MEMORANDUM

TO: Karen Miller, Public Advisor, California Public Utilities Commission

FROM: Kelly Foley, Regulatory Director and Legal Counsel on behalf of Sonoma Clean Power and Marin Clean Energy

DATE: April 30, 2014

RE: Community Choice Aggregation Code of Conduct Joint Rate Comparison

BACKGROUND

On April 28, 2014, the California Public Utilities Commission's (Commission) Public Advisor's Office (PAO) convened a meeting with Sonoma Clean Power (SCP), Marin Clean Energy (MCE) and Pacific Gas and Electric Company (PG&E) (collectively, "Parties") to resolve outstanding disputes regarding the Joint Rate Comparisons (JRC) required by Commission decision 12-12-036 (Decision). The JRC are "neutral, complete, and accurate written comparisons" of Community Choice Aggregator (CCA) and investor owned utility (IOU) *tariffs*, *sample bills* and *generation portfolio contents* for communicating to customers via mail and Web posting. (Decision at p.A1-3).

At this time all outstanding disputes related to the 2014 version of the JRC have been resolved. PG&E did, however, raise an issue relating to JRC issued in 2015 and beyond. The issue involves a dispute regarding the authority of the PAO to require parties to include information on the JRC that is not closely tied to the explicit requirements stated in the Decision.

PARTY POSITIONS

PG&E argues that the PAO's office exercises plenary or general power over the content of the JRC. Under this erroneous theory, PG&E concludes that the PAO can, therefore, require the Parties to provide in the JRC information that is not clearly delineated in the requirements set forth in the Decision.

SCP and MCE argue to the contrary. That is, SCP and MCE assert that the PAO's authority under the Decision and other sources of California law and regulation is specific, limited and narrowly prescribed.

LEGAL ANALYSIS

The Decision grants the PAO authority to "review and approve the wording of the [JRC] before it is distributed to customers, and by this final approval shall resolve any disputes about the

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contents of the written notice or Web site contents that the CCA and utility cannot resolve informally." (Decision at p.A1-4). Accordingly, under the Decision, the PAO is the designated dispute mediator regarding the *characterization* of the JRC contents, but the PAO is not, under any circumstance, the authority for determining the *subject matter* of the contents. The Decision itself predetermines the *subject matter* of the JRC -- i.e. (as referenced above), *tariffs, sample bills* and *generation portfolio contents*.

The limit on the PAO's authority does not, however, necessarily prohibit communicating information to customers not otherwise indicated in the Decision *provided* that all Parties and the PAO agree to the *voluntary* inclusion of the information, and the information is otherwise lawful and proper.

In this instance, however, a dispute has arisen regarding greenhouse gas (GHG) emissions *voluntarily* reported by MCE and PG&E in their 2013 JRC. In last year's JRC, MCE and PG&E, with the assistance of the PAO, arrived at an agreement regarding whether and how to report total CO2 emissions from electricity sales per MWh, or "GHG data." Note, however, that because the reporting of GHG data by CCAs is neither required by the Decision nor any other source of California law, in the absence of a mutual, voluntary agreement between the Parties, the PAO has no authority, whatsoever, to otherwise require CCA's to report GHG data on the JRC.

PG&E is now recanting on the GHG reporting terms originally agreed to in the 2013 JRC and now proposes to compel GHG reporting using a selective new methodology. Nevertheless, because SCP and MCE fully support transparency and disclosure, both agreed to report GHG emissions in their 2014 JRC in the same manner utilized in MCE and PG&E's 2013 JRC. SCP and MCE do not, however, agree with PG&E's newly proposed alternative GHG reporting terms for future JRC. The newly proposed PG&E terms do not appear to be applicable to retail customer sales and thus could misrepresent SCP and MCE GHG emissions. This disagreement regarding GHG reporting cannot, unfortunately, be resolved by the PAO. Not only does the PAO have no authority to consider such decisions, because GHG emissions are a critically important element of California policy, they must be vetted in an open, Commission proceeding that allows all interests to be represented. Accordingly, SCP and MCE assert that, at least for now, the only resolution is to omit the GHG data from the JRC in future years, while PG&E erroneously argues that the PAO can *require* the Parties to include the GHG data using terms unilaterally dictated by PG&E and "approved" by the PAO.

Clearly, the PAO does not have the authority to require the Parties to provide JRC information not otherwise required by the Decision. First, the Commission simply cannot delegate this type of authority to the PAO. The California Public Utilities Code Section 321 limits the PAO's authority to three areas: (1) assisting members of the public and ratepayers regarding participation at the CPUC, (2) advising the CPUC on procedural matters related to public participation and (3) publicizing "the commission's programs for encouraging and supporting participation in the commission's proceedings." While the Decision appears to have expanded the PAO's authority beyond its statutory limitations by asking the PAO to approve the JRC prior to distribution/posting and resolve any disputes related to the JRC, this delegation clearly did not include allowing the PAO to expand the required JRC contents. Such an interpretation would be

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beyond the role of the PAO pursuant to both Public Utilities Code Section 321 and the Decision, and could result in an abuse of Commission discretion. Delegation of this broad authority to the PAO would be an act outside of the Commission's own rules, policies and procedures.

Indeed, the Commissions has established policies that ensure parties' due process rights are honored and that any delegated decision-making authority is couched in sound procedural protections. As demonstrated by the Commission's General Orders, such as General Order 96-B (which, among other things, governs the disposition of advice letters by the Commission's Energy Division), the Commission has gone to great lengths to ensure that adequate procedures are in place whenever decision-making authority is vested in an entity other than the five Commissioners.

Furthermore, the Commission's rules of Practice and Procedure do not delegate any decision-making authority to the PAO, and the plain language of the Decision limits the authority it does grant to the PAO. Other closely related Commission decisions support this interpretation. Decision 05-12-041, one of two seminal CCA decisions, unequivocally concludes that:

> *Nothing in the statute [AB 11] 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 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.... [The Commission] is 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.* (D. 05-12-041 at pp.9-11)

Citing *Louise Gardens of Encino Homeowners' Assoc. v. Truck Insurance Exchange, Inc.* (82 Cal. App. 4th 648 at 657), D. 05-12-041 goes on to state that 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 a related issue implies a limit on that role and authority." Assuming, *arguendo*, that the Commission even could, and in fact intended to, grant the PAO expansive authority over adding to the prescribed content of the JRC, the Commission would have explicitly indicated this in the Decision.

CONCLUSION

The PAO should deny PG&E's request to require CCAs to involuntarily report total CO_2 emissions from electricity sales per MWh under specific terms that are not voluntarily agreed to by MCE, and furthermore should deny any request from

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PG&E to require any other information in JRC communications that is not indicated in the Decision. The PAO should further find that its authority regarding the JRC is narrowly limited to reviewing the characterization of the required tariffs, sample bills and generation portfolio contents, and resolving disputes within these areas. Should any Party desire a change to the subject matter of the JRC reporting, this must be addressed in an open and fully vetted Commission proceeding. SCP and MCE suggest that a Petition for Modification to the Decision is an acceptable procedural method for requesting Commission action. Both CCAs object to PG&E's attempt to use the PAO to establish law and policy, but would support any fully vetted efforts by the full Commission to consider GHG emission reporting and other issues of transparency and disclosure.

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