BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Portions of AB117 Concerning Community Choice Aggregation.	Rulemaking 03-10-003 (Filed October 2, 2003)
Rulemaking Regarding Whether, or Subject to What Conditions, the Suspension of Direct Access May Be Lifted Consistent with Assembly Bill 1X and Decision 01-09-060.	**(NOT CONSOLIDATED)** Rulemaking 07-05-025 (Filed May 24, 2007)

OPENING BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY

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I. INTRODUCTION

Pursuant to Rule 13.14 of the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission"), San Diego Gas & Electric Company ("SDG&E") provides its Opening Brief regarding the legal question whether Assembly Bill ("AB") 117 (2002), as codified in Public Utilities Code Section 394.25(e), requires electric service providers ("ESPs") to post sufficient financial security to cover certain costs associated with the involuntary return of ESP customers to utility service.[1]

II. DISCUSSION

Public Utilities Code Section 394.25(e) provides:

> If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, *any reentry fee imposed on that customer that the commission deems is necessary to avoid imposing costs on other customers of the electric corporation shall be the obligation of the electric service provider or a community choice aggregator*, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer's contract has expired.

[1] *Southern Cal. Edison Co.*, 85 Cal. App. 4th at 1096 ("The interpretation of a regulation, like the interpretation of a statute, is a question of law subject to our independent review.").

> *As a condition of its registration, an electric service provider or a community choice aggregator shall post a bond or demonstrate insurance sufficient to cover those reentry fees.* In the event that an electric service provider becomes insolvent and is unable to discharge its obligation to pay reentry fees, the fees shall be allocated to the returning customers. (Emphasis added.)

Under settled canons of statutory construction and Commission precedent, an agency must first look to the statute's words and give them "their usual and ordinary meaning."[2] The statute's plain meaning controls the agency's interpretation unless its words are ambiguous.[3] If the plain language of a statute is unambiguous there is no need to go beyond that pure expression of legislative intent in order to effectuate the law's purpose.[4]

The plain language of Section 394.25(e) makes clear: to avoid imposing costs associated with the involuntary return of Direct Access ("DA") customers to utility service, e.g., reentry fees, on the returning DA customers and to avoid shifting these same costs onto bundled service customers, ESPs must post a bond or have sufficient insurance to cover the costs. Section 394.25(3) is unambiguously a consumer protection regulation designed to protect DA customers involuntarily returned to utility service and bundled service customers from an ESP's fraudulent actions and/or potential non-performance.[5]

Even, for the sake of *arguendo*, if the regulation was not clear, the legislative history shows the Legislature intended that ESPs should bear the costs associated with an involuntary return of DA customers to utility service. AB 117 was first introduced by California Senator Carole Migden on January 22, 2001 during the 2001-02 session. The original language did not contain language regarding reentry fees or an ESP bond requirement. The language of Section

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[2] *See* ("D.") Decision 10-06-019 at pp. 2-3 (quoting *People v. Canty* 32 Cal.4th 1266, 1276 (2004).

[3] *Id. See also Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 (1973).

[4] *Lundgren v. Deukmejian* 45 Cal.3d 727, 735 (1988).

[5] *See* D.03-12-015 at p. 34.

394.25(e) was first added by the State Senate in the 2nd round of amendments on June 5, 2002 and reads:

> This bill would provide that if a customer of an electric service provider is involuntarily returned to service provided by an electrical corporation, any reentry fees imposed on that customer are to be the obligation of the electric service provider. The bill would require the electric service provider, as a condition to its registration, to post a bond or demonstrate insurance sufficient to cover paying those reentry fees.[6]

Ostensibly, the Legislature made use of both its foresight and hindsight. Looking forward in contemplation of the possibility that not all ESPs would thrive, the Legislature attempted to shield involuntarily returned DA customers from the burden of paying costs to return to utility service—costs which the DA customers would incur through no fault of their own.[7] Looking back at the 2000-2001 Energy Crisis and its aftermath, the Legislature sought to ensure that bundled ratepayers do not once again pay the costs associated with the return of DA customers to utility service. To protect these customers, ESPs must indemnify their involuntarily returned customers by posting a bond or insurance sufficient to cover those costs. If the ESP's bond is insufficient and the ESP is unable to cover the total amount of the reentry fees, then under Section 394.25(e), those involuntarily returned DA customers, upon whom the reentry fees are imposed, are to be held responsible for the residual amount.

The legal question of whether Section 394.25(e) requires ESPs to provide financial security to cover reentry fees is a relatively easy one to answer: yes. In fact, most parties

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[6] Assembly Bill No. 117 (June 5, 2002 Amendment) available at: http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0101-0150/ab_117_bill_20020605_amended_sen.pdf. The last Senate amendment, August 27, 2002 added "community choice aggregators" to Section 394.25(e). The resulting proposed language read as it does today.

[7] By contrast, Section 394.25(e) does not shield DA customers returning to bundled rate service "due to default in payment or other contractual obligations or because the customer's contract has expired."

acknowledge "that some form of bonding is required for ESPs."[8] Moreover, the Commission has also recognized that ESPs are required to post some form of financial security.[9]

III. CONCLUSION

The question before the Commission regarding the DA financial security requirement is two-fold; 1) Legally, does Public Utilities Code Section 394.25(e) require ESPs to post a bond or demonstrate insurance sufficient to cover reentry fees that would otherwise be imposed on involuntarily returned DA customers?; and 2) Factually, how should the "re-entry fees" be defined? As discussed in detail above, SDG&E contends that legally ESPs are required to post financial security to cover reentry costs. As such, the Commission must now turn to the factual and more contested policy issues regarding how the reentry fee should be defined and calculated. Determining the answers to these and other relevant factual questions will entail consideration of the fundamental differences between the circumstances by which DA customers and CCA customers return to utility service, as well as the fundamental differences between the classes of DA and CCA customers—especially the stark variances between commercial customers and residential customers.

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[8] Comments of the California Alliance for Choice in Energy Solutions and the Alliance for Retail Energy Markets on Assigned Commissioner's Amended Scoping Memo at p. 8 (May 7, 2010). *See also* Comments of the Utility Reform Network on the Revised Scope of Issues at pp. 7-8 (May 7, 2010); Comments of Southern California Edison Company on Assigned Commissioner's Amended Scoping Memo at pp. 11-18 (May 7, 2010); Pacific Gas and Electric Company's Comments on Assigned Commissioner's Amended Scoping Memo at pp. 4-5 (May 7, 2010); Reply Comments of the Division of Ratepayer Advocates on the Amended Scoping Memo at p.6 (May 21, 2010); Reply Comments of the Direct Access Customer Coalition on Assigned Commissioner's Amended Scoping Memo at p. 9 (May 21, 2010); Reply Comments of Commercial Energy of California on Assigned Commissioner's Amended Scoping Memo at p. 8 (May 21, 2010).

[9] Pursuant to D.03-12-015 at p. 34, ESPs are required to post a bond to ensure that customers have adequate recourse in the event of the ESP's fraud or non-performance and to pay any applicable reentry fees to ensure that these costs are not shifted to bundled customers.

SDG&E appreciates this opportunity to submit its Opening Brief and looks forward to providing further input throughout the proceeding.

Sincerely,

/s/ Kim F Hassan

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February 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **OPENING BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY** on all parties identified in Dockets No. R.03-10-003 and R.07-05-025 by U.S. mail and electronic mail, and by Federal Express to the assigned Commissioner(s) and Administrative Law Judge(s).

Dated at San Diego, California, this 1st day of February, 2011.

/s/ JOEL DELLOSA
Joel Dellosa