Excerpts D0512041
DECISION RESOLVING PHASE 2 ISSUES ON IMPLEMENTATION OF COMMUNITY CHOICE AGGREGATION PROGRAM AND RELATED MATTERS

CCAs are governmental entities formed by cities and counties to serve the energy requirements of their local residents and businesses... D0512041, p. 2.

In the process of developing the CCA program in this proceeding, the question has arisen as to whether and the extent to which AB 117 grants this Commission jurisdiction over CCAs and, by implication, the cities and counties that create and oversee them. Indeed, almost every controversy in Phase 2 of this proceeding somehow implicates the extent to which the Commission may or should control CCA activities, whether by way of utility tariffs or independently.

…Utilities argue AB 117 intended for the Commission to have broad authority over CCAs and did not limit the scope of the Commission's authority in this regard. As evidence of this legislative intent, the Utilities cite several sections of the statute that refer explicitly to the Commission:
1. The CCA must file an implementation plan and a statement of intent with the Commission;
2. The CCA must register with the Commission; and
3. The Commission must adopt rules for CCAs before CCAs may offer services.
The Utilities argue that the Commission has exercised authority over Energy Service Providers (ESPs) and utility holding companies and that this "derived authority" extends equally to CCAs…

CCAs reply that the Commission's role is primarily to "advise and assist" CCAs, which are entities of local government subject to open meeting laws and established procedures for public participation and information disclosure. As evidence that the Legislature did not intend for the Commission to assume jurisdiction over CCAs, CCAs observe that AB 117 requires an implementation plan in order to develop a cost responsibility surcharge (CRS) and that AB 117 does not require a CCA to submit changes to its implementation plan to the Commission. With regard to authority over CCAs, AB 117, according to CCAs, establishes responsibilities for the Commission that are primarily ministerial, for example requirements to notify the utility of a filed implementation plan, requesting additional information about the plan and requiring the CCA to register with the Commission. Ibid, pp. 7-8.

Discussion. In considering this Commission's jurisdiction over CCAs and the implementation of CCA program, we rely almost exclusively on the guidance

provided by AB 117, which is the only California statute that guides the development of a CCA program.[1]3 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. That is, we interpret AB 117's requirements for the CCA to file an implementation plan, to register with the Commission, and to comply with program rules to be conditions of receiving related utility services. … The conditions of service imposed
on utility customers do not confer upon this Commission general jurisdiction over customers...

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.

In support of their view that the Commission has broad and general jurisdiction over CCAs, utilities cite D.04-07-037 which found that the Commission has authority over ESPs as a result of statutory language authorizing the Commission to suspend or revoke an ESPs's registration if an ESP were not financial capable of providing electric service. In the case of ESPs, the Commission has express statutory authority which AB 117 does not confer with regard to the CCA implementation program. In fact, the distinction is significant in that we must assume the Legislature would have explicitly granted us authority over these programs as it has in the case of ESPs if that is what it had intended. Instead, Section 394, which outlines how the Commission is to process ESP applications, explicitly exempts public agencies from its provisions… Ibid, pp. 9-10

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.

[1] 3 Other statues and our own decisions have addressed other areas of jurisdiction over CCAs and ESPs, for example, but not limited to the issue of resource adequacy requirements. (See e.g., D.05-10-042 and AB 380 (Ch. 367, Stats 2005) which, [among] other things added Section 380 to the Pub. Util. Code and requires the Commission to consult with the ISO to establish resource adequacy requirements for all load-serving entities.

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.

Although we find that we do not have broad regulatory authority over CCA program implementation, we do have authority to subpoena information and witnesses, to require information from a CCA and to require its involvement in any relevant Commission inquiry, authority we have over any individual or entity whose acts or knowledge are germane to our regulatory obligations. As the utilities argue, we also retain a responsibility to assure that a CCA's policies, practices and operations do not compromise the operations of the utility or services to utility customers. We may affect those protections in the CCA program rules that will be incorporated into utility tariffs. At this time, we have no reason to believe that this approach is inadequate to protect utility customers. Finally, we address the utilities' complaint that they "should not be forced to adopt the tariff changes drafted by the local governmental agencies" and that they, the utilities, "are the entities responsible for writing and administering their own tariffs." We remind the utilities that every party to our proceedings is entitled to comment on utility tariff proposals and to our full consideration of their views. Local governmental agencies participating in this proceeding have done nothing novel by objecting to utility tariff proposals and proposing their own. More importantly, we most assuredly will order the utilities to modify their tariff language in ways they themselves did not propose if that tariff language is required to conform the tariffs with our view of the public interest, consistent with our statutory obligations and notwithstanding which party proposed them. pp. 10-12

Discussion. We begin by addressing the appropriate extent of our oversight of Implementation Plans. Consistent with our discussion on jurisdiction more generally, we defer to the express language of the statute. As a threshold matter, we find nothing in the statute that directs the Commission to approve or disapprove an implementation plan or modifications to it. Nor does the statute provide explicit authority to "decertify" a CCA or its implementation plan. While we agree with the utility that the Legislature could not have intended for the requirements regarding the Implementation Plan and modifications to it to be "a meaningless, perfunctory exercise," we do not agree that the Legislature intended the Commission to treat CCAs like utilities, which

is what the utilities suggest.
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.

The Legislature's treatment of private power sellers - ESPs - is also instructive here. Section 394 sets forth an elaborate regulatory process for the registration of ESPs that seek to sell power to individual customers, a business relationship commonly referred to as "direct access." Section 394 requires ESPs to register with the Commission, to be subject to finger printing and a criminal background check, to file formal applications for authority to operate under certain conditions, and to prove technical, financial and operational ability as a precondition to the Commission's issuance of a license to operate. The Commission is explicitly provided authority to deny a license under certain circumstances and to revoke it. Section 394(a) explicitly exempts public agencies, such as CCAs, from its provisions. If the Legislature had intended the Commission to impose these types of procedures on CCAs, as the utilities suggest either directly or by inference, we must presume it would have so stated. Since it did not, we must assume the Legislature intended a much more limited role for the Commission in its oversight of CCAs.

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. 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. Ibid, pp. 14-16

While we part company with the utilities on the issue of how much authority we have over CCAs and how much formal Commission process is required or authorized by AB 117, we realize that the Commission has a role in assuring the CCA's operations comport with utility tariff requirements and rules, especially in the early years of the program while the utilities and CCAs are implementing an untested program. We also recognize that CCA operations or implementation plan modifications may not be consistent with the requirements of the utility's tariffs. We therefore adopt certain procedures to promote understanding and cooperative relationships between the utilities and CCAs. In order to facilitate the smooth operation of the CCA where its policies, practices and decisions may affect the utility and its customers, we will direct the Executive Director to develop and publish the steps of an informal process of review that provides a forum for the CCA and the utility to understand the CCA's implementation plans and assures the CCA is able to comply with utility tariffs. We expect the process to be collaborative and, if required, facilitated by Commission experts. The process would be mandatory only at the request of either the utility or the CCA and where the request is presented in writing with a recitation of disputed items or areas of concern. The process would implicate no approvals, either formal or informal, from the Commission. Ibid, p. 17

The procedures we adopt are designed to comply with AB 117 and facilitate a CCA's program while protecting utility customers. They will require a commitment by each utility and CCA to work cooperatively and in good faith. We are also aware of the particular responsibility of the utilities that is imposed by Section 366.2(c)(9), which requires the utility to "cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs." The failure of a utility to cooperate in good faith with a CCA could cause the CCA or utility bundled customers to incur unnecessary costs and create unnecessary customer confusion. In our role to regulate the utilities that are the subject of this subsection, if we find that a utility has failed to comply with Section 366.2(c)(9) or relevant Commission orders, we retain authority to impose substantial penalties on the utility and cooperate in any law suit that seeks material damages. Fortunately, at this point,

we have no reason to assume that our authority will be required in this regard. Ibid, p. 18

Because we have declined to issue an order approving an implementation plan for each CCA or one that directs a utility to stop procuring power for a CCA, we apply Section 366.2(c)(8) by herein finding that the earliest possible implementation date for the CCA *program* was the effective date of the tariffs filed pursuant to D.04-12-046 in Phase 1 of this proceeding. The utilities shall immediately undertake to affect the system changes required to satisfy the tariffs as soon as it receives a binding commitment from a single CCA. It should complete its work within six months for the first CCA in its territory. The earliest possible implementation date for a CCA's provision of service would be the date of the completion of all tariffed requirements, but no later than six months after notice from the first CCA or the date the CCA and the utility agree is reasonable. In no event may the utility delay the initiation of CCA service once the utility has implemented the required processes and infrastructure and the CCA has fulfilled tariffed requirements. Ibid, pp. 47-48

X. Future CCA Issues

The CCA program is new in California and there is little experience with such a program anywhere. Our order today and the parties who contributed to it have sought to anticipate every contingency on the one hand and permit some flexibility on the other with the expectation that the utilities and CCAs may be able to tailor operational arrangements according to circumstances in ways that promote program efficiency and fairness. We recognize, however, that a CCA's operation may affect customers, utilities and the power system in ways we cannot today anticipate.

We expect CCAs may initiate service to local customers in the next year or two. Experience with their operations will undoubtedly provide experience and information about the policies and rules we adopt today. We intend for that experience to inform future inquiries and decision-making on CCA issues. Accordingly, although we close this proceeding today, we intend to initiate a new rulemaking to review the program within a year of the initiation of the first CCA's operation. In the meantime, we encourage CCAs and utilities to bring to our attention problems with existing tariffs, rules or policies adopted today. They may do so by consulting with our technical staff or filing petitions to modify orders issued in this proceeding. We will also entertain motions to reopen this proceeding and consider specific issues. pp. 54-55

Findings of Fact

1. Section 394 specifies regulatory procedures for the oversight of energy service providers but does not articulate similar requirements for CCA program

implementation.
2. Although the Commission has the authority to assert limited jurisdiction over certain CCA matters, 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. Existing laws applicable to CCAs would protect customers by requiring CCAs to conduct open meetings, disclose relevant information to the public and be accountable to elected officials, the courts and voters.
…
4. The Commission's advice letter process is not required in order to process a CCA's implementation plan and registration with the Commission.
5. Disputes between CCAs and utilities may be able to be resolved by way of an informal facilitation or mediation procedure.
…
10. Utility marketing of procurement services to CCA customers and providing information about a CCA's services and rates to customers may create conflicts of interest and costs that may not be offset by benefits.
…
14. The purpose of a binding notice of intent between a CCA and a utility for a CCA in-service date is to minimize utility power purchases that might later become stranded when the CCA initiates service. This notice of intent would commit the CCA to assuming any power purchase liabilities that the utility may incur if the CCA does not initiate service according to the terms of the notice.
15. A voluntary open season may provide an opportunity for CCAs to minimize risk associated with CRS amounts and for the utility to limit its exposure to the risk of purchasing unneeded power.
16. Imposing liability on utility bundled customers for all power purchases made after the date of the creation of a CCA or its filing of an implementation plan, absent a binding commitment, may require bundled customers to pay for power reasonably purchased on behalf of CCA customers.
Xxx*17. Requiring a CCA to assume the risk of a load forecast for five years effectively shifts the risk from the utility to the CCA for part of the utility's forecasting activities. The utilities routinely adjust forecasts to account for lost load.
…
40. D.04-12-046 required the utilities to unbundle billing services. PG&E has not proposed an unbundled billing service that would permit CCAs to provide adequate information to customers about rates. Its proposed rate for billing service is not unbundled.
41. D.04-12-046 required that a utility's general body of customers should assume the costs of system changes required to serve CCAs, consistent with AB 117.

Conclusions of Law

Xxx**1. AB 117 provides for limited jurisdiction over CCA program implementation. The statute's provisions for participation in the CCA program are generally either permissive as to the CCA or govern the Commission's regulation of the utilities in the way they offer services to the utilities or structure CCA rates so as to protect utility bundled customers.

2. Although relevant portions of AB 117 do not confer general regulatory oversight of CCAs, the Commission has the authority to exercise limited jurisdiction over non-utilities in furtherance of their regulation of public utilities, including resource adequacy. (*See PG&E Corp. v. CPUC,* 118 Cal. App. 4th (2001)

3. Commission has authority to subpoena information and witnesses, to require information from a CCA and require its involvement in any relevant Commission inquiry, whenever germane to the Commission's obligations under AB 117.

4. AB 117 does not require the Commission to approve, disapprove, decertify or modify a CCA's implementation plan. AB 117 requires the CCA to file an implementation plan with the Commission and to register with the Commission before initiating electricity service to customers.

5. The Executive Director should implement a process under which disputes between a CCA and a utility may be facilitated or mediated, as required and as set forth herein.

6. The Executive Director should develop and publish instructions for CCAs and utilities that would include a timeline and describe the procedures for submitting and certifying receipt of the CCA's implementation plan, notice to customers, notice to CCAs of the appropriate CRS, and registration of CCAs. The process and timeline should be consistent with AB 117 and this order.

…

8. The use of the term "fully cooperate" in Section 366.2(c)(9) is reasonably interpreted to mean that utilities shall facilitate the CCA program and a CCA's efforts to implement it to the extent reasonable and in ways that do not compromise other utility services.

9. AB 117 circumscribes the Commission's role in establishing protections for the customers of CCAs.

10. Utility tariffs are generally not appropriate vehicles for regulating the protections CCAs offer to their customers.

…

12. AB 117 requires that every customer offered service by the CCA be served by the CCA unless the customer affirmatively declines CCA service. The statute does not make exceptions for bundled portfolio service customers, direct access customers or new customers.

…

14. Utilities' ratepayers should not be required to support in rates utility marketing activities related to services to CCA customers.

…

19. The utilities will not procure power on behalf of CCA customers as part of their resource adequacy planning.

…

22. The utilities and CCAs should work collaboratively to develop forecasts for load the utilities will lose when a CCA initiates service. Utility tariffs should require that CCA's provide information about services, rates and customer groups on a confidential basis, to facilitate the development of a forecast.

23. A utility should not be permitted to impose risk on the CCA for the utility's own load forecasts once the CCA has initiated service.

24. A collaborative process whereby the utility and the CCA work together to develop a forecast of departing load, would help mitigate forecast risk.

…

30. A binding notice of intent signed by the CCA and which specifies a date for the CCA's initiation of service, which specifies phase-ins where planned, should automatically relieve the utility of its obligation for purchasing power for the CCA's customers as of the specified service initiation date.

…

37. Section 366.2(c)(9) requires the utilities to provide all relevant customer information to CCAs and prospective CCAs and the Commission has found that the statute does not permit the utilities to determine the types of customer information required by CCAs and prospective CCAs. Utility tariffs therefore may not limit access to such information.

…

46. The utilities should not notify customers of their change in service to the CCA, which is the subject of two CCA notices. The utilities may include this information in their regular bill inserts but may not charge CCAs or CCA customers for it.

47. Utility tariffs should not govern the relationships between CCAs and the ISO and utilities should not be permitted to stop serving a CCA on the basis of its relationship with the ISO except by order of the Court, the Commission or the FERC.

50. The utilities should be ordered to immediately effect the system changes required to satisfy their CCA tariffs following notice by a CCA of an intent to offer service.

51. The earliest possible implementation date for a CCA's provision of service should be the date of the completion of all tariffed requirements but no later than six months following notice by a CCA to offer service or the date the CCA and the utility agree is reasonable, whichever is later, unless an order of the Commission or a letter from the Executive Director states otherwise.

…

O R D E R

IT IS ORDERED that:

4. Pursuant to Section 366.2(c)(8), the earliest possible implementation date

for the CCA program was the effective date of the tariffs filed pursuant to Decision (D.) 04-12-046 in Phase 1 of this proceeding. The utilities shall immediately effect the system changes required to satisfy the tariffs.

5. The earliest possible implementation date for a Community Choice Aggregator's (CCA) provision of service is the date of the completion of all tariffed requirements or the date the CCA and the utility agree is reasonable, whichever is later, unless a Commission order or letter from the Executive Director states otherwise.

…

8. In order to facilitate the smooth operation of the CCA where its policies, practices and decisions may affect the utility and its customers, the Executive Director shall develop and publish the steps of an informal process of review, as described herein, that provides a forum for the CCA and the utility to understand the CCA's implementation plans and assures the CCA is able to comply with utility tariffs. The process shall be mandatory at the request of either the utility or the CCA and where the request is presented in writing with a recitation of disputed items or areas of concern. The process shall implicate no approvals, either formal or informal, from the Commission. Utility tariffs shall describe the process for resolving disputes over operational issues prior to initiation of services, as set forth herein.

…

10. The Executive Director shall prepare and publish instructions for CCAs and utilities that includes a timeline and describes the procedures for submitting and certifying receipt of the Implementation Plan, notice to customers, notice to CCAs of the appropriate CRS, and registration of CCAs. The process and the timeline shall be consistent with the statute and with this order. The instructions shall require that the CCA's registration packet include the CCA's service agreement with the underlying utility and evidence of insurance, self-insurance or a bond that will cover such costs as potential re-entry fees, penalties for failing to meet operational deadlines, and errors in forecasting.