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Vice President of Regulatory Operations

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California Public Utilities Commission
Energy Division Tariff Unit
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of Southern California Edison Company on Draft Resolution E-4518

Dear Energy Division Tariff Unit:

Southern California Edison Company (SCE) appreciates the opportunity to comment on Draft Resolution E-4518 (DR) issued by the California Public Utilities Commission's (CPUC's) Energy Division (ED). The DR certifies Marin Energy Authority's (MEA's) 2012 Energy Efficiency Program Administration Plan and orders Pacific Gas & Electric Company (PG&E) to transfer up to $428,270 in funds collected from MEA's customers through nonbypassable charges authorized by the CPUC for cost-effective Energy Efficiency (EE) and conservation programs. Based on the legal issues raised below, the CPUC should revise the DR to clarify that MEA is authorized to implement an EE program under the administration of PG&E and oversight of the CPUC.

I. BACKGROUND

California Public Utilities Code Section 381.1[1] provides that a local entity that establishes a community choice aggregation (CCA) program may apply to become an administrator of cost-effective EE and conservation programs. The statute also provides that the CPUC must make a determination as to whether or not to approve a CCA's application.

Based on the background provided in the DR, "[o]n February 3, 2012, [MEA] submitted a plan to the Energy Division requesting to administer energy efficiency program funding for the 2012-2015 timeframe under Section 381.1."[2] The investor owned utilities (IOUs) and other parties to the EE or CCA proceedings were not copied on this submission. It appears that for several months MEA consulted with the ED, which resulted in revisions to MEA's program plan.

On June 20, 2012, Administrative Law Judge (ALJ) Fitch issued a ruling in Rulemaking (R.)09-11-014 soliciting comments regarding the process discussed in Section 381.1, by which CCAs would be able to request to administer EE programs. In addition to requesting comments, the ruling proposed an interim process by which CCAs could make such requests prior to the completion of the formal proceedings.[3] Just two days after this ruling was issued, MEA submitted its amended plan to the ED and served it on the service list for R.09-11-014. This was the first time that SCE was informed of this program plan. Then, just over a week later, the ED issued the DR certifying MEA's proposed plan and requiring PG&E to transfer funds to MEA. These comments are the first time relevant stakeholders with significant background and knowledge related to these issues have been permitted to comment on this program plan or opaque process.

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1 All references are to the California Public Utilities Code Sections unless otherwise indicated.

2 DR, p. 3.

3 R.09-11-014, *Administrative Law Judge's Ruling Regarding Procedures for Local Government Regional Energy Network Submissions for 2013-2014 and for Community Choice Aggregators to Administer Energy Efficiency Programs*, issued June 20, 2012.

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For the reasons discussed below, the CPUC should revise the DR to ensure that it will retain regulatory oversight of any IOU ratepayer funds awarded to MEA. SCE requests the CPUC revise the DR to incorporate prior legal precedent, which provides that third parties not subject to the CPUC's regulatory authority may implement IOU ratepayer funded EE programs subject to IOU administration and CPUC oversight. In the case of MEA, the CPUC should require that MEA contract with PG&E prior to transfer of funds to MEA and implementation of the proposed EE programs.

II. DISCUSSION

A. The DR Errs in Proposing Independent Administration of Ratepayer EE Funds by MEA

The DR requires PG&E to "transfer to the [MEA] fifteen percent of all moneys collected through nonbypassable charges from MEA retail electricity customers" from February 3, 2012.[4] The threshold issue that needs to be resolved, but which is not addressed by the DR, is whether the CPUC can properly discharge its statutory duty to oversee the use and expenditure of ratepayer funds using a CCA as an administrator. The CPUC previously examined this issue based on a thorough record of the relevant legal and policy issues, fully vetted and vigorously litigated by the parties and the CPUC. As there has been no change in the law or facts, the CPUC cannot simply ignore its previous legal findings and reach a different conclusion on the legality of non-IOU EE program administration and the DR must be modified accordingly.

1. The DR's Proposal to Shift EE Program Administration to MEA is Unlawful Because it Would Divest the CPUC of its Jurisdiction Over Ratepayers Funds

In Decision (D.)05-01-055, the CPUC found that non-IOU administration of EE programs funded by IOU ratepayers would impede its ability to discharge its statutory obligation to oversee program funds, and require statutory authorization because ratepayer funds are public trust funds. D.05-01-055 acknowledged the State Attorney General's assessment that "ratepayer money such as the [EE] funds were public funds" that were imbued with the public trust.[5] This was in recognition of the general rule that powers conferred upon public agencies and officers that involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authority.[6] Thus, the public trust is the primary reason why the CPUC cannot permit EE program administration by any party that is not regulated by the CPUC. The CPUC must retain regulatory jurisdiction over EE program administration to ensure that EE funds are properly spent. This is part of the CPUC's overriding statutory duty to ensure that programs funded by ratepayers are carried out in the public interest.[7] The DR's proposal to allow for program administration by MEA, a nonutility administrator, is unlawful because it would divest the CPUC of such jurisdiction.

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[4] DR, OP #2.

[5] *See* D.05-01-055, mimeo p. 35.

[6] *See Cal. School Employees' Assn v. Personnel Commission*, 3 Cal.3d 139, 144 (1970).

[7] *See e.g.,* Public Utilities (P.U.) Code Section 451, providing that "[a]ll charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded, or received for such product or commodity or service is unlawful."

The CPUC's regulatory jurisdiction is limited to IOUs, unless expressly extended by legislation.[8] The CPUC has found that it lacks jurisdiction to regulate third parties such as MEA or other CCAs.[9] In D.05-01-055, the CPUC correctly observed that it would have limited recourse in the event that the programs do not deliver the requisite energy savings or the program administrator fails to perform in other ways.[10] The CPUC found:

> Certain proposals "contemplate the transfer of ratepayer funds from the IOUs to independent administrator(s). Based on past rulings from the Attorney General and the Department of Finance, such transfers require statutory authority. Seeking statutory authority would introduce delays and uncertainty into the process, and *render program funding vulnerable to borrowing by the Legislature*." (*emphasis added*)[11]

Ratepayer funds transferred to MEA is equally vulnerable to borrowing by MEA for uses other than CPUC-authorized or certified EE programs, and the CPUC would have little recourse for recovering the money if that were to occur.[12]

Accordingly, the DR errs in proposing to permit the administration of ratepayer funded EE programs by MEA. The DR must be modified to provide for PG&E administration so that the CPUC can oversee the EE programs in the public interest. The general character of IOUs involves undertaking public functions subject to CPUC supervision and regulation to ensure that it is done in the public interest. This is especially pertinent in the context of EE, which is another means of meeting electricity demand and is thus an integral part of the IOUs' duty to serve. Indeed, California's Energy Action Plans reveal that cost-effective EE is a high priority resource that should be maximized by the IOUs in meeting customer demand and formulating long-term procurement plans. To that end, the CPUC in D.05-01-055 was clear that to meet the state's goals for EE:

> [W]e must have the authority to hold the administrator(s) fully accountable for delivering energy savings without recourse to litigation. We believe that this authority is clearly established with our regulatory oversight of the IOUs, but considerably less certain under the proposals for independent administration in this proceeding.[13]

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[8] *Television Transmission v. Public Utilities Commission* (1956), 47 Cal.2d 82, (301 P.2d 862). The legislature has occasionally provided for limited jurisdiction by the CPUC over non-utilities.

[9] *See* D.05-01-055, mimeo p. 35.

[10] D.05-01-055, *mimeo* p. 63, stating "[t]he Commission has broad regulatory authority to ensure and enforce the IOUs' compliance with our policy rules and requirements based on current statute and Constitutional authority. In contrast, the proposals for independent administrators in this proceeding rely on contractual authority. This form of authority is potentially weaker, more complex, and less flexible than relying on our regulatory powers. In particular, we would have limited recourse in the event that the programs do not deliver the requisite energy savings or the program administrator fails to perform in other ways. . . . [T]he remedies for breach of contract are much more limited than our regulatory authority under current law . . ."

[11] *Id.,* Finding of Fact 13.

[12] The risk of government borrowing from agencies holding ratepayer monies for EE program administration has materialized on numerous occasions in the past. *See* SCE's Application for Rehearing of D.11-12-035, filed January 19, 2012 in R.11-10-003, at Section II.A.7, discussing the Legislature's various diversions of Public Goods Charge funds held by the California Energy Commission.

[13] D.05-01-055, *mimeo* p. 65.

2. *After Thorough Vetting of Legal and Policy Issues the CPUC Interpreted Administrator in Section 381.1 to Mean Implementer*

The CPUC in D.03-07-034 interpreted the term administrator in Section 381.1 to mean an entity that implements an EE program.[14] Specifically, the CPUC stated:

> We interpret "administrator" in this context [of Section 381.1]to mean an 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."[15]

The CPUC reaffirmed its interpretation of the term "administrator" in Section 381.1 in D.05-07-046, which upheld its determination in D.05-01-055 regarding EE program administration. Furthermore, the CPUC stated "[Section 381.1] does not grant non-IOUs the authority to hold, manage or control ratepayer funds collected for the EE programs."[16]

In D.04-01-032, the CPUC also mentioned that "courts will generally defer to an agency's long-time consistent interpretation of a statute."[17] More generally, California law follows "a presumption that the Legislature is aware of an administrative construction of a statute," and this presumption "should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it."[18] Therefore, in 2011, when Senate Bill (SB) 790 was enacted, the Legislature was presumed to have known of the CPUC's 2003 interpretation of Section 381.1. Nothing in the language of SB 790 indicates a contrary intent of the Legislature to overturn the CPUC's interpretation of "administrator" in Section 381.1. Thus, because the Legislature is presumed to know the Commission's interpretation of the term administrator and in SB 790 the Legislature did nothing to alter this interpretation, the previous long-standing and legally sound Commission interpretation stands.

Moreover, Section 381.1(f) requires a CCA program be consistent with the goals of Section 399.4, which discusses participation in EE programs by local governments, community-based organizations, and EE service providers and states they "are encouraged to participate in *program implementation* where appropriate." (emphasis added). This reveals that the Legislature is also using the words implementation and administration interchangeably.

Therefore, as discussed in D.03-07-034, D. 04-01-032, D.05-01-055, and D.05-07-046, the CPUC's interpretation of the term administrator in Section 381.1 must stand and the CPUC should revise the DR to be consistent with this legally required interpretation.

B. MEA's Plan to Offer Services to Low Income Customers Violates Section 327

MEA'sproposed EE Program Plan provides for the provision of Low Income EE measures. Specifically, the Plan states "The Multifamily Energy Efficiency Project (MFEEP) will provide cost-effective residential [EE[improvements that will benefit low-income occupants and owners of multi-family buildings in Marin County."[19] Such a provision would violate Section 327, which provides that:

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[14] D.04-01-032, p. 9 (citing D.03-07-034).

[15] D.04-01-032, p. 9 (citing D.03-07-034, p. 7, fn 2).

[16] D.05-07-046, p. 9.

[17] D.04-01-032, p. 10.

[18] *Redevelopment Agency of the City of Long Beach v. Cnty. Of L.A.*, 75 Cal.App.4th 68, 89 Cal.Rptr.2d 10, 17 n.5 (1999) (quoting *Moore v. Cal.*, 2 Cal.4th 999, 9 Cal.Rptr.2d 358, 831 P.2d 798, 809 (Cal.1992)).

[19] MEA Energy Efficiency Program Plan p. 7.

> The electric and gas corporations that participate in the California Alternate Rates for Energy program, as established pursuant to Section 739.1, shall administer low-income energy efficiency and rate assistance programs described in Section 739.1, 739.2, and 2790, subject to commission oversight.

In D.00-07-020, the CPUC analyzed this statute and found that:

> . . . AB 1393 [Section 327] directs that utilities (rather than any independent administrator envisioned by D.97-02-014) shall continue to administer low-income energy efficiency programs, subject to Commission oversight.

Therefore, if the MEA program plan is approved as is, it will violate Section 327.

C. Adoption of MEA's Plan Without Administratively Vetting the Approval Process Violates Parties' Due Process Rights

As described above, it appears that MEA and the Energy Division have been working together on MEA's EE program plan for six months without providing notice to stakeholders or providing the opportunity for comment. Just prior to the service of MEA's plan to stakeholders, the ALJ in the EE proceeding issued a ruling requesting comments from parties regarding what process to use for CCA implementation of EE programs in compliance with Section 381.1.[20] This comment process will allow CPUC to make its decision on the CCA process based on the input from relevant stakeholders which will develop a full and complete record on the issue. In contrast, the DR, without solicitation of comments or input from parties and in advance of the outcome in the EE proceeding, proposes to fund MEA's EE programs. This hasty and premature action is not necessary. In order to provide adequate due process to stakeholders involved in the EE proceeding, the CPUC should allow for a full and complete record on this issue to be developed. Therefore, SCE requests that the CPUC delay taking action on MEA's request until such a process has been fully and properly vetted and a decision has been issued by the full CPUC. Any other action would be a violation of parties' due process rights.

III. CONCLUSION

SCE appreciates the opportunity to comment on the DR. For the foregoing reasons, the CPUC should modify the DR such that MEA is under PG&E's administration and CPUC jurisdiction.

Very truly yours,

/s/ AKBAR JAZAYERI
Akbar Jazayeri

cc: President Michael Peevey, CPUC
Commissioner Timothy Alan Simon, CPUC
Commissioner Michel Florio, CPUC
Commissioner Catherine Sandoval, CPUC
Commissioner Mark Ferron, CPUC

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[20] R.09-11-014, *Administrative Law Judge's Ruling Regarding Procedures for Local Government Regional Energy Network Submissions for 2013-2014 and for Community Choice Aggregators to Administer Energy Efficiency Programs*, issued June 20, 2012.

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Service Lists R.03-10-003 and R.09-11-014
Service List for Resolution E-4518