policy to permit third parties to apply for energy efficiency program funding rather than allocating all energy efficiency program funding and responsibilities to the Commission's jurisdictional utilities." Ibid, p. 8.

D0307034 acknowledged that it is the intent of AB117 to "promote the use of Section 381 funds by cities, counties, and CCAs…." It encouraged CCAs to apply and stated "a commitment to granting them funding:"

> Although we here interpret the statute literally and retain our discretion to allocate funds to the most responsible administrators and the programs that best meet our stated criteria, ***we nevertheless believe the intent of AB 117 is to promote the use of Section 381 funds by cities, counties, and CCAs in ways that are responsive to local needs, cost-effective and fair.*** For that reason, ***we encourage those entities to apply for funding and state a commitment to granting them funding where they demonstrate that their programs meet with statewide objectives and will be well-managed. (p. 13)***

Dissent analyzed legislative intent regarding administration of EE under AB117

Commissioner Lynch's dissent to D0401032 stated:

> [T]he Commission runs afoul of the clear intent of that legislation by continuing to conflate the implementation of energy efficiency programs with program administration and by avoiding the statutory directive to make third parties eligible to apply to administer energy efficiency programs. While I supported the initial decision on this matter (D.03-07-034), upon further review of the statute I realized the error of this interpretation. Lynch Dissent to D0401032, p. 1.[5]

She explained at length the difference between administrator and implementer, and why the ordinary meaning of the words must apply in the context of AB117. She concluded with an in-depth analysis of why this was such an issue in the legislative history of AB117, as well as in the EE proceeding R0108028 during those same years.

[5] D0401032 denied rehearing of D0307034.

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

The concern was not merely with allowing third parties to receive funds as program implementers, as third parties *already* were eligible to receive such funds. Thus, for example, PG&E, which supported the bill if amended, objected to the provisions of § 381.1 that allow third parties to administer programs, noting that if the bill was aimed at ensuring third parties can share in energy efficiency funds if they propose cost-effective programs, the bill would be solving a problem that does not exist. Similarly, San Francisco lobbied for the bill, arguing that it needed the ability to have a sum of money that it could manage itself. San Francisco argued that while the utilities were initially selected as the administrators of the energy efficiency programs because they already had an administrative structure in place, it was expected that others could take on the responsibility of managing these programs but that the Commission had not yet developed a process for evaluating alternatives to the utility management function. In a similar vein, Local Power noted that the goal of the bill was to see that there was local control of a share of the energy efficiency funds…

The Commission's interpretation of § 381.1(a), focusing on requirements for allocating funding for implementation of energy efficiency programs, is at odds with the language of the statute, past Commission decisions on energy efficiency, and the arguments in favor on the legislation.

The only part of the administrative structure approved by the Commission majority that appears even to partially reflect the goals of § 381.1 is the fact that the Commission has taken over from the utilities the administrative task of selecting the third party programs that actually receive funding. Section 381.1, however, goes farther than that, and requires a system in which third parties, such as Community Choice Aggregators, can be awarded substantial sums of energy efficiency funds to administer themselves, including choosing what energy efficiency programs to fund, within the constraints imposed by the statute, and under the oversight of the Commission. Lynch Dissent to D0401032, pp. 6-8.

Subsequent EE decisions affirmed the likelihood of modifying D0307034

Subsequent decisions in EE proceedings reiterated the tentative nature of D0307034 and the likelihood of modifications — even D0501055, the decision that re-established IOUs as monopoly EE administrators:

> We have interpreted our decisions that allow CCAs and other third parties to apply for PGC funds as consistent with this requirement while at the same time recognizing that, as the procedures for allowing CCAs to begin serving customers evolve, we may need to revisit the issue…
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> At the same time, we have recognized that "we may ultimately find that CCAs are appropriately independent agencies that should have considerable deference to use Section 381 funds" and have reserved broader issues about CCAs role and discretion for later determination.[6] We are currently establishing the procedures required by AB 117 before CCAs begin serving customers, including obligations of CCAs, recovery of IOU costs, and required reports to the legislature.[7] Once those details are resolved, we may revisit the issue of allocating electric energy efficiency PGC funds to CCAs in the context of their role in delivering electricity to their customers… Nothing in this decision prevents us from modifying the process for allocating PGC funds to CCAs in the future. D0501055, pp. 75-77, emphasis added.

D0501055 ended CPUC's open solicitations for non-utility programs and re-established utility control. Ever since then, only the utilities were allowed to apply for energy efficiency funds.[8] Utilities, not CPUC, ran solicitations for third party programs and local government partners.

Decision in Community Choice proceeding acknowledged sovereignty of CCAs

Eleven months after D0501055 was issued in the EE rulemaking, the Commission issued D0512041 in the Community Choice proceeding, R0310003.[9]

D0512041 was preoccupied with all the other issues involved in CCA startup, and did not further address energy efficiency. However, the decision left no doubt that CCAs are indeed "appropriately independent agencies" that "should have considerable deference to use Section 381 funds." It explained in detail that the Commission's authority over CCAs is very limited:

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[6] *Ibid.*, p. 10.
[7] See R.03-10-003, Order Instituting Rulemaking to Implement Portions of AB 117 Concerning CCA.
[8] Applications were held in 2005 for 2006-08 programs and in 2008 for the 2009-11 programs (the start of the cycle was delayed for a year, so it became the 2010-12 cycle).
[9] Phase 1 issues were addressed in D0412046.

> Our review of AB 117 leads us to the general conclusion that our authority over CCAs is circumscribed. AB 117's provisions are generally either permissive with respect to CCAs or direct us to regulate the utilities that serve them. …
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> The Commission must adopt rules *for the utility* in order that it may provide adequate service to the CCA and its customers while simultaneously protecting utility bundled customers and the utility's system. Nothing in the statute directs the Commission to regulate the CCA's program except to the extent that its program elements may affect utility operations and the rates and services to other customers. For example, the statute does not require the Commission to set CCA rates or regulate the quality of its services. To the contrary, while providing very precise guidelines on a number of issues involving the utilities' services to CCAs and ways to protect utility customers, the statute does not refer to how the Commission might oversee the rates and services CCA's offer to their customers.
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> We are confident that existing law protects CCA customers. Entities of local government, such as CCAs, are subject to numerous laws that will have the effect of protecting CCA customers and promoting accountability by CCAs. Under existing law, a CCA must conduct public hearings, operate within a budget and disclose most types of information to members of the public. To the extent that a CCA fails to consider the interests of its customers - who are local citizens - there is recourse in subsequent elections, the courts and before local government agencies. We are not convinced that our oversight would necessarily contribute anything in that regard, as long as utility tariffs provide adequate protections for the integrity of the utility system and bundled ratepayers are protected from costs that are attributable to CCA customers, as AB 117 requires. D0512041, pp. 8-10.

The language of D0512041 was explicit about the limitations of the Commission authority regarding a CCA's Implementation Plan — "or some other document." The CCA's application for energy efficiency funds would almost certainly be included in this policy description:

> We may agree with the utilities that the implementation plan - or some other document - should disclose relevant information to CCA customers and prospective customers. However, we do not agree it is our job to determine what that information should disclose. Instead, we believe it is up to the CCA to comply with the statute. This view is supported by the Legislature's historical treatment of local governments that operate utilities for such commodities as electricity, sewage treatment and water. We have no evidence to suggest that utility operations performed by local government have failed to operate successfully absent strict state oversight. CCAs are government entities subject to specific statutes with regard to their operations, decision-making procedures and information disclosure. No one has claimed that those statutes are

> inadequate to protect local citizens and we choose not to second guess them. Ibid, p. 16 emphasis added.

D0512041 specifically rejected the advice letter process for its review of a CCA's Implementation Plan, because it would impose an "elaborate and time-consuming procedure" on both the CCA and the Commission.

> Because we do not believe the AB 117 intended to give this Commission broad jurisdiction over CCAs, we reject the utilities' proposal to subject CCAs to the advice letter process, a formal administrative procedure that the Commission employs for the purpose of authorizing changes to the tariffs of regulated utilities. The procedure would require the formal adoption of a CCA's implementation plan at a public meeting following the filing of formal comments by parties, the issuance of a proposed resolution, and the filing of comments on the proposed resolution, a process that would take no less than 60 days and would probably take much longer. Nothing in the statute authorizes the Commission to conduct this elaborate and time-consuming procedure. D0512041, pp. 14-16

Similarly, for the Commission to approve a CCA's application for its energy efficiency funds, it should be unnecessary to conduct a formal process requiring parties' comments and replies and the formal adoption of a decision or resolution at a public meeting.

D0307034 had noted (p. 9): "AB 117 does not specify the process the Commission should use to consider CCA applications for energy efficiency program funding…" but went on to assume that the Commission could use a somewhat similar process it was already using to conduct solicitations.

D0512041 refined that thinking, clarifying that silence in a statute was not an invitation to the Commission to fill in the blanks — quite the opposite:

> A general rule of statutory interpretation suggests that where a statute provides specific guidance -- in this case on the Commission's role and authority -- its silence in a related section or on related issues implies a limit on that role and authority. (*Louise Gardens of Encino Homeowners' Assoc. v. Truck Insurance Exchange, Inc.* 82 Cal. App. 4th 648 at 657). Here, the statute *does* require the CCA to file the plan here and gives the Commission authority to request information about the plan and to register the CCA. We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included explicit language in the statute with regard to its intent. D0512041, p. 15.

Conclusion

The Commission has continued to recognize that AB117 promised CCAs a chance to apply to administer energy efficiency programs, and D0307034 might need to be modified if and when CCAs asked for their funds. D0512041 established conclusively that the modifications must reflect the very limited authority of CPUC regarding any aspect of CCAs, which must included energy efficiency.