BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans.	Rulemaking 12-03-014 (Filed March 22, 2012)

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO ON JUDGE GAMSON'S PROPOSED TRACK 1 DECISION

January 14, 2013

Dennis J. Herrera, City Attorney
Theresa L. Mueller
Jeanne M. Solé
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: 415-554-4700
Email: jeanne.sole@sfgov.org

On behalf of the City and County of San Francisco

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. EXECUTIVE SUMMARY.

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the City and County of San Francisco (City) respectfully files these comments on the Proposed Decision of Judge Gamson in Track 1 of this Proceeding mailed on December 24, 2012 (PD).[1] At least with respect to Community Choice Aggregation (CCA), the PD errs in failing to revise and limit application of the Cost Allocation Mechanism (CAM) consistent with recent changes to the Public Utilities Code. Appendix A sets forth proposed changes to the Findings of Fact and Conclusions of Law to correct the flaws in the PD.

The legal flaws in the PD are important and will have a significant impact on retail competition in California. By side-stepping the important task of distinguishing between capacity additions undertaken for the benefit of bundled customers and capacity additions undertaken for the benefit of all customers within an Investor Owned Utility's (IOU) distribution service territory, the PD would allow the IOUs to indiscriminately procure capacity on behalf of CCA and direct access customers, even after these have departed bundled service. The PD hence relegates retail competition largely to energy. This outcome unduly restricts competition; many customers seek retail competition precisely in order to have more control over the type of new generation added to the system to meet their needs.

II. THE PD ERRS IN FAILING TO REVISE AND LIMIT APPLICATION OF THE CAM CONSISTENT WITH RECENT CHANGES TO THE PUBLIC UTILITIES CODE.

The PD declines to adopt standards to determine whether capacity procurement by an IOU is authorized or ordered by the Commission for the benefit of <u>all</u> customers in an IOU's service territory, or just bundled customers. In doing so, the PD maintains the status quo in

[1] The Proposed Decision states that it was mailed on December 21, 2012; however, it was only sent out electronically on December 24, 3012. Thus, the due date for comments is January 14, 2013.

which the IOUs can, and regularly do, obtain CAM treatment merely by arguing that any capacity procurement by the IOU benefits all customers in the IOU's distribution service territory. Moreover, the PD does this without any technical analysis and evidence, but merely on the general theory that all capacity benefits all customers. This unsupported conclusion is inconsistent with the Public Utilities Code particularly with respect to CCAs. It is also contrary to public policy and unfair.

The PD errs in assuming without evidence that the status quo is just and reasonable. If, as the PD asserts, the record is insufficient to adopt an approach for distinguishing between capacity additions for the benefit of bundled customers and capacity additions for the benefit of all customers in an IOU's distribution service territory, then the Commission should provide for further proceedings to enhance the record. It is instructive that in this proceeding, Pacific Gas and Electric Company (PG&E) is seeking clarification that capacity purchases by Southern California Edison (SCE) should not be charged to PG&E customers. PG&E Opening Brief at 21. The City generally agrees with PG&E on this matter; however, this argument between PG&E and SCE underscores the arbitrary decisionmaking in this area. It is the lack of standards and technical rigor for demonstrating a capacity benefit to all customers that gives SCE any basis to argue that PG&E customers should contribute towards the costs of SCE's capacity purchases.

A. The PD Errs in Maintaining a Status Quo that Is Inconsistent with the Public Utilities Code.

Section 365.1(c)(2)(A)[2] provides that "in the event that the Commission authorizes, in the situation of a contract with a third party, or orders, in the situation of utility-owned generation, an electrical corporation to obtain generation resources that the Commission determines are needed to meet system or local area reliability needs for the benefit of all customers in the

[2] All references are to the California Public Utilities Code unless otherwise noted.

electrical corporation's distribution service territory" the Commission must afford CAM cost-recovery for those resources. The Public Utilities Code requires that, at least in the case of CCAs, CAM treatment should be the exception and not the rule. The requirements for IOU stranded cost-recovery from CCA customers are carefully spelled out in Section 366.2(f). Section 366.2(f) clearly provides for cost recovery for IOU commitments made before CCA customers depart IOU service as follows:

> (f) A retail end-use customer purchasing power from a community aggregator pursuant to subdivision (b) shall reimburse the electrical corporation that previously served the customer for all of the following:
>
> (1) The electrical corporation's unrecovered past undercollections, including all financing costs attributable to that customer, that the Commission lawfully determines may be recovered in rates.
>
> (2) The costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated net unavoidable power purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community aggregator, through the expiration of all then existing power purchase contracts entered into by the electrical corporation.

If, as the PD allows in maintaining the status quo, any resource that provides a reliability benefit is subject to cost recovery pursuant to Section 365.1(c)(2)(A), recovery pursuant to section 366.2(f) would be rendered superfluous. This is because virtually any generating resource will have some reliability benefit. See AReM/DACC/MEA Opening Brief at 16. If the costs of all generating resources are subject to recovery under Section 365.1(c)(2)(A), no generation resources costs would be subject to recovery under Section 366.2(f). Case law is clear that courts should avoid statutory interpretations that render other statutory language superfluous. See California Jurisprudence 3d, Statutes § 91 (2012).

Moreover, Section 380 (h)(5) requires the Commission to strive to ensure that "community choice aggregators can determine the generation resources used to serve their

customers" and Section 366.2 (a)(5) provides that "A community choice aggregator shall be solely responsible for all generation procurement activities on behalf of the community choice aggregator's customers, except where other generation procurement arrangements are expressly authorized by statute." Further, Section 380 (b) requires the Commission to achieve several objectives in establishing resource adequacy requirements, including "[m]aximiz[ing] the ability of community choice aggregators to determine the generation resources used to serve their customers." The unduly expansive use of CAM cost recovery that the PD maintains, severely restricts, rather than maximizes, the ability of CCAs to determine the generation resources used to serve their customers, contrary to Section 380(b)(4). The PD's failure to correct the status quo constitutes legal error.

B. Broad Application of CAM Cost-Recovery Undermines the Existence of Effective Retail Competition, and CCAs, and Is Contrary to Public Policy.

The distinction between cost recovery pursuant to Section 366.2(f), on the one hand, and CAM cost recovery pursuant to Section 365.1(c)(2)(A) on the other hand, is important. Section 366.2(f) cost recovery is available only from customers who were IOU customers at the time a commitment was made, and except in the case of RPS procurement, is only available for a ten year period. See D.04-12-048, COL 16, and D.08-09-012 at 52. In contrast, CAM treatment applies to commitments made years after a customer departed IOU service and for the life of the commitment.[3] Section 361.1(c)(2)(A). Accordingly, pursuant to CAM, a CCA that enters into long term capacity commitments to meet the resource needs of its customers can be forced to accept IOU capacity purchases and have to back-down or sell the resulting excess in its own commitments. If CAM treatment is afforded to a large volume of IOU resources, CCAs lose the ability to determine the generating resources that will be used to serve the capacity needs of their

[3] In addition, of course, the costs that can be recovered from departing load vary as between cost recovery pursuant to Section 366.2(f) and CAM cost recovery.

customers. In fact, a broad application of CAM treatment will discourage CCAs from entering into long-term capacity commitments because they will face a high risk of having those commitments rendered superfluous by IOU commitments.

Thus, a broad application of CAM, in addition to being inconsistent with law, would have the effect of narrowing retail competition to primarily energy only. This outcome reduces true retail customer choice. It is also at odds with a statutory scheme that repeatedly makes resource adequacy requirements applicable to all Load Serving entities. See Section 380; and Section 365.1(c)(1).

C. AReM/DACC/MEA's Proposed Criteria Are Consistent with the Statute but if the Commission Requires Additional Information it Should Require Further Proceedings.

AReM/DACC/MEA proposed a common sense test for distinguishing between capacity procurement for the benefit of bundled customers and capacity procurement for the benefit of all customers in an IOU's distribution service territory. Namely, if a resource is needed to meet bundled customer load and expected load growth, it is not eligible for CAM cost-recovery because it was not authorized or ordered "for the benefit of all customers in the electrical corporation's distribution service territory" but rather to meet bundled customer needs. AReM/DACC/MEA Opening Brief at 6-7.[4] The AReM/DACC/MEA approach properly gives meaning to both Sections 366.2(f) and 365.1(c)(2)(A). It properly makes CAM, with its anti-competitive effects, the exception rather than the rule. Consistent with Section 380(b)(4), it maximizes the ability of CCAs to determine the generation resources used to meet CCA customer needs.

[4] The AReM/DACC/MEA proposal is more detailed and complete than this summary suggests. The City supports the entire AReM/DACC/MEA proposal for CAM criteria. In the interest of brevity, the City has "collapsed" the proposed criteria and process into its fundamental concept.

The PD summarily dismisses the AReM/DACC/MEA proposal stating, without explanation:

> AReM's approach imposes additional requirements designed to limit CAM allocation, and appears to create a precise determination of "benefitting customers." However, precision is not the same as fairness. The Commission's previously adopted criteria fairly apportion costs to customers as envisioned by past Commission and the legislature actions. While creating more complexity, nothing in AReM's proposal improves on the fairness of the current allocation. PD at 102.

If the Commission requires additional information to develop a fair standard for CAM cost recovery, it should provide for further proceedings, and potentially require participation by the Energy Division.

Further, the PD suggests that an opt-out mechanism could be one alternative to moderate the anticompetitive effects of the CAM but then states that the Commission will not entertain any proposal for such a mechanism unless it is supported by all relevant parties. PD at 108. But the PD provides NO incentive for the IOUs to negotiate with CCAs and others on fair limits to CAM application. It is inconsistent with the Public Utilities Code for the Commission to abdicate its responsibility to apply the CAM fairly and consistent with the limitations set forth in the law, and to leave it to the parties to work out an approach they can all accept.

III. CONCLUSION.

The Commission should correct the legal errors in the PD as identified in Appendix A.

Respectfully submitted,

January 14, 2012

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
JEANNE M. SOLÉ
Deputy City Attorneys

By:_____/S/_____
JEANNE M. SOLE
Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4700
Facsimile: (415) 554-4763
E-Mail: jeanne.sole@sfgov.org

Findings of Fact

~~48. AReM's driving peak/decreasing load CAM proposal is inconsistent with the principle that each customer must pay their fair share for the benefits that flow to them from the new generation.~~

49. AReM's two-step/six criteria framework for CAM allocation is a fair and workable approach to distinguish between IOU capacity procurement for the benefit of bundled customers and IOU capacity procurement for the benefit of all customers in an IOU's distribution service territory ~~imposes additional requirements designed to limit CAM allocation, but does not improve on the fairness of the current allocation~~.

…

~~51. The record does not provide an adequate basis upon which to comprehensively consider and adopt any potential changes to the auction mechanism.~~

53. Further proceedings are required to develop a record for a fair CAM opt-out ~~It is not clear that a CAM opt-out could be implemented without undue administrative burden~~.

Conclusions of Law

19. Criteria are needed to distinguish between IOU capacity procurement for the benefit of bundled customers and IOU capacity procurement for the benefit of all customers in an IOU's distribution service territory in order to comply with Public Utilities Code Section 365.1(c)(2)(A) and to avoid rendering superfluous Public Utilities Code Section 366.2(f).

~~19~~20. AReM's two-step/six criteria framework for CAM is consistent with Public Utilities Code Sections 380(h)(5), 366.2(a)(5) and 380(b) because it maximizes the ability of community choice aggregators to determine the generation resources used to serve their customers ~~The record is insufficient to resolve outstanding questions about a CAM opt-out at this time~~.

(Renumber remaining conclusions of law.)