BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Pursuant to Senate Bill No. 790 to Consider and Adopt a Code of Conduct, Rules and Enforcement Procedures Governing the Conduct of Electrical Corporations Relative to the Consideration, Formation and Implementation of Community Choice Aggregation Programs.	Rulemaking 12-12-009 (Filed February 16, 2012)

CITY OF SAN DIEGO RESPONSE TO JOINT ELECTRICAL CORPORATIONS' PETITION TO MODIFY D.12-12-039

Pursuant to Rule 16.4(f) of the Commission's Rules of Practice and Procedure (Rules) the City of San Diego (CSD) submits this response to the Petition For Modification (PFM) of Decision 12-12-036 filed by Pacific Gas & Electric Company (U 39-E), San Diego Gas & Electric Company (U 902-E), and Southern California Edison Company (U 338-E) (Joint Utilities) on January 30, 2018.

BACKGROUND AND SUMMARY OF POSITION

The PFM seeks to have the Commission modify D.12-12-036 which adopted a Code of Conduct for electrical corporations with respect to marketing and lobbying activities related to Community Choice Aggregation (CCA) pursuant to Section 707 of the Public Utilities Code.[1] CSD was not a party to Rulemaking R.12-02-009. It files this response out of concern that the PFM, if granted, could allow utilities to use market power and ratepayer funds to influence local

[1]All statutory references are to the Public Utilities Code unless otherwise stated.

government evaluation of the feasibility of forming a CCA program. CSD adopted a Climate Action Plan (CAP) in December 2015 which contains goals for the supply of increasing amounts of renewable generated electricity to customers within the City in coming years, toward the goal point of 100% by 2035. The CAP cites CCA or another program as possible vehicles to attain these goals.[2] CSD desires to continue its deliberations for the possible formation of a CCA without lobbying interference from electrical corporations which is paid for with electric ratepayer funds. The Commission should summarily deny the PFM in its entirety.

The PFM is untimely, its arguments lack foundation, and modifications to D.12-12-036 are not necessary to permit electrical corporations to lobby local elected officials and the press with information the Joint Utilities themselves believe to be in the public interest. The utilities can provide information about CCA service, local government assumptions, and what the utilities believe to be insufficiently considered issues to elected officials and the press via an Independent Marketing Division (IMD) that is funded by shareholders, not ratepayers, and which is certified by the Commission.[3] CSD supports customer choice and customer access to information from both CCA proponents and from electrical corporations. However, D.12-12-036 established a CCA Code of Conduct for electrical corporations pursuant to valid statutes of the California legislature. D.12-12-036 is a legal decision and it does not need to be modified to protect the public interest or the First Amendment rights of electrical corporations. CSD supports electrical corporation free speech and believes that that the Code of Conduct does not proscribe them from providing factual answers to questions about approved programs, rates, and tariffs.

[2]The City of San Diego Climate Action Plan specifically contemplates the possibility of a program other than a Community Choice Aggregation being pursued for the attainment of its renewable energy goals. Other programs might include utility programs.

[3]In San Diego SDG&E has already created a Commission-approved Independent Marketing Division. See Energy Division Director Edward Randolph letter dated April 6, 2017 approving SDG&E Advice Letter 3035-E. The Sempra IMD is named Sempra Services and is currently operating subject to reporting requirements. https://www.sempraservices.com/.

And to the extent the Joint Utilities believe it is necessary to offer more information to local officials or the press on issues which they believe the local governments have not sufficiently recognized or appreciated, they are free to do so through an IMD. The public interest does not warrant removal of lobbying restrictions from the Code of Conduct so that Joint Utility ratepayers pay for the information education curriculum the Joint Utilities wish to provide. The education is entirely welcome in CSD's view, but must be provided as factual answers to questions or through an approved IMD as already provided by the Code of Conduct.

THE PETITION IS UNTIMELY AND NO GOOD CAUSE IS SHOWN FOR RELIEF

Rule 16.4(d) provides that a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

The PFM admits it was not filed within one year of D.12-12-036.[4] The Joint Utilities argue that the PFM could not have been brought within the one year period because of "changed circumstances." They argue that when D12-12-036 was adopted there were not many local agencies that were considering forming CCAs. Now, 5 years later, they say that dozens of localities are considering forming a CCA. As this interest in CCA has grown more recently, the utilities assert that they have "become aware" that localities may not be receiving complete or accurate information regarding CCA formation.[5] The Joint Utilities claim in effect that this

[4]Petition For Modification page 30, Section III.F
[5]Ibid.

newfound awareness amounts to changed circumstances warranting a modification of D.12-12-036.

This argument assumes that the Commission must take the Joint Utilities' impressions at face value, and agree (without any substantial record of evidence) that localities considering CCA are not receiving complete or accurate information regarding CCA formation, or do not have the ability to seek and obtain it or to have it brought to them by the utilities. All the Commission would have to rely on for this contention is the PFM itself and the attached declarations in its Exhibit C. In summary the declarations describe certain perceptions and frustrations experienced by utility governmental and public affairs staff in being restrained by the Code of Conduct from openly discussing renewable energy options or CCA service with local governments, community groups, and the press. All of the declarations assert that the level of these apprehensions and frustrations about public officials and press being uninformed or under-informed, to the detriment of the "public interest," has increased after the one year had passed since the adoption of D.12-12-036.[6]

This proffered evidence does not adequately explain or justify why a petition to modify *could not* have been brought within the one year required by Rule 16.4(d). The exception for relief from the one year limitation under Rule 16.4(d) only applies to a showing that the petition *could not* have been filed within the one year. Here the Joint Utilities *could have* filed the PFM in a timely manner, for any "public interest" consequences to their ability to communicate with local officials and the press about CCA matters were completely foreseeable at the time that

[6]Petition For Modification Exhibit C. Declaration of Colin Cushnie (PG&E) para. 4: "My team and I are aware of the significant *increase* over approximately the *past 18 months* of localities' interest in CCA…" Declaration of Christopher Thompson (SCE) para. 4: "*Today* there appears to be a significantly *greater interest* in CCA formation…" (in contrast to the year after D.12-12-036, per declaration para. 3). Declaration of Mitch Mitchell (SDG&E) para. 4: "*Increasingly since 2015*, city, county, and state representatives have communicated to SDG&E asking for information to help inform their decision on whether to adopt or join a CCA." (Italics added.).

D.12-12-036 was adopted. The fact that relatively fewer localities were exploring CCA at the time did not make these consequences any less foreseeable. The late submission is not justified under Rule 16.4(d) and the Commission should summarily deny it as provided by that Rule.

PUBLIC UTILITIES CODE SECTION 707 SUPPORTS THE CODE OF CONDUCT'S RESTRICTION AGAINST UTILITY LOBBYING WITH RATEPAYER FUNDS

Section B of the PFM argues that Public Utilities Code Section 707 does not mandate that the Code of Conduct contain a prohibition on lobbying other than through an IMD. This is offered as an indication that the Commission *could* lawfully modify D.12-12-036 to eliminate the restriction on ratepayer-funded "lobbying" (what the Joint Utilities urge to be essential information the public must have at ratepayer expense) with statements that might be construed as "having the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program" under the Code of Conduct. The PFM does not argue that the Commission did not have authority under Section 707 to include restrictions on "lobbying" in the Code of Conduct, or that the Commission *must* modify D.12-12-036 because of Section 707. The Commission did have authority to include "lobbying" restrictions in the Code of Conduct and properly exercised it.

Section 707(a)(4)(A) authorizes the Commission to: "Incorporate rules that the commission finds to be necessary or convenient in order to facilitate the development of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization paid by ratepayers." Section 707(a)(4)(C) provides: "This paragraph does not limit the authority of the commission to adopt rules that it determines are necessary or convenient in addition to those adopted in Decision 97-12-088 and Decision 08-06-016 or to modify any rule adopted in those decisions."[7] And Section 707(a)(5) provides that the Commission may:

[7]The decisions referenced in the statute relate to affiliate transaction rules of conduct.

"Provide for any other matter that the commission determines to be necessary or advisable to protect a ratepayer's right to be free from forced speech or to implement that portion of the federal Public Utility Regulatory Policies Act of 1978 that establishes the federal standard that no electric utility may recover from any person other than the shareholders or other owners of the utility, any direct or indirect expenditure by the electric utility for promotional or political advertising (16 U.S.C. Sec. 2623(b)(5))." In light of all these statutory authorizations the Commission was well within its authority to include lobbying restrictions in the Code of Conduct.

The PFM issue as concerns Section 707 is not whether the Commission must modify D.12-12-036 but whether it should. The Decision itself explains the Commission's purpose in these restrictions, no abuse of discretion is argued, and no good basis has been shown as to why the Commission must revisit its "lobbying" restrictions on account of Joint Utility concern for what they call the "public interest."

DELETION OF "LOBBYING" RESTRICTION FROM THE CODE OF CONDUCT IS UNNECESSARY FOR LOCAL GOVERNMENT INFORMED DECISION MAKING

The PFM asserts: "Absent access to information from the utility, local governments' primary source of information is often external advisory firms that potentially anticipate having a role in implementing the CCA entity after the feasibility study. Allowing the Joint Utilities to communicate with local governments in connection with their deliberations on CCA formation will promote informed decision-making by these governments and mitigate the risk of unanticipated costs and outcomes that customers may incur resulting from CCA formations based on incomplete or inaccurate information."[8]

[8] Petition For Modification page 3

These assertions ignore the fact that local governments and their consultants can seek any information they need from the utilities and that the utilities can – and have, in the case of SDG&E – readily provide(d) factual answers about utility programs and rates to local governments and their consultants while being completely within bounds of the Code of Conduct as it was adopted in D.12-12-036. Beyond this, to the extent that the utilities believe that local governments are not asking the all the right questions or are not considering all the issues about risks and benefits of adopting a CCA program, the utilities can --and have, in the case of SDG&E – further informed local governments and consultants through an IMD.

For example the SDG&E IMD commissioned its own consultants to publicly critique a CSD consultant's CCA feasibility study.[9] CSD did not dismiss this report but instead welcomed it to be presented publicly at the Environment Committee of City Council members, with the press and the public present on September 27, 2017. CSD has in fact posted this critical report on its website.[10] CSD very much appreciates receiving this information from SDG&E's IMD and it is being considered. The presentation of this information to CSD elected officials, staff, and consultants in public, and to the press, disproves the PFM complaint that electrical corporations are squelched by the Code of Conduct from providing what they deem to be essential "public interest" information about CCA programs to local officials and the press. Certainly if the utility IMD desires to provide more information as the City deliberates whether to form a CCA the City would consider it useful information.

CSD has found that practical application of the Code of Conduct as adopted in D.12-12-036 has allowed it to ask for and receive the information it has sought directly from

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9 Dr. Lynn Reaser, *Analytical Review of the Feasibility Study for a Community Choice Aggregation Program in the City of San Diego,* Fermanian Business & Economic Institute, Point Loma University, September 2017. (Exhibit A.)
10 https://www.sandiego.gov/sites/default/files/sd_city_council_environmentcom_092917_th.pdf

SDG&E, and beyond that, CSD has welcomed and invited consultants retained the utility's IMD to publicly critique the City's CCA consultant's feasibility study, to identify what it deems to be issues of concern, and to present its own perspective of the risks, benefits, and potential issues inherent in forming a CCA. CSD does not believe modifications to D.12-12-036 are necessary or warranted to protect the public interest. Ultimately what the PFM portends is that ratepayers, not shareholders, should pay for the cost of such critiques. CSD does not support the use of ratepayer funds for lobbying.

THE FIRST AMENDMENT RIGHTS OF ELECTRICAL CORPORATIONS ARE NOT INFRINGED BY THE LOBBYING PROVISIONS OF THE CODE OF CONDUCT

Section E of the PFM contends D.12-12-036 must be modified to comply with the First Amendment of the United States Constitution. The essence of this argument is that the "lobbying" restrictions in the Code of Conduct violate the First Amendment by censoring or unjustifiably burdening corporate speech. They argue that the Code of Conduct restrictions on "lobbying" is subject to strict judicial scrutiny and that the restrictions are not narrowly tailored to support a compelling governmental purpose. Principal cases cited by the Joint Utilities in this line of argument are *Citizens United v. Fed, Election Comm'n* 558 U.S. 310, 324 (2010), and *United States v Playboy Entm't Group,* 529 U.S. 803, 812 (2000).[11]

The PFM acknowledges that "lobbying" speech is not barred by the Code of Conduct and that it allows electrical corporations to "lobby" through an IMD.[12] But they rely on *Playboy Entm't* to support an argument that complete prohibition is not necessary to show a restraint of

[11] PFM page 24
[12] Ibid.

speech, the mere additional burden of having to "lobby" through a non-ratepayer funded IMD is sufficient to show an illegal restraint in their view.

CSD ultimately must leave these arguments to the Commission to address, but would suggest that a compelling state interest and "narrow tailoring" of regulations exist because the "burden" of the restrictions[13] merely amounts to requiring corporate shareholders to bear the cost of the speech rather than allowing the cost to be put on captive ratepayers of a regulated public utility. CSD also observes that a PFM under Rule 16.4(a) provides: "Filing a petition for modification does not preserve the party's appellate rights; an application for rehearing (see Rule 16.1) is the vehicle to request rehearing and preserve a party's appellate rights." If the Joint Utilities aim for appellate review of constitutional issues, the PFM is an inappropriate vehicle. An application for rehearing would have been the vehicle for that issue as a step toward preservation of appellate rights and exhaustion of administrative remedies on the constitutional claims. However, an application for rehearing is not before the Commission here.

CONCLUSION

For the reasons outlined in this Response the Commission should summarily deny the PFM.

Respectfully Submitted,
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By: */s/ Frederick M. Ortlieb*

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Attachments: Ex. A Fermanian Business & Economic Institute Report

[13] Cf. *Playboy Entm't* at p. 812. *Playboy* did not involve a regulated public utility wanting to use ratepayer funds for the speech that was subjected to the regulatory burdens.

EXHIBIT A

Analytical Review of the Feasibility Study for a Community Choice Aggregation Program in the City of San Diego

The City of SAN DIEGO

Environment Committee
September 29, 2017

Lynn Reaser, Ph.D., CBE
Chief Economist

PLNU 1902 | Fermanian Business & Economic Institute

TOPICS

- Study's Conclusions and FBEI's Analysis
- Two Critical Pending Pieces of Information
- Recommendations

Study's Claims of Feasibility Fail in Four Key Areas

I. Climate Action Plan (CAP)
   A. 100% Renewables
   B. Greenhouse Gas (GHG) Reduction

II. Lower Consumer Utility Rates

III. Economic Benefits

IV. Financial Stability

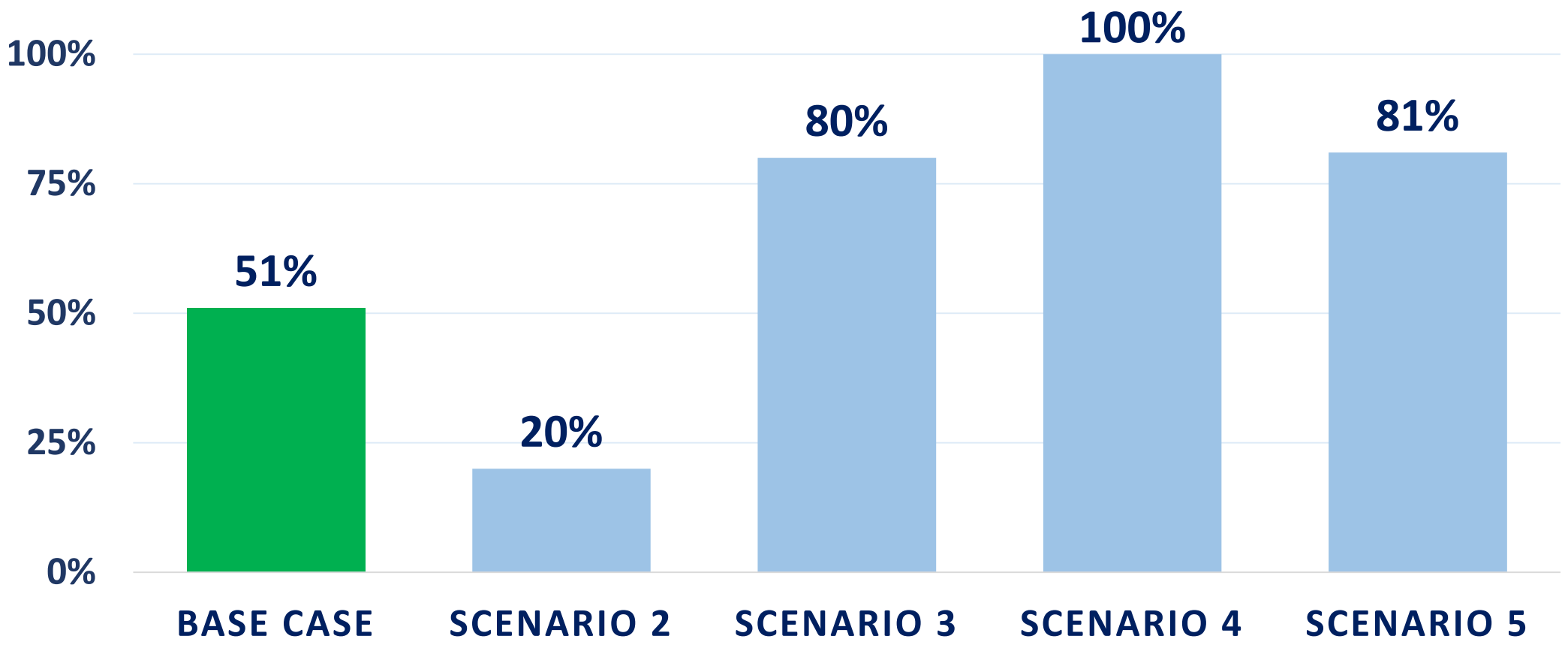
Feasibility Claims

IA. Climate Action Plan (CAP)
100% Renewables

Fails to Achieve 100%
Renewable Goal for 2035

CCA Plans Versus 2035 CAP Goal

Percent of renewable energy



Source: Feasibility Study Table 2; FBEI

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FEASIBILITY CLAIMS

IB. Climate Action Plan (CAP)
Greenhous Gas (GHG) Reduction

Fails to Prove Case for Actual Reduction

- *Need long-term contracts*
- *City just takes a larger share of existing supply*

Feasibility Claims

II. Lower Consumer Utility Rates

Fails to Credibly Prove Lower Utility Rates

Rate Comparisons: Base Case versus SDG&E

Annual averages for all customers

	2022		2023		2024		2025		2026	
	CCA	SDG&E	CCA	SDG&E	CCA	SDG&E	CCA	SDG&E	CCA	SDG&E
Average $/kWh	0.1368	0.1345	0.1368	0.1390	0.1368	0.1436	0.1368	0.1484	0.1368	0.1535
CCA Rate Premium/(Savings)		1.72%		-1.55%		-4.73%		-7.83%		-10.85%
Annual Percent Change in Rates			0.0	3.3	0.0	3.3	0.0	3.3	0.0	3.4

Source: Feasibility Study Table 23; FBEI

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Feasibility Claims

III. Economic Benefits

Fails to Credibly Show Economic Benefits

- *Consumer rate savings – Improbable*
- *Hypothetical solar plant – 11 Operational Jobs*

Feasibility Claims

IV. Financial Stability

Shows Sizable Risk to City

- *Negative net present values 9 out of 11 cases*
- ***-$47 million to -$2.8 billion***

Two Critical Pieces of Information

I. California Legislation on 100% Renewable Mandate

II. California Public Utilities Commission (CPUC) Decision on Exit Fees

SUMMARY AND RECOMMENDATIONS

- CCA: High costs, limited benefits, and many unknowns and risks
- City should exercise caution
- Wait for outcome on state legislation and CPUC decisions
- Need much more evidence of viability of CCA
- Little green, but more red