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	R.12-03-014 (Filed March 22, 2012)

MARIN ENERGY AUTHORITY APPLICATION FOR REHEARING OF DECISION 13-02-015 AUTHORIZING LONG-TERM PROCUREMENT FOR LOCAL CAPACITY REQUIREMENTS

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March 15, 2013

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In accordance with Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission") the Marin Energy Authority ("MEA") respectfully submits this Application for Rehearing of Decision ("D.") 13-02-015 in Track 1 of the Long-Term Procurement Plan ("LTPP") proceeding (the "Decision"). The Decision was issued on February 13, 2013, as such this Application for Rehearing is timely filed.

Specifically, MEA believes that the Decision requires clarification with regards to the determinations the Commission made with respect to the Cost Allocation Mechanism ("CAM") treatment authorized pursuant to the Decision. CAM is the means by which the Commission may, under specified circumstances, authorize the procurement of a generation resource by an investor-owned utility ("IOU") and have the net capacity cost of the resource passed through to other customers not receiving generation service from the IOU. These customers include community choice aggregation ("CCA") customers. MEA is the public agency that administers the MCE CCA program which launched electricity service to customers in May 2010 and it is the first, and, to date, only operating CCA program in the state of California.

MEA has been actively participating in the LTPP proceedings and – although it was scarcely noted in the Decision – MEA filed joint testimony on these essential CAM issues. This

testimony was essentially denied in whole, in particular as that testimony relates to CAM opt -out issues.

I. Introduction

CAM is a challenging issue for CCA . It creates significant regulatory and procurement planning uncertainty, and the cu rrent CAM policies fail to acknowledge the value of a CCA's procurement which benefits all customers and creates local and system reliability benefits. CCAs procure, as IOUs do, on a long -term basis and in accordance with the resource adequacy rules and requirements set forth by the Commission. The Decision as written raises uncertainty, and, to the extent applicable beyond the determinations made for the Los Angeles Basin, concern regarding the Commission's compliance with law and the policy determinations it has set forth in the Decision.

This Application for Rehearing is divided into four parts: (1) a request for clarification that the determinations made related to CAM in the Decision relate solely to the Los Angeles Basin and has no policy implication s beyond the local capacity requirements authorized for the Los Angeles Basin; (2) to the extent the Decision has greater implications beyond the Los Angeles Basin, an analysis of legal error committed by the Commission related to CAM ; (3) to the extent the Decision has greater implications beyond the Los Angeles Basin, an analysis of the policy issues raised by the Decision; and (4) proposed solutions to conform the Decision to law.

II. The Decision Needs Clarification that the Rejection of a CAM Opt -Out Applies only to the LA Basin Determinations Made in the Decision

The primary thrust of the Decision relates to various needs of the Los Angeles Basin region and specifically authorizes Southern California Edison ("SCE") to procure resources

under CAM. MEA does not operate in the SCE service territory and as such MEA and its customers will not be affected by the CAM determinations made in the Decision.

However, if contrary to MEA's understanding, the CAM opt-out provisions of the Decision are policy determinations which impact all service territories, the Commission's determinations are not supported in law, policy or good reason. The Commission is refusing to review a CAM opt-out in the future unless the following circumstances are met:

> We will not rule out consideration of a CAM opt-out at a future date. However, we have considered parties' positions on more than one occasion, and declined to adopt a CAM opt-out. Therefore, we are disinclined to relitigate this issue in the future unless all or nearly all impacted parties can agree on a specific, detailed and implementable proposal, or there are significant changed circumstances. (Decision at 112.)

This means that the LSEs who are negatively impacted by the current implementation of CAM have no recourse at the Commission unless – somehow – they can convince the IOUs and other parties who directly benefit from this inequitable implementation to agree to such revisions to CAM. This is contrary to law as it sets a methodology for determining CAM which is contrary to, *inter alia*, Sections 365.1(c)(2), 366.2(a), 380(b), and 707(a)(4)(A). Furthermore, it is a regulatory failing to place in the hands of benefitting regulated parties the Commission's determination of what is or is not reasonable for its own policies.

If, however, it is the intent of the Commission to create a CAM determination for solely the Los Angeles Basin generation resources mandated in the Decision, it is for those customers and LSEs to raise the issue of whether or not the resources as set forth therein would in fact comply with the requirements of CAM. MEA does not raise that issue herein, and addresses solely the policy determinations for CAM which apply more broadly.

III. To the Extent the Decision's Determination to Deny a CAM Opt -Out Would Apply to CCAs, the Determination Would Violate Law

In this section, MEA analyses various cannons of interpretation applicable to legislation and this Decision, and continues by analyzing the ways in which the Decision violates law in its denial of a CAM opt-out for CCAs.

A. The cannons of interpretation and the applicable statutes indicate that the Decision does not comply with law

In its evaluation of this Application for Rehearing, the Commission should be mindful of the cannons of statutory construction. MEA b elieves that with regard to the CAM determinations made by the Commission, the plain meaning, the legislative intent and each component of the relevant legislation have not been addressed and incorporated into the Commission's Decision.

1. Plain Meaning

Under the "plain meaning" cannon of statutory interpretation, statutes are to be read and understood through a plain understanding or ordinary meaning of the words in the statute. To the extent terms are defined, they continue to have the meaning of the term as defined by statute.

Example: Public Utilities Code Section 380(b)[1] states:

> In establishing resource adequacy requirements, the [C]omission shall achieve all of the following objectives: … (4) Maximize the ability of community choice aggregators to determine the generation resources used to serve their customers.

2. Clear Statement of Legislative Intent

Furthermore, to the extent that there are clear statements of legislative intent related to a statute, such clear legislative intent must be considered by the Commission.

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

Example: Section 2(h) of Senate Bill ("SB") 790, enacted in 2011:

> The Legislature finds and declares all of the following: … (h) It is therefore necessary to establish a code of conduct, associated rules and enforcement procedures, applicable to electrical corporation in order to facilitate the consideration, development, and implementation of community choice aggregation program, to foster fair competition and to protect against cross-subsidization paid by ratepayers.

3. Statutory Language Not to Be Construed as "Mere Surplusage"

New statutory text which supplements existing statutory language is not, under cannons of statutory interpretation, to be treated as "mere surplusage." That is, new legislative language is not to be disregarded as ineffectual.

Example: Section 365.1(c)(2), which was subsequently revised by SB 790 to add subsection (B). The underlined section is new text since 2011. MEA provides an analysis of these revisions below.

> (c) Once the commission has authorized additional direct transactions pursuant to subdivision (b), it shall …
>
> (2)(A) Ensure 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 electrical corporation's distribution service territory, the net capacity costs of those generation resources are allocated on a fully nonbypassable basis consistent with departing load provisions as determined by the [C]ommission […]
>
> (B) If the commission authorizes or orders an electrical corporation to obtain generation resources pursuant to subparagraph (A), the commission shall ensure that those resources meet a system or local reliability need in a manner that benefits all customers of the electrical corporation. The commission shall allocate the costs of those generation resources to ratepayers in a manner that is fair and equitable to all customers, whether they receive electric service from the electrical corporation, a community choice aggregator, or an electric service provider.

Whereas subsection (A) provides that the Commission must merely "determine" that a resource is needed to meet a system or local area reliability need, new subsection (B) requires

that the Commission "ensure" that a system or local area reliability need is met. Section 365.1(c)(2) and the importance of subsection (B) is discussed in greater detail below.

B. First, the Commission must determine the criteria for when CAM does or does not apply

The first step the Commission must take is to determine the circumstances under which CAM does or does not apply . This is a requirement of Section 365.1(c)(2)(B) , which the Decision fails to address. Specifically, Section 365.1(c)(2)(B) requires that "the commission shall ensure that [CAM] resources meet a local or system area reliability need in a manner that benefits all customers of the electrical corporation." This raises the following questions:

1. Has the Commission "ensure[d] that resources meet a local or system area reliability need"?

The issue of ensuring that resources meet a local or system area reliability need has not been met by the Commission. Given the applicability of Resource Adequacy ("RA") rules to all LSEs, there is no logical or legal reasoning which would result in all procurement being CAM procurement. The Commission has not determined what the para meters for CAM are. While MEA does not take a position on the CAM determinations made in this Decision, to the extent the determinations made in the Decision are setting policy for other CAM authorizations, the Decision raises significant concerns for MEA.

First, if the benefit provided by these resources is simply the same benefit that all procurement provides, CAM is not an appropriate mechanism. These basic procurement requirements are mandated by the Commission in its RA rules, with which all LSEs com ply. As such, the IOUs should retain the RA for their own portfolio and have their bundled customers pay the costs; similarly, CCAs already procure in this way. IOUs and CCAs should be required

to procure responsibly for their own loads, which is the pur pose of the RA requirements set by the Commission.

Second, to the extent a resource meets a "special" need, such a "special" resource could be eligible for CAM. However, the costs and benefits of a "special" resource should be offset by any "special" reso urces procured by a CCA. It is essential for the Commission to determine what makes a resource "special" or not.

2. Has the Commission ensured that, if a local or system area reliability need is met, that the resource "benefits all customers of the electri cal corporation"?

All LSEs, including CCAs, procure RA for their loads in accordance with Commission requirements, and to a certain extent, all new capacity creates a benefit, whether on the system or locally. However, the Decision presupposes that all LS E customers benefit from an IOU's procurement in some way which would permit application of CAM. The Decision asserts:

> The Commission designated IOUs to procure the new generation through long - term PPAs, and the rights to the capacity were allocated among all LSEs in the IOU's service territory. The allocated capacity rights can be applied toward each LSE's RA requirements. In exchange for those benefits, the LSEs' customers – termed "benefitting customers" – pay for the net cost of the capacity .[FN 247] (Decision at 98.)

The Decision presupposes that all LSEs in fact benefit from an IOU's "on behalf of" CAM procurement. This has not been demonstrated by the Commission or by any other Party.

As noted above, if the benefit of the resource is a standard benefit which any procurement by a CCA would provide, CAM is not appropriate. If a resource is "special" then CAM may be appropriate. However, who benefits is a different question. Unfortunately, the Commission has wholly disregarded MEA's – and its co-filers' – conclusion that the Commission must determine who benefitting customers are. The Decision concludes:

> AReM's [and MEA'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." (Decision at 107.)

MEA concurs that "precision is not the same as fairness"; however, MEA fundamentally disagrees that there exists currently a fair apportionment of costs and fundamentally disagrees that such apportionment meets with the legislative intent, particularly as those determinations relate to CCA.

If an IOU is procuring responsibly for its own load, it should not receive CAM treatment for that procurement. No entity should simply receive a "gold star" in the form of anticompetitive "on behalf of" CAM procurement simply for their ability to procure the resources which by law and by Commission rules are required of them. These simple compliance obligations create the base "benefit" that customers receive. However, if there is an exigent need, or a unique and necessary characteristic of a certain generation facility, CAM may be appropriate such that all uniquely "benefitting" customers pay their fair share for those resources.

3. The Commission must set criteria which provide guidance to all LSEs and stakeholders on what resources are or are not CAM-eligible.

It would be eminently reasonable for the Commission to begin setting the criteria and guidelines for <u>all LSEs</u> to better understand when CAM treatment is appropriate and lawful. These criteria and guidelines have not yet been set. This process should begin as soon as practicable so that the Commission can create a workable framework for determining when there is a system or local area reliability need which would result in a well-reasoned application of CAM.

C. Second, if CAM is applied to a generation resource, the Commission must ensure that the allocation of those costs is "fair and equitable"

The Decision makes passing reference to Senate Bill ("SB") 790 by acknowledging that . "SB 790 in 2011 codified the Commission requirement that the costs to ratepayers for CAM procurement are allocated to ratepayers in a 'fair and equitable' manner." (Decision at 100.) However, the Commission has failed to incorporate these changes in law to its policies. Specifically: (1) the Commission has not ensured that application of CAM is "fair and equitable" as required by P.U. Code Section 365.1(c)(2)(B). Specifically, the Commission claims that:

> Section 365.1(c)(2)(A) -(B) holds that in instances when the Commission determines that new generation is needed to meet local or system area reliability needs for the benefit of all customers in the IO U's service area, the net capacity costs for the new capacity shall be allocated in a fair and equitable manner to all benefiting customers, including DA, CCA and bundled load. Simply put, each customer must pay their fair share for the benefits that flow to them from the new generation for the full life of the asset. (Decision at 106.)

MEA does not oppose paying for a "fair share of benefits" when appropriate CAM determinations are made. However, to determine that the "fair share of benefits" is equal between an IOU and a CCA is fundamentally flawed reasoning. The current CAM construct entirely ignores the procurement by CCAs and other LSEs and the benefits that procurement provides to the system.

One question which relates to both whether CAM applies an d also who is a "benefitting customer" is: Who is driving the need for the generation resource ? While the Commission attempted to place parameters around this question in the Decision, the result is fundamentally illogical. The Decision provides:

> AReM's [and MEA's] driving peak/decreasing load proposal fails to recognize the interrelated nature of the electric system and the reality that some individual customers of ESPs, CCAs and IOUs have static load profiles, while others are driving the need for new r esources. In addition, the retirement of existing resources creates the need for new resources to serve customers that may not be driving increases. (Decision at 106.)

In this example, the Commission does not evaluate the load profiles of the various LSEs, and as such cannot come to a reasonable determination on who is driving the need for the resource. The Decision continues, in a *non sequitur*, that even if a need is not driven by a particular LSE's customers, those customers still must pay. The Decision asserts that if a resource serving bundled load must be retired, the resource replacing it to serve bundled load should be paid for by the customers of all LSEs, bundled and unbundled alike. At a minimum, each LSE should be responsible for procuring for its own customers. Just as a CCA or another LSE would need to address retirements for their own loads, so should IOUs.

D. Third, failure to provide a CAM opt-out for CCA violates SB 790

The Decision also fails to address the various other portions of SB 790 which require that a CCA be able to determine the generation resources used to serve its customers. *See*, *inter aila*, Sections 366.2(a), 380(b), 380(h).

1. SB 790 requires the Commission the maximize the ability of a CCA to procure for its own customers

Throughout SB 790, it is a tenet that the Commission shall "maximize the ability of community choice aggregators to determine the generation resources used to serve their customers." (Section 380(b)(4).) However, the Decision falsely assumes that CAM does not interfere with the CCA's ability to procure:

> [FN 247] "The energy and capacity components of the newly acquired generation are disaggregated. The net capacity cost is calculated as the net of the total cost of the contract minus the energy revenues associated with the dispatch of the contract. The non-bypassable change levied is for the net capacity cost only, and the non-IOU LSEs maintain the ability to manage their energy purchases." (Decision at 98-99.)

Simply stated, CAM takes away the ability of a CCA to procure for its own load. While in some circumstances, CAM may be appropriate, it is not a tool to be conveniently used by the

IOUs (or the Commission) for any project. Rather, it is reserved only for those generation resources which meet the requirements of CAM. One key step to ensure that CAM procurement is more reasonably granted treatment is to ensure that IOUs first meet the needs of their bundled loads (and each LSE is required to meet the needs of its load), and then determine if additional resources are needed for system or local area reliability needs. This will ensure that a CCA has – as required by statute – the ability to procure for its own load to the greatest extent possible.

2. Furthermore, CCAs procure on a long-term basis, just as IOUs do, eliminating a major source of concern for the Commission

CCAs, like IOUs, procure on a long-term basis. MEA, for example, has an Integrated Resource Plan which is akin to the IOUs' Long Term Procurement Plans. MEA's open season procurement processes focus on long-term contracts to ensure price stability for its customers. The Commission appears to not be aware of those facts in the Decision. For example:

> In D.06-07-029, the Commission found the concept of a CAM opt-out mechanism for LSEs appealing, upon the demonstration that an LSE is fully resourced with new generation for ten years forward. However, D.06-07-029 stated "the reality is that we have no viable enforcement program or mechanism for doing so," such as a "multi-year RA program where an LSE could demonstrate it is fully resourced for the next four or 10 years." (Decision at 110.)

MEA's Integrated Resource Plan ensures that it is appropriately resourced, and the Plan is a publicly available – and publicly developed – document. Furthermore, the Commission did not acknowledge that in 2006, at the time of D.06-07-029, there were no existing CCAs at the time and SB 790 had not been passed.

Due to this significant change in circumstances and as a result of CCAs' long-term procurement planning and contracting, it appears certain of the Commission's concerns regarding CAM are not applicable to CCAs. Upon a more full evaluation of CAM policies and CAM opt-out, this change should be specifically addressed.

IV. Failure to Adopt a CAM Opt-Out and Failure to Ensure Regulatory Certainty Is Flawed Policy

This Application for Rehearing addresses the legal errors committed by the Commission. However, in order for the Commission to understand the policy implications of CAM and CAM opt-out, MEA raises certain key policy issues below.

A. CAM is a one-way benefit to the IOUs which fails to acknowledge the value of the generation resources added to the system by other LSEs, such as CCAs.

CAM is a policy which only works in one direction: it allocates the costs undertaken by an IOU and passes them through to a CCA customer or other LSE customers. CAM as currently implemented does not acknowledge the value of the resources brought online by a CCA or other LSE. This creates a significant policy failure which should be comprehensively addressed by the Commission and stakeholders in a forum which will comprehensively address CAM. The current Decision relates to the Los Angeles Basin needs and as such is essentially an *ad hoc* determination of CAM. MEA assumes that the Commission will undertake this more complete analysis of CAM and CAM opt-out and encourages the Commission to do so promptly.

B. CAM creates significant regulatory uncertainty for non-IOU LSEs, particularly CCAs.

MEA procures on a long-term basis and in compliance with law, Commission requirements, and MEA's Integrated Resource Plan. However, CAM creates procurement issues for MEA. Due to the lack of clear parameters when CAM applies and lack of certainty regarding upcoming CAM obligations, MEA procures fully on a forward-looking basis. As CAM is approved, MEA takes into consideration those costs and RA benefits. However, MEA is not in control of those resources and cannot ensure the RA value which MEA will receive. Furthermore, MEA will have already contracted for RA to meet its load's needs. As a result,

CAM results in MEA being "long" in its RA. MEA can sell its excess RA in the market, but potentially at a loss; on the other hand, the IOUs procure RA, are in control of the resources, and receive the utmost rate protection from the Commission that will ensure cost recovery for the IOUs.

C. CCAs are not privy to the pricing of the resources to receive CAM treatment.

CAM procurement is undertaken through review groups consisting of "non-market participants." This means that CCAs will not be privy to the pricing of CAM resources, or other RA resources. As such, a CCA cannot determine whether the RA being passed through to its customers is above market. While it is the Commission's determination whether a resrouce receives CAM, it is generally encouraged by the IOUs when they claim that a "system or local area reliability need" would be met. As such, there is a certain measure of "picking and choosing" which MEA is concerned about.

D. Resource Adequacy – and CAM – Policies should be structured to encourage responsible and efficient procurement by all LSEs.

A key policy objective for the Commission in developing resource adequacy policy – including CAM policy – is to encourage responsible and efficient procurement. One way of ensuring this is to require that all IOUs meet the needs of their bundled customer load growth first. (And as a corollary that all LSEs meet the needs of their respective loads first.) Current policy does not require this. Rather, CCA customers are paying for the resources built to cover bundled customer load growth.

For example, SCE has a highly disconcerting stance on procurement. Specifically:

> SCE states that the costs of any SCE procurement to meet system reliability needs must be "fully recoverable and allocated appropriately" to DA and CCA customers via the CAM.[FN] SCE asserts that it would prefer not to procure beyond its bundled customers for system reliability,[FN] and maintains that it will

not procure system reliability resources unless "all benefitting customers pay their fair share."[FN]

That is, SCE asserts that they will not procure unless everyone pays. SCE makes this assertion notwithstanding the fact that they are obligated to procure resources to meet their bundled customer's needs, just as a CCA must do. Furthermore, that SCE is a regulated utility which is required to procure resources pursuant to its LTPP. CCAs, while not directly regulated by the Commission develop similar long-term plans; in the case of MEA, this is its Integrated Resource Plan, which is updated each year.

MEA encourages the Commission to develop policies which result in efficient and responsible procurement, and should evaluate CAM in that context.

V. Proposed Solutions to Conform the Decision to Law and to Begin a Thorough Policy Review of CAM and CAM Opt-Out

In order to achieve the legal requirements and objectives set forth above, MEA recommends the following revisions to the Decision:

1. In order to comply with law, including, but not limited to Sections 365.1(c)(2), 366.2(a), 380(b), and 707(a)(4)(A), Commission must clarify that the determinations related to CAM and CAM opt-out in Section 9 of the Decision relate solely to the local resources described in Ordering Paragraphs 1 and 2 of the Decision, to the extent those mandated resources meet the necessary conditions for CAM to be authorized.[2]
2. With regards to the Commission's Findings of Fact, inaccuracies in the Findings of Fact should be struck as follows:

[2] MEA – the sole operating CCA to date – operates in the Pacific Gas & Electric service territory, and as such, does not address a determination on whether the resources ordered pursuant to the Decision in the SCE service territory are in fact eligible for CAM treatment.

Finding of Fact 50:

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

MEA notes that the Commissions current determination of "benefitting customers" does not create a fair result , and MEA's propo sal specifically addresses that issue and concern . In particular, the Commission in its Decision notes that resources which serve bundled customers and which need replacement should also be paid for by unbundled customers. (*See* Decision at 106.)

Finding of Fact 51:

AReM's two -step/six criteria framework for CAM allocation imposes additional requirements designed to limit CAM allocation ~~, but does not improve on the fairness of the current allocation~~.

MEA's proposal to clarify the parameters regarding CAM i s not only reasonable, it conforms with the requirements of law and resolves significant policy issues regarding the *ad hoc* application of CAM currently being undertaken by the Commission.

Finding of Fact 55:

~~It is not clear that a CAM opt -out could be imp- lemented without undue administrative burden.~~

MEA's proposal simply requires the Commission to comply with law, including but not limited to Sections 365.1(c)(2), 366.2(a), 380(b), and 707(a)(4)(A) . Compliance with law does not create an undue administr ative burden for the Commission

3. Conclusions of Law 21 must be struck as the record shows that the CAM as set forth in the Decision does not comply with law – including but not limited to Section 365.1(c)(2)(A)-(B) – and does not remain reasonable without modification.

~~The cost allocation mechanism established in D.06-07-029 and refined in D.07-09-04, D.08-09-012 and D.11-05-005 remains reasonable for application in this proceeding without modification, and is fair and equitable as required by Section 365.1(c)(2)(A)-(B).~~

4. MEA recommends that – to the extent Conclusion of Law 23 remains intact – that the Commission add guidance on in which proceeding the Commission plans to "resolve outstanding questions about a CAM opt-out."

5. The Commission should initiate a process to comprehensively evaluate CAM and specify a proceeding in which this key issue will be addressed. MEA and a wide range of co-petitioners have filed a Petition for Rulemaking (Petition 12-12-010) which would be an appropriate venue for such legal and policy determinations.

VI. Conclusion

MEA thanks the Commission, Commissioner Florio and Administrative Law Judge Gamson for their thoughtful evaluation of this Application for Rehearing.

Respectfully submitted,

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March 15, 2013