

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Examine the Commission's Future Energy Efficiency Policies, Administration and Programs.	Rulemaking 01-08-028 (Filed August 23, 2001)
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APPLICATION FOR REHEARING OF DECISION 05-01-055

BY

WOMEN'S ENERGY MATTERS (WEM)

March 7, 2005

BARBARA GEORGE Women's Energy Matters (WEM) P.O. Box 883723 San Francisco CA 94188-3723 510-915-6215 wem@igc.org	DANIEL W. MEEK Attorney 10949 S.W. 4th Avenue Portland, OR 97219 503-293-9021 voice 503-293-9099 fax dan@meek.net
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Pursuant to California Public Utilities Code §§ 1731 and 1732 and Article 21 of the Rules of the California Public Utilities Commission (CPUC), Women's Energy Matters (WEM) files this Application for Rehearing of D.05-01-055 (the "Decision") on behalf of its ratepayer client Ardys De Lu and by extension other California residential and small business ratepayers.

This application is timely filed within 30 days of the mailing of D.05-01-055 on February 3, 2005.

WEM requests oral argument on this application, as it satisfies the criteria of CPUC Rule 86.3.

In D.04-09-026, the Commission complained that an earlier WEM Application for Rehearing repeated arguments made previously in the docket. Cal PUC Code § 1732, however, bans judicial review of a Commission decision on any grounds that are not "set forth in the application" for rehearing. Thus, the statute requires that WEM "set forth" all grounds upon which it believes that the order is unlawful. The standards for determining whether an order is unlawful are listed in Cal PUC Code § 1757 for a "ratemaking or licensing decision of specific application that is addressed to particular parties" and 1757.1 for orders in all other CPUC proceedings. In this docket, the Commission named the individual utilities as respondents and has ordered the allocation of specific funds to specific entities. Thus, it appears that Cal PUC Code § 1757 may provide the standards for judicial review. Otherwise, those standards are provided by Cal PUC Code § 1757.1, which states:

1757.1. (a) In any proceeding other than a proceeding subject to the standard of review under Section 1757, review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following occurred:

- (1) The order or decision of the commission was an abuse of discretion.
- (2) The commission has not proceeded in the manner required by law.

- (3) The commission acted without, or in excess of, its powers or jurisdiction.
- (4) The decision of the commission is not supported by the findings.
- (5) The order or decision was procured by fraud.
- (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

Thus, Cal PUC Code § 1732 requires WEM to include in this Application for Rehearing all of the "grounds" upon which the order may be found reversible by the courts, which are defined by the criteria listed in PUC Code § 1757 or 1757.1. Failure of WEM to raise these grounds in this application would preclude judicial review on those grounds, as the Commission itself argued to the courts in an earlier WEM petition for writ of review.

The Commission has previously characterized the content of WEM applications for rehearing as largely "policy arguments," but in fact those arguments provide the basis for judicial review and must be included in the application. For example, when WEM contends that the Commission's conclusions are nonsequitur, that is an argument that the decision is not supported by the findings.

In order to accommodate the Commission's desire that WEM not repeat arguments previously made, while also complying with the requirement that all grounds for appeal be "set forth in the application," WEM hereby incorporates by reference all of the grounds for objecting to D.05-01-055 and to assigning the function of "administrator" to the investor-owned utilities (IOUs) that WEM or TURN have previously stated in this docket. We also so incorporate the full Dissent of Commissioner Loretta Lynch in D.04-01-032, which extensively addresses the matter of compliance with the requirements of AB 117.

SUMMARY

In D.05-01-055 the Commission chose to put utilities in charge of administering all energy efficiency programs, eliminating other options for reasons that are not supported by the record in the proceeding or by the findings, several of which consist of incorrect legal conclusions. The Commission exceeded its powers by failing to comply with AB 117, the Community Choice law. WEM believes the Decision was procured by fraud, because the Commission relied on statements by the IOUs that have been shown to be false, to grant the utilities a lucrative monopoly over energy efficiency administration based on their purportedly superior ability to maximize energy savings for ratepayers and achieve the Commission's energy savings goals, and their supposed need to control energy efficiency in order to integrate their resource planning.

The fundamental question is whether utilities can be relied on to select and manage programs in a manner that provides the greatest energy savings to ratepayers. There is a wealth of evidence in the record that they have not done so in the past and are not likely to do so in the future. WEM and many other parties gave many reasons to oppose giving utilities the program choice function, based on the experience of IOU v. CPUC selection, the IOUs' conflicts of interest which motivate them to minimize energy savings, and the inadequacy of the Commission's safeguards against bias.

The Commission had (and has) other options, including setting up a new structure along the lines proposed by the WEM or TURN coalitions or keeping the current structure, any of which would be far superior to having the IOUs in charge. The Decision wrongly assumes that there are prohibitive legal barriers to the other structures, based on earlier litigation, when current law actually prevents the utilities from assuming the administration functions. The Decision mistakenly disqualifies the California Standard Offer proposal by WEM's coalition based on a misreading of the proposal.

I. THE DECISION DOES NOT COMPLY WITH THE REQUIREMENT OF AB 117 THAT ANY PARTY CAN APPLY TO BECOME AN ADMINISTRATOR FOR PUBLIC GOODS CHARGE-FUNDED ENERGY EFFICIENCY PROGRAMS

The Decision is contrary to AB 117, because it assigns the function of "Administrator" solely to the IOUs.

A. D.05-01-055 FLATLY DISREGARDS THE LANGUAGE OF AB 117.D

AB 117 requires that "any party" be allowed to administer Public Goods Charge (PGC) energy efficiency (EE) funds, subject to criteria that do not include status as an investor-owned utility (IOU). AB 117, codified at Cal PUC Code § 381.1, states in part:

381.1. (a) No later than July 15, 2003, the commission shall establish policies and procedures by which any party, including, but not limited to, a local entity that establishes a community choice aggregation program, may apply to become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381. In determining whether to approve an application to become administrators, the commission shall consider the value of program continuity and planning certainty and the value of allowing competitive opportunities for potentially new administrators. The commission shall weigh the benefits of the party' s proposed program to ensure that the program meets the following objectives:

- (1) Is consistent with the goals of the existing programs established pursuant to Section 381.
- (2) Advances the public interest in maximizing cost-effective electricity savings and related benefits.
- (3) Accommodates the need for broader statewide or regional programs.

D.05-01-055 violates AB 117, because it expressly allows only the IOUs to apply for or "become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381."

The Commission in earlier decisions sought to justify favorable treatment toward granting administrator duties to the IOUs on grounds that the term "administrator" in AB 117 should be interpreted to mean program implementor, as that term is defined in the Energy Efficiency Policy Manual and in numerous Commission decisions. In

D.05-01-055, however, the Commission cannot maintain that position, because D.05-01-055 (p. 3) expressly defines "administrator" as excluding the program implementation functions. Thus, allowing non-IOUs some opportunity to be program implementors (only if selected by the IOUs, of course), cannot possibly satisfy the mandate of AB 117, because the Commission has now defined "administrator" as follows:

Our use of the term "administration" or "administrative structure" in this decision does not, however, include the various tasks associated with program delivery, e.g., recruiting of customers and installation of measures. We refer to the entities that perform these functions as "program implementers," who operate under contracts/agreements with the entity or entities managing the entire portfolio of ratepayer-funded programs. Program implementers may deliver programs directly to customers, or hire contractors to perform these services, or a combination of both.

There are many potential program implementers in the energy efficiency market, including investor-owned utilities (IOUs), private energy service companies (ESCOs), local government agencies, nonprofit organizations and other entities that can influence customer decisions over energy services and deliver energy savings measures to them. The proposals presented in this proceeding all recognize that IOUs as well as non-IOUs will continue to play a role in delivering energy efficiency services to customers as program implementers. They differ significantly, however, with respect to the future role of IOUs in performing two key administrative functions: Program Choice and Portfolio Management.

D.05-01-055, p. 3. Thus, this Decision defines "administrator" as the entity that performs the program choice and portfolio management functions. Then the Decision refuses to allow anyone to become an administrator, other than the IOUs. This renders the Decision unlawful, as contrary to AB 117.

B. THE DECISION CANNOT LAWFULLY USE TWO CONTRADICTORY DEFINITIONS OF THE SAME WORD.

Curiously, D.05-01-055 attempts to use, simultaneously, two entirely different definitions of "administrator."

We reiterate our interpretation of "administrator" for purposes of AB 117 as meaning "any entity implementing an energy efficiency program that is the subject of Section 382, which authorizes the expenditure of certain funds on

energy efficiency programs." We believe this is consistent with the competing interests articulated in Section 381.1 as well as the requirements for handling ratepayer money, as discussed above.

D.05-01-055, p. 82. It is not legal for the Commission to adopt two different, mutually exclusive, definitions of the same word in the same decision. The Commission in D.05-01-055 effectively defines "administration" as the Program Choice and Portfolio Management functions, as those are what D.05-01-055 assigns to the IOUs. The Commission cannot simultaneously conclude that "administration" or "administrator" means program implementation or program implementor, particularly when it has expressly excluded those from the functions of "administrator."

Further, the rules of statutory interpretation require that the Commission presume that the Legislature is fully aware of the Commission's contemporaneous use of such terms:

The statutory term "regularly employing" is susceptible of more than one interpretation. Therefore, the court will look to the legislative history of the FEHA (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 96, 255 Cal.Rptr. 670, 767 P.2d 1148) **and to administrative construction reasonably contemporaneous with the law's adoption** in order to ascertain the intent of the Legislature in using the phrase. (*City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, 696, 125 Cal.Rptr. 779, 542 P.2d 1371; *Wotton v. Bush* (1953) 41 Cal.2d 460, 466, 261 P.2d 256.)

Robinson v. Fair Employment & Housing Commission, 2 Cal.4th 226, 825 P.2d 767, 771 5 Cal.Rptr.2d 782, 786 (1992) (emphasis added). In this case, the CPUC has been using the terms "administrator" and "implementer" in its orders on EE programs for many years, prior to the Legislature's incorporation of the term "administrator" into AB 117.¹ See D.97-02-014, D.97-12-103, D.99-03-056, D.99-12-053, D.01-11-066, D.02-03-056, D.02-04-063, D.02-05-046. It certainly used those terms clearly in its Energy Efficiency Policy Manual, which currently governs these programs and was in

¹ . The amendment to AB 117 which requires the Commission to enable any parties to apply to become administrators was made in the Senate on August 27, 2002.

effect at the time the Legislature enacted AB 117. The Energy Efficiency Manual itself does not limit “administrator” to the utilities:

Administrator: A person, company, partnership, corporation, association, or other entity selected by the Commission and any Subcontractor that is retained by an aforesaid entity to contract for and administer energy efficiency programs funded in whole or in part from electric or gas public goods charge (PGC) funds. (Energy Efficiency Manual, p. 6)

Since the Commission in the Spring of 2002 had already made its allocation of funds for the original, 2001 solicitation, the Legislature already knew that many programs were implemented by non-utility entities, such as community-based organizations and private contractors. Had the Legislature meant to extend to CCAs and others a mandatory opportunity to "implement" programs, not to "administer" programs, then it would have so stated. Instead, it chose to use the specific terms “administrators” and "administrator."

The Commission has now partly recognized this, as the initial definition of "administrator" offered in the Decision is consistent with the legislative intent. But the second, contradictory definition of "administrator" is not.

The use of contradictory definitions of the same term in the same decision raises other legal problems. Using the Decision's second definition of "administrator" (meaning "implementor"), PUC Code § 381.1 requires the agency itself to decide whether to approve submitted proposals to implement "cost-effective energy efficiency and conservation programs established pursuant to Section 381." This is the Program Choice function. We see no authority for the Commission to delegate this authority to a utility or to any other entity. The statute requires the Commission to "weigh the benefits of the party's proposed program," not to delegate the weighing to other entities.

The Commission cannot have the definition both ways. The Decision cannot lawfully conclude that "administrator" means "implementer" (for the purpose of transferring the administrator function to the IOUs) and then argue that "administrator" somehow does not mean "implementer" when PUC Code § 381.1 specifies that the

Commission itself shall choose the implementers (using the Commission's definition of "administrator" to mean "implementer"). If "administrator" means "implementer," then PUC Code § 381.1 requires that the Commission itself choose the implementers of energy efficiency programs. If "administrator" means "administrator," then D.05-01-055 clearly violates the requirement of AB 117 that any party be allowed to compete to perform that function.

C. D.05-01-055 FAILS TO RECOGNIZE THE STATUTORY CRITERION TO FAVOR "COMPETITIVE OPPORTUNITIES" FOR NEW ADMINISTRATORS.

AB 117 expresses a preference for "allowing competitive opportunities for potentially new administrators." AB 117 then sets forth specific criteria for the CPUC to weigh. Status as a utility is not one of the criteria. When a statute sets for a list of criteria, those which are missing are presumed to be not intended. The "expression of one thing in a statute ordinarily implies the exclusion of other things. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, 25 Cal.Rptr.2d 500, 863 P.2d 745.)" *In re J.W.* 29 Cal.4th 200, 209, 57 P.3d 363, 369, 126 Cal.Rptr.2d 897, 904 (Cal. 2002)

AB 117 itself states a strong preference for increasing competition in the provision of energy efficiency administration services by requiring the CPUC to consider "the value of allowing competitive opportunities for potentially new administrators." While we recognize that the Commission may reasonably decide that a statewide (or local) utility program is superior to any program to be administered by other parties, the Commission cannot comply with AB 117 while simultaneously precluding non-IOUs from applying to administer (or even "implement") a large share of the PGC EE funds. D.05-01-055 does not implement this statutory criteria.

II. THE DECISION ESTABLISHES NO SCHEDULE FOR COMPLYING WITH AB 117.

AB 117 requires that the Commission, by July 15, 2003, "shall establish policies and procedures by which any party, including, but not limited to, a local entity that

establishes a community choice aggregation program, may apply to become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381." The Commission has not complied with this requirement.

No party can today go to the Commission and apply to become an administrator, other than an IOU. Thus, various cities, counties, nonprofit organizations, and firms which may have been direct competitors of utilities in the solicitations for energy efficiency funds would instead have only the opportunity to be "implementors" who remain under the administration of the IOUs with whom they are actually competing for use of implementation dollars.

This presents a severe and inherent conflict of interest. D.05-01-055 places the IOUs in the role of "administrator" with enormous power over all other parties (deemed "implementors"). This grants to the IOUs the power to impair or destroy the effectiveness of the programs being implemented by third parties. The IOUs have an incentive to make third party implementation both difficult and costly, because doing so will (1) discourage third parties from seeking PGC funds in the future and (2) make third party programs appear less effective or attractive than the programs proposed by the IOUs themselves, in future "competition" with the third parties.

While it is possible that the Legislature meant to promote this severe and inherent conflict of interest, it is much more likely that the Legislature meant to remove these programs from the **administration** of the utilities and to entrust their **administration** to Community Choice Aggregators (CCAs) and others.

III. **D.05-01-055 IS PREMISED UPON SEVERAL ERRONEOUS LEGAL CONCLUSIONS.**

The Decision expresses very few of its express and implied legal conclusions in the form of the Conclusions of Law (pp. 143-44). Instead, it contains numerous legal conclusions in the Findings of Fact and throughout the Discussion part of the document.

A. ERRONEOUS LEGAL CONCLUSION THAT THE COMMISSION LACKS LEGAL AUTHORITY OVER NON-UTILITIES WHICH IT COULD CONTRACT TO SERVE AS ADMINISTRATORS.

The Decision (p. 59) states:

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.

This legal conclusion, upon which the Commission relies in rejecting all proposals for non-IOU administration, is incorrect.

1. THE COMMISSION'S ABILITY TO CONTROL THE BEHAVIOR OF PARTIES BY MEANS OF CONTRACT IS MUCH STRONGER THAN ITS ABILITY TO CONTROL THE BEHAVIOR OF UTILITIES BY REGULATION.

As noted in the WEM Opening Comments and Legal Brief (October 18, 2004), the Commission can exercise far greater control of a non-utility, by means of contract, than it can exercise upon a utility it regulates. Regulated utilities are protected from what they would view to be onerous conditions by the Due Process clauses of the respective constitutions. It is completely accepted doctrine that they are entitled, under the U.S. Constitution, to the opportunity to recover costs, including investment costs, sufficient to attract capital. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The California Legislature codified this limitation on the CPUC's authority in enacting Public Utilities Code § 399(d):

It is the intent of the Legislature to reaffirm, without requiring revision, California's doctrine, as reflected in regulatory and judicial decisions, regarding electrical corporations' reasonable opportunity to recover costs and investments associated with their electric distribution grid and the reasonable opportunity to attract capital for investment on reasonable terms.

There is no such restriction on the terms and conditions that the Commission can offer non-IOU parties by contract. A non-IOU party that contracts with the Commission does

so voluntarily and is not entitled to anything that is not provided for by the contract or the common law of contracts. The contracting party is not entitled to any return on investment at all. Thus, the Commission can exercise far more leverage over a contracting party than over a regulated utility. It merely needs to make contract offers sufficient to attract the interest of qualified contractors.

The Decision concludes that somehow the CPUC cannot enforce equitable contractual remedies, including specific performance. We cannot, however, locate any actual legal authority cited to or by the Commission for this proposition. The Decision cites the NRDC Opening Comments (p. 11), and those comments cite for this proposition only *People v. Barenfeld*, 203 Cal. App. 2d 166, 177 (1962), which in fact contains no such holding or conclusion at all. It merely states that the government is not entitled to equitable relief on grounds not also available to non-government litigants, which is an entirely unremarkable proposition.² The NRDC memo in the next sentence states that contract "remedies include restitution and monetary damages," omitting the remedy of specific performance, which is obviously recognized as a remedy for breach of contract in California. See WILLISTON ON CONTRACTS, ' 67:8 (July 2004).

2. **CONTRACTS CAN INCLUDE PROVISIONS FOR SPECIFIC PERFORMANCE.**

The remedy of specific performance can also be expressly included in the contract. In *AMD v. Intel*, 9 Cal.4th 362, 885 P.2d 994, 36 Cal.Rptr.2d 581 (1994), the parties had agreed that specific performance could be ordered as a contract breach remedy. The Court not only found no problem with that but even upheld the equitable remedy ordered by the arbitrator, which went beyond specific performance of the contract. The Court had utterly no problem concluding that such equitable remedies were available to the parties, even when the contract did not specify them. The cases involving specific

² . A quick scan of Westlaw indicates that the case has never been cited for the proposition offered by the Decision.

performance, except the one cited above, deal with situations where the parties have not stated in the contract that the appropriate remedy for breach is specific performance.

The IOUs and NRDC sought to contort the mundane conclusion of *People v. Barenfeld*, 203 Cal. App. 2d 166, buried in a lower court decision, into the absurd notion that the government cannot obtain specific performance of contracts. Since contracting parties (including government entities) can themselves place into contracts language stating that the remedy for breach shall be specific performance, the IOUs would need to contend that contracting parties cannot choose the remedy of specific performance in the contract itself, which is doubly absurd.

And the Commission's conclusions about the weakness of contractual remedies are self-contradictory. The IOUs themselves obtain a significant share of their power supplies from other companies, pursuant to contracts. If contract remedies are so weak, then how can the Commission rely on them in order to provide a reliable supply of power for California?

The Decision (p. 59) further concludes that an action for recovery of damages against a private party administrator would be an insufficient remedy. That alone, in California law, authorizes an action for specific performance of the breaching party's contractual obligations.

In the absence of a statute that makes specific performance more readily available, as a general rule, before specific performance may be decreed for breach of a contract for the purchase and sale of tangible personal property, the remedy at law, that is, damages, must first have been determined to be incomplete and inadequate to accomplish substantial justice. [FN82] It should be cautioned, however, that, as with specific performance, generally, the modern trend is to relax this requirement where a specific performance decree is necessary to serve justice. [FN83] Moreover, while the Uniform Commercial Code purports to make specific performance more readily available, [FN84] it has been noted that a state's adoption of the Code does not abrogate the maxim that specific performance is inappropriate where damages are recoverable and adequate. [FN85]

Even under the traditional rule, the mere fact that there is a remedy at law does not preclude the equitable remedy, if the legal remedy is not adequate.

[FN86] In reaching this conclusion, it has been said: "In order to deny one the relief which a court of equity can give, it is not in all cases sufficient that there be a remedy at law. The remedy must be plain and adequate, and as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity." [FN87] Thus, for example, even though there is a contract provision for liquidated damages in case of a breach, the contract may be specifically enforced. [FN88]

WILLISTON ON CONTRACTS, ' 67:8 (July 2004).

Further, a "material breach" of a contract is any breach that the contract itself defines as material. Contracts can be very precisely crafted to accord the CPUC any and all rights it desires, while providing sufficient benefit to the other party to induce the signing of the contract.

3. THE COURTS HAVE RULED THAT THE CPUC CAN EXERCISE REGULATORY JURISDICTION OVER NON-UTILITIES.

The Decision (p. 60) relies upon *PG&E v. CPUC*, 118 Cal. App.4th 1174 (2004), but for a proposition that case does not support (as noted in the Comments of TURN, October 18, 2004, p. 6). In addition, that case ruled that the CPUC can exercise regulatory jurisdiction over non-utilities, if authorized by statute.

The California Constitution, however, also provides that "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, *to confer additional authority and jurisdiction upon the commission*" (Cal. Const., art. XII, ' 5, italics added.) As our Supreme Court has recognized, citing the Legislature's plenary power to confer additional jurisdiction on the PUC, "[t]he commission's powers ... are not restricted to those expressly mentioned in the Constitution." (*CLAM, supra*, 25 Cal.3d at p. 905, 160 Cal.Rptr. 124, 603 P.2d 41.) Thus, for example, there is no dispute that, when authorized by the Legislature, the PUC may exercise limited jurisdiction over entities other than public utilities. (See, e.g., ' 394.1 [jurisdiction over energy service providers]; ' 739.5 [jurisdiction over mobile home parks]; ' 99152 [jurisdiction over public transit].) Indeed, the holding companies do not suggest such grants of authority are beyond the power of the Legislature. Accordingly, the holding companies are incorrect in their assertion that, as a general principle, the PUC's jurisdiction is limited to public utilities.

PG&E v. CPUC, 118 Cal. App.4th at 1197-98. Here, PUC Code §' 381 and 381.1 authorize the Commission to deal directly with non-utility administrators (and/or

implementers) and to subject them to regulatory-style audit requirements, among other conditions. Thus, the premise that only utilities can be "regulated" is also wrong.

The CPUC can regulate the non-IOUs by imposing conditions upon the IOUs, stated the court. Applied here, the CPUC can direct the IOUs to sign contracts with independent administrators or implementers, those contracts requiring the administrators or implementers to answer to the CPUC and perform functions required of them by the CPUC. Also, the Court states that the CPUC is not limited to regulating utilities only.

B. ERRONEOUS LEGAL CONCLUSION THAT THE COMMISSION CAN DELEGATE PROGRAM CHOICE AND PORTFOLIO MANAGEMENT FUNCTIONS WITHOUT REGARD FOR STATE PERSONNEL LAW.

The Decision (p. 135) makes this conclusion of law (labeled a finding at fact):

25. Returning the IOUs to a lead role in program choice and portfolio management will not create the legal obstacles experienced during the "restructuring era" and will not require statutory changes.

The Decision does not explain how transferring to non-state personnel substantial functions now admittedly performed by state personnel, using public funds, avoids the legal problems that the IOUs raised in order to frustrate the implementation of independent administration in the late 1990s.

The Decision itself (pp. 34-36) states that the "administration" functions (Program Choice and Portfolio Management) are being performed by the Commission itself, through its staff. It states that Energy Division staff are performing both of these functions, along with supervision of EM&V. The Decision (pp. 68-74) also states that transferring state personnel-performed functions to non-state entities is fraught with such legal peril that it cannot be accomplished. But the Decision never explains how that same **legal** perils do not attach to transferring administration functions from the Energy Division to the IOUs.³

³ . As explained on many occasions in this proceeding, The WEM proposal does not encounter these legal perils, as it allows the Program Choice and Portfolio Management functions to remain with CPUC staff.

The Decision contains a fundamental contradiction. It states that the CPUC would encounter huge legal problems (restrictions on outsourcing civil service jobs, primarily Government Code § 19130) if it were to choose independent entities (not the IOUs) to perform administration. In contradiction, the DD also concludes that the same functions can be outsourced to the IOUs, without such problems.

The Decision (p. 73) attempts to resolve this contradiction with a new rationale: They also argue that allowing the IOUs to perform program administrator functions could raise similar legal challenge. We disagree. On its face, Government Code § 19130(b) applies to personal services contracts, not activities that have been traditionally performed by utilities regulated by the Commission. Therefore, placing responsibility for program choice and portfolio management with the IOUs would not raise the same risk of challenge under ' 19130(b).

The Decision offers no reason why the functions it groups under "administration" are not personal services functions. The Government Code does not define "personal services contract"; the applicable definition of "personal services contract" is contained in SPB Rules '547.59:

"Personal Services Contract" is defined as any contract, requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element.

This definition is, by rule, expressly applicable to determinations under Government Code 19130.⁴

The Decision fails to address several critical questions here:

1. Why would "administration" not have a significant element of personal services, if that function were assigned to the IOUs?
2. Why would "administration" have a significant element of personal services, if that function were assigned to independent administrators?

There is one exception in the definition of "personal services contract"--the exception for "public works contracts." But the definition of "public works contract" used

⁴ . Note that this definition includes not only formal "contracts" but to any method by which personal services are procured. Thus, the restrictions in Government Code § 19130 applies to any method of taking personal services functions now formed by civil service personnel and outsourcing those functions.

by the courts when applying Government Code § 19130 is Labor Code § 1720.

Professional Engineers v. Dept. of Transportation, 13 Cal.App.4th 585, 16 Cal.Rptr.2d 599 (1993), review denied (May 13, 1993). The relevant part of that definition states:

- (a) As used in this chapter, "public works" means:
 - (1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

The Decision-defined functions of "administration" are not "public works" functions, unless one considers the installation of Energy Efficient Measures to be "installation."⁵ Even so, if the "public works" function is done "directly by any public utility company," then it is not "public works," which negates the possible application to the IOUs of this "public works" exception from the definition of "personal services contract." Thus, while non-IOU independent administrators might qualify for the "public works contract" exception to Government Code § 19130, the IOUs would not.

Thus, the legal problems the Decision envisions for outsourcing "administration" to independent administrators would apply with even greater force to outsourcing "administration" to the IOUs.⁶

⁵ . And that would contradict the Decision's distinction between "administration" and "implementation," which is where installations occur.

⁶ . The WEM/CCEE Proposal is lawful, because it outsources only those functions for which there is express statutory authority to outsource. The CCEE Proposal retains the Program Choice function with the Commission itself, because that is required by the CPUC's own interpretation of PUC Code § 381.1. See WEM Reply Comments re Selected Administrative Structure Issues (October 25, 2004), pp. 7-11. Under the Decision, however, the Program Choice function is (continued...)

(Continued...) unlawfully delegated to the IOUs. As for the Portfolio Management function, the WEM/CCEE Proposal assigns that to the independent administrators, who may apply to and be selected by the Commission under Public Utilities Code Section 381.1 (a), which is an express authorization that meets the requirements of Government Code 19130. But Section 381.1 (a)

As for funding, the Decision fails to resolve its other **legal** contradiction on why the Energy Division (1) can direct the IOUs to pay the invoices of EM&V contractors from whom Energy Division procures services but (2) somehow cannot direct the IOUs to pay the invoices of independent administrators from whom the Energy Division (as System Director in the CCEE proposal) procures services. Since the Energy Division has been doing the former for years now, there is no legal reason that the CCEE's System Director (which would be part of the CPUC itself) cannot do the latter. No new legislation is required, as the Decision asserts.

In law, the legal perils would be greater, not lesser, if the administration functions were transferred to IOUs rather than either kept at the CPUC staff or transferred to one or more independent administrators. California law does not approve the transfer of government functions to private entities with conflicts of interest. **California School Employees' Assn v. Personnel Comm'n**, 3 Cal.3d 139, 144 (1970), held 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 authorization. Under that interpretation, the WEM proposal is lawful, but Decision is not. Under the WEM proposal, the Commission itself retains the Program Choice function, which is assigned to the Commission by its own interpretation of PUC Code § 381.1. Under the Decision, however, the Program Choice function is unlawfully delegated to the IOUs.

In **California School Employees' Assn**, the Court held that the agency could delegate authority, as long as it was accompanied by sufficient safeguards. The Court has repeatedly concluded, however, that authority cannot be delegated to private parties with financial interests. In **State Board v. Thrift-D-Lux Cleaners**, 40 Cal.2d 436, 254 P.2d 29 (1953), the Court overturned a statute which allowed a 7-member State Board

requires that the opportunity to become an administrator be open to "any party," not just to the IOUs.

of Dry Cleaners to set prices. Six of the seven board members were in the dry cleaning industry.

Here the statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule and its penal provisions with no guide for the exercise of the delegated authority. The board is made up of six active members of the industry, and one member of the public at large. . . . ' . . . one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.' " (40 Cal.2d at p. 448, 254 P.2d at p. 36.)

Thrift-D-Lux Cleaners, 40 Cal.2d at 448, 254 P.2d at 36. This is precisely what the Decision does--delegates one person the power to regulate the business of its competitors. The Decision delegates to the IOUs the authority to choose which EE programs get implemented in California. It allows them to choose their own, internally-designed and implemented programs over those of all other competitors in the field of energy efficiency. It subject them only to the nonexistent restraint of advisory committees, selected by the IOUs themselves. It violates the constitutional rights of all Californians by taking public money and pouring it into a structure with inherent and serious conflicts of interest.

Thus, the courts would likely uphold delegation to an independent administrator but not to the IOUs, whose conflicts of interest in administering and implementing energy efficiency efforts has been recognized.

IV. OVERWHELMING EVIDENCE IN THE RECORD SHOWS THAT THE COMMISSION CANNOT RELY ON UTILITIES TO SELECT AND MANAGE PROGRAMS IN A MANNER THAT PROVIDES THE GREATEST ENERGY SAVINGS TO RATEPAYERS.

A. The utilities have insurmountable conflicts of interest against saving energy.

WEM, TURN and others submitted extensive comments on utilities' conflict of interest against maximizing energy savings, notably in WEM and TURN Comments on Administrative Structure Proposals 4/26/04 and WEM's Reply 5/10/04. TURN decisively debunked the notion that shareholders incentives, "decoupling" profits from sales revenues or any other mechanism the Commission has used, can overcome the utilities' fundamental interest in selling, not saving energy, because the corporation's duty to shareholders to increase stock value requires them to increase energy sales. The Decision fails to recognize the extent and effect of such conflicts.

B. The IOUS have deep conflicts against selecting programs that compete with their own.

The Decision also fails to fully acknowledge the utilities' conflict of interest against choosing non-utility programs that effectively compete with its own. The Decision recognizes the potential for utilities' bias in the program selection process, but proposes utterly inadequate safeguards, which we outline here and describe more fully below.

1. Utility-run "competitive" solicitations which have no assurance of actually being competitive or effective in choosing the best programs;
2. Voluntary advisory groups with members selected by utilities, which are given no voting rights nor power to decide anything, including when they will meet or what documents they will review;
3. Possible incentives that reward utilities for energy savings (such as the "shareholders incentives" programs in effect from 1990 to 2001).
4. An independent system of Evaluation, Measurement & Verification (EM&V).

So-called "competitive" solicitations will not solve the problem of utility bias.

The Decision orders utilities to put 20% of the funds out for “competitive” bidding:

With regard to program selection, we believe that competitive solicitations can provide an important safeguard against bias in that process...

As part of that process, the IOUs will identify a minimum of 20% of funding for the entire portfolio that will be put out to competitive bid to third parties *for the purpose of soliciting innovative ideas and proposals for improved portfolio performance.* (Decision, p. 83)

WEM noted in our 12/20/04 Comment on the Draft Decision (p. 8) that the blueConsulting Audit⁷ identified serious deficiencies in utilities’ competitive bidding procedures. The Audit stated:

Perhaps the greatest weakness at most utilities was in the procurement and contractor selection process and vendor oversight,, SCG and SDG&E have no formalized policies and procedures that define and control the decision-making process regarding the use of in house staff versus contractors, or regarding competitive biddingY SCE’s procurement practices are inadequate and the utility does not utilize appropriate criteria when making initial outsourcing decisions. Significant vendors have sole-source contracts at SCE and competitive bidding is infrequent. (Audit, p. IV-1)

The Decision plans to substantially revise the 2001 Policy Manual, eliminating its specific criteria and scoring process for program selection. It gives only vague guidelines on how the utilities shall conduct bidding to ensure fairness and selection of the best programs, leaving those decisions to the utilities and their Advisory Groups.

With input from the advisory groups described below, the IOUs will specify the portion(s) of the portfolio to put out to bidY as well as the proposed bid evaluation criteria... The bid solicitation should be designed to improve performance of the portfolio in terms of producing the most cost-effective energy savings that meet or exceed our savings goals. (p. 83)

In terms of how to develop the RFPs, evaluate the bidders and make final selections, we will use procedures similar to the ones we recently adopted for

⁷ . The Decision never mentions the *Financial and Management Audit of Utility Public Goods Charge Energy Efficiency Programs from 1998 through 2002*, by blueConsulting, submitted to the CPUC July 9, 2004. This was the first outside audit of EE programs. <http://www.cpuc.ca.gov/static/industry/electric/energy+efficiency/rulemaking/pgc+audit.htm>
The Audit identified many problems with utility administration of energy efficiency, including:
! IOUs frequently failed to conduct competitive bidding, choosing instead to award an inordinate number of Asole-source@ contracts;
! when forced to conduct competitive bidding by CPUC order, IOUs failed to conduct such bidding according to generally accepted business practices;
! widespread negligence in contract oversight;
! failure to meet energy savings targets;
! failure to track and report Acommitments,@ resulting in inflated savings claims;
! excessive administrative costs and confusion over what constitutes those costs;
! refusal to provide auditors with adequate, timely information.

supply- side competitive solicitations in D.04-01-050, utilizing the advisory group structure we adopt today. We discuss that structure and describe the portfolio design and selection process in further detail below. (p. 85)

This allows the IOUs to blackball disfavored contractors by simply not going out to bid for the types of products or services the contractors provide. The Decision goes on to describe the Advisory Group structure (see WEM’s description of problems with that structure below) but states:

In the discussion that follows, we provide general guidance and expectations for the advisory group structure, but purposefully do not specify every implementation detail. The IOUs should put together the advisory groups and implement the program design and selection process consistent with today’s decision in the spirit of the collaborative approach they discuss in their filings. (Decision, p. 86)

The Decision states the unlikely expectation that utilities will select “superior” programs including ones that compete with their own:

In our view, decisions on whether non-IOUs should be program implementers responsible for designing and delivering the program (rather than working to implement IOU-designed programs) should be made based on an evaluation of whether the program designs and delivery mechanisms proposed by non-IOUs are superior to those currently being implemented or planned for the future. (p. 82)

This is asking the IOUs to declare themselves incompetent to design programs and to somehow favor the programs designed by others over programs of their own design.

Expecting this is fantasy.

The Decision implies that a little of that non-IOU magic will rub off on utilities because 40% of utility programs are contracted out to non-IOUs. Or at least they’ll have jobs.

We also note that a large portion of IOU-implemented programs are already delivered through non-IOU third parties. For example, data provided by Energy Division indicates that PG&E and SCE each contract out approximately 40% of the energy efficiency program dollars that they implement to non-IOUs via both competitive bidding and sole source contracts. Thus, it appears that non-IOUs are already actively involved in program implementation. (p. 82)

Note that the decision fails to quantify the IOUs’ current use of competitive bidding at all. Further, the Decision appears to consider as “competitive bidding” mere procurement of energy efficiency items, such as CFLs. There is a large difference between the IOUs undertaking competitive procurement for products they do not manufacture and competitive procurement of programs, when the IOUs themselves design programs that they naturally favor over all others.

WEM has argued that utility administrators are likely to pass over superior programs, and pointed out that they had done so in the past. For example, all the

utilities resisted offering the refrigerator recycling program of ARCA (which has consistently showed the highest cost-effectiveness score of all programs), until the CPUC finally ordered them to do it in the mid-90s. That fight took a long time, during which ratepayers were deprived of these savings. (WEM Reply 12/28/04, p. 5, fn. 4)

The City of Oakland gave an example of a successful program that PG&E failed to select in 1999, but the CPUC accepted, *based on the same application*, in 2000.

19 In 2000, we were pleased to be selected to do
20 an energy-efficiency design assistance program. That
21 was an overlay to the excellent Savings By Design
22 program offered by PG&E. We had underperformance in
23 Oakland, where people were not getting themselves into
24 the programs. And so we did some handholding, and we
25 did extra marketing to take what is notably an excellent
26 program and make it work for our community in ways that
27 it just wasn't

1 **When we applied for it in 2000, we were**
2 **actually reusing an application we made in 1999 that we**
3 **submitted to PG&E as a third-party program.** And the
4 feedback we got was: it's a great program; why would
5 you want to add anything more to it?

6 Well, experience has shown that there were
7 some benefits to doing just what we said. (Oral Argument, pp. 93-94, emphasis added)

Oakland gave examples of other types of programs that it doubted the utilities would select, and why:

8 Our position is that sometimes the utilities
9 are structurally incapable of understanding or adopting
10 the kind of ideas that innovative implementers are going
11 to put forward, and that you all are going to never see
12 the kind of programs that aren't going to make it
13 through the fine mesh that the utilities impose when
14 they are facing risks, when they are facing legal
15 challenges, legal issues...

10 We've got folks at Lawrence Berkeley Labs who
11 are going in -- scientists who are going into systems
12 and making changes to the mechanical systems in large
13 buildings. That's a complicated program. That has more
14 risks than we think are going to make it through the
15 fine mesh of the -- the selection process that's
16 proposed. (Ibid pp. 94-95)

C. Partnerships will not solve the problem of utility bias.

The Decision states that utility-city partnerships will make use of the strengths of both parties. But what if the utilities' "strengths" are largely illusory, and the Cities could do better by themselves or with other managers. Unfortunately, the Commission did not take sufficient note of serious problems in current partnership relationships. WEM has commented at length about problems with the San Francisco Peak Energy Program, a pilot for utility-city partnerships. (See, for instance, WEM/CFC Comments on Program Implementation Plan for the SF PEP, 6/20/03, WEM Comment on Proposed San Francisco Pilot, 12/23/02, CFC/WEM Joint Motion, 10/23/03.)

WEM's 12/29/04 Comment pp. 11-12 and testimony at the Oral Argument revealed that most of the utility-city partnerships that were approved for 2004-5 had not yet received signed contracts from the utilities by that late date (Sept. 30). (Oral Argument, p. 81) A discussion ensued which verified that fact.⁸ The City of Oakland testified that their partnership had only been signed the previous week (Ibid, p. 95).

The Decision states (p. 127) that its upcoming Rules will update expectations for partnerships and may provide a standard contract. But this is not an adequate response. All of the cities commenting on Administrative structure asked for independent administration of energy efficiency. (See comments and replies by cities and counties throughout the administration phase, filing separately or as members of the TURN coalition, including CCSF, Berkeley, Oakland, San Diego, South Bay Council of Government, LA County.) The Commission should have conducted a poll of all local governmental entities involved in the proceeding to ask if they preferred partnerships to running their own programs. Instead, they were given no choice.

Furthermore, as described more fully below, Community Choice cities have the statutory right to administer their own energy efficiency programs. While the Decision states that it may revisit the question of energy efficiency under Community Choice, this may not happen in time to allow cities to run their own programs in the next cycle.

D. Advisory Groups will not solve the problem of utility bias.

WEM has described many problems with Program Advisory Groups and Peer Review Groups that will result in them being ineffective in countering utility bias and wrongdoing in program selection and management (see WEM Comment, 12/20/04 and Reply, 12/29/04). For example:

⁸. This discussion was inexplicably omitted from the transcript but WEM has a videotape.

Membership in both groups will be dominated by utility staff and hand-picked sweethearts; and utilities will control their agendas, meeting dates and places, and access to documents. (WEM Reply Comments, 12/29/04 p. 4)

TURN sums up the problem: “The commission should not rely on loosely coordinated volunteers who are ultimately accountable to no one.” (TURN Comments, 12/20/04, p. 7)

E. Incentives will not solve the problem of utility bias.

The Decision clearly indicates that it intends to develop an incentive mechanism: We concur with NRDC and others that we need to consider a risk/reward mechanism for energy efficiency program administration in this proceeding. As indicated in prior rulings and decisions, we intend to do so in careful coordination with the development of an overall procurement incentive framework: (p. 80)

WEM and TURN have argued for years in this proceeding and the AEAP, that incentives do not solve the problem of utility bias and are a tremendous waste of money. (See WEM and TURN Comments, 4/26/04, WEM Comment on Performance Basis 7/2/04)

F. The new EM&V structure will not solve the problems of utility bias or wastefulness.

The Decision states (p. 75) that parties’ concerns about utilities being wasteful administrators are irrelevant because such problems could apply to any administrator. It says the real problem is “ensuring the credibility of program results, both costs and benefits,” and that the solution is a better EM&V structure.

WEM strongly disagrees that the utilities’ record of wastefulness is irrelevant. We don’t let a bank robber off the hook just because the bank lacked a state of the art security system. We also don’t excuse bank robbers just because they were running the security system and now we’re going to get somebody else. The issue is, did they rip off the bank?

Most importantly, the Decision fails to recognize that the utilities’ management of the EM&V system has enabled them to game the measurement system in multiple ways, undermining the credibility of current and past energy savings claims.

The utilities have been gaming the energy efficiency system for years. WEM is profoundly grateful that the Commission has decisively taken the EM&V system out of the utilities' hands. Unfortunately, however, the Decision fails to address the damage done throughout the years that the utilities were in control, and actively gaming the system. *Most importantly for this rehearing application, the utilities were able to prevent the Commission from seeing the extent of utility failure before it voted to give them control of the system.*

The true picture began to emerge the month after the Decision, and it is a shocking picture of incompetence and deception, although the utilities are still trying to make sure no one will notice. Buried in PG&E's handouts for its PAG meeting (sent to the service list 2/27/05) is an extraordinary chart (see below), revealing that several *current residential programs will fall 38-50% short of their targets, and small business programs will miss the mark by 28-32%, because the types of lighting and other things being installed do not produce the amount of savings the utilities have been claiming.*⁹

We believe the Commission will see more data such as this dribbling out in the months ahead, revealing that what it thought was a tried and true, safe vehicle that could carry us with certainty towards the Energy Action Plan goals, has been seriously misrepresented. In many ways it is an empty shell, the energy efficiency equivalent of Enron. *Putting utilities in charge of energy efficiency is like putting Enron in charge of the grid.*

The Commission made many false starts to take EM&V away from the utilities, beginning with the 4/5/02 Draft Decision of ALJ Sarah Thomas, which was reversed in D.0205046 (p.30), then the 3/4/03 Draft Decision of ALJ Malcolm (p. 17) which was reversed in D0304055 (p. 17).

⁹ . This information should be cognizable in this application for rehearing, as it was produced pursuant to the Decision in this docket. To the extent necessary, WEM also characterizes this document as a petition for modification of D.05-01-055.

Much has changed for the better in EM&V since this proceeding began. Although utilities still ran the show in the past few years, Energy Division staff and ALJs were given the authority to more closely supervise and intervene in measurement issues. Nevertheless, the utilities were able to continue to game the system until the present time.

1. CALMAC.

The California Measurement Advisory Council (CALMAC) provided them with many opportunities for gaming. CALMAC is an informal utility-run club that has played a key role in determining what studies will be proposed as well as overseeing their implementation, including budgets and timing. (CALMAC is described in the Decision, p. 35). Controlling these decisions provides opportunities for utilities to game the system. CALMAC's mission statement reveals its pivotal role in energy efficiency measurement:

CALMAC Mission Statement: CALMAC's mission is to provide a forum for **development, implementation, presentation, discussion, and review of market assessment and evaluation (MA&E) studies for energy efficiency programs** within California that are conducted by member organizations individually and collectively (CALMAC Contacts). **CALMAC also coordinates the development and implementation of statewide MA&E studies.** (<http://www.calmac.org/calmac.asp> as of 3/5/05), emphasis added)

In CALMAC¹⁰ utilities had tools to manipulate the release of information to the Commission and other parties, which assisted them in gaming the system. IOU-administered CALMAC controlled most aspect of PGC-funded studies, including the RFPs, which were not provided to a wide list, and sometimes not even to parties that expressed interest.

ALJ Malcolm's 3/19/03 Ruling Denying the Motion of WEM and Denying PG&E Motion to Quash took note of these problems:

CALMAC is an informal organization and therefore is not required to conduct itself according to state meeting laws or procedures. Nevertheless, utility customers fund it. It is therefore accountable to the public, of which WEM is a member... CALMAC may not, as PG&E suggests, exclude interested parties from meetings,

¹⁰ . CALMAC was not (and is not today) a Commission-constituted body, although representatives of the Commission and ORA are Amembers.@ IOUs rotate the chairmanship on a yearly basis, controlling the agenda and timing of meetings. There were no meetings to address the performance of non-utility programs. WEM complained that public notice was poor, including changes of venue less than 24 hours in advance and wrong phone numbers for remote participation.

conferences or gatherings where its members are discussing matters relevant to its public mission...

Turning to the matter of conference expenses, WEM argues that neither the utilities nor CALMAC should sponsor multi-day conferences in expensive venues and charge the costs to public goods charge accounts... Such practices may create an appearance of conflict and undermine public confidence in the commission's oversight of program funding. Upcoming audits will address whether the utilities have appropriately spent public goods charges...

PG&E objects to WEM's participation on CALMAC by arguing that WEM has no technical expertise and has not followed proper process. As an active participant in Commission energy efficiency proceedings, WEM is a "stakeholder" and would not need particular expertise to contribute to the discussion of ways to evaluate energy efficiency programs. If the process for joining CALMAC suggests CALMAC is an exclusive club, perhaps the Commission should reconsider the funding for and activities of the CALMAC...

WEM is concerned that the utilities are managing consultants hired to evaluate utility performance. Logically, consultants hired to critique a utility's program should not also act as a consultant to the same utility on other matters. Many of WEM's concerns are likely to be obviated in the future. The Commission intends to hire and manage such contracts internally. In that context, Commission staff is considering ways to assure consultants do not have conflicts of interest...

Utilities should provide RFPs to any interested party, whether or not they appear to be qualified. They should notify those included on the service list of this proceeding of all RFPs for energy efficiency contracts. (3/19/03 ALJ Ruling Denying the Motion of WEM, p. 3-4)

There are many types of studies, as noted by the Decision. One type measures program results, another provides engineering and other data for input to the DEER, still others provide market research. The CPUC commissioned an "overarching study" in 2001 (D0111066) to update the DEER, but it is not quite completed. WEM's commented on the IOUs reducing the study's funding and other reasons for the delay in our 7/2/04 Comment on Performance Basis and Reply Comment on Selected Administrative Issues 10/25/04. (The Decision puts Energy Division in charge of future DEER updates (p. 121)).

The Energy Efficiency Groupware Application (EEGA) was commissioned the following year (D.03-04-055) to provide an easy comparison among different programs. Energy Division staff told WEM it was supposed to be ready in spring 2004, however it was mysteriously delayed all year. This prevented Energy Division from having a clear way to compare IOU and non-IOU programs, or providing that information to the Commission and the public.

SESCO's Myth of IOU Cost-Effectiveness, 8/1/03, remains the only comparison available. It ranked all programs and found utility residential programs nearly all ranked on the bottom, and most were not even cost-effective. They were tied in commercial/industrial programs, however non-IOUs were probably superior there too, since they lacked economies of scale and other advantages the IOUs enjoyed. WEM described these and other problems in our Comment on Performance Basis, 7/2/04, p. 5.

Regaining control of EE administration enriches the utilities in a variety of ways, including getting more EE funds for corporate overhead and potentially receiving new "shareholders' incentives." "Negative benefits" to the utilities may be the most significant ones: preventing more effective, non-IOU administrators from reducing energy sales and thereby ultimately reducing utility stock value. Utilities' failure to achieve greater reductions in energy use also increases the need for supply-side resources, thereby leading to them to receive return-on-investment from more steel-in-the-ground resources.

The Commission wrongly acquiesced to utilities' arguments, such as PG&E's, that:

The Commission's Energy savings goals are ambitious, and require a unified planning and administrative effort to achieve the savings. Currently, the IOU administrators have a track record of successfully working together to plan and deliver unified statewide programs. The IOUs are now successfully working with local governments in implementing energy efficiency programs, and look forward to doing so in the future. (PG&E Comment on the Alternate Decision of Commissioner Brown, 1/20/05, p. 5)

Finding of Fact 28 states that IOUs "have the requisite expertise and capability to administer energy efficiency consistent with... the savings goals." The Commission should re-examine that statement in light of PG&E's recent Handout # 8 for its PAG, p. 2, which reveals that it may need to drastically revise its energy savings claims, based on the soon-to-be-released update of the Database for Energy Efficiency Resources (DEER):¹¹

¹¹ . WEM has been complaining for years about the long delay in the DEER update. This is an example of how utilities= manipulation of the timing of studies, in part through CALMAC, prevents the Commission from receiving important information in a timely way. Another example is the delayed completion of the software that would enable Energy Division to provide comparisons between IOU and non-IOU programs (the Energy Efficiency Groupware Application, or EEGA). WEM believes that the Commission would not have been able to justify utility administration, if the results of these studies had been available before the Commission voted this January.

PY 2004-05 Residential Single Family Rebate & Upstream Lighting EE Program

	Current Measure Savings & IMCs	Updated DEER Measure Savings & IMCs	% Reduction
Program TRC ratio	3.19	1.67	
PY2004-05 Energy Targets	70,004 net kW 393,427,416 net kWh 4,405,698 net Therms	39,229 net kW 238,550,689 net kWh 2,220,154 net Therms	44 % 39 % 50 %

PY 2004-05 Express Efficiency Program

	Current Measure Savings	Non-weather sensitive DEER Measure Savings	% Reduction
Program TRC ratio	3.97	3.73	6 %
PY2004-05 Energy Targets	28,997 coin peak kW 166,745,902 annual kWh	19,798 coin peak kW 119,284,798 annual kWh	32 % 28 %

G. How utilities game the energy efficiency system — the CFL story.

The above chart begins to confirm what WEM, SESCO and the Center for Small Business & the Environment have been reporting for nearly two years, that utilities have been grossly exaggerating energy savings from Compact Fluorescent Lights (CFLs) (See SESCO Comment 7/29/03, CFC/WEM Joint Motion 10/23/03, CSBE Motion for Express Efficiency Field Study 3/25/04, WEM Comment, 12/20/04, p. 10, fn. 11.) It's not complicated — just simple sixth grade arithmetic. Here's how PG&E did it:

1. The energy savings claims are based on a residential study from the mid-1990 — there was no business study (utilities generally decided what should be studied);
2. Back then CFLs were supposed to last 10,000 hours. Currently manufacturers say they only last 6000 hours;
3. The bulbs burn out much more quickly in businesses, because the lights are on during the day and evening, while in homes the lights are usually on for only a few hours in the evening;
4. PG&E says the bulbs burn 4500 hours a year in businesses. At that rate, bulbs lasting 6000 hours would burn out in a year and a quarter;
5. However, the study from the mid-1990s said the bulbs last eight years (in residential installations). Based on that study, PG&E claims eight (and sometimes even nine) years of savings at 4500 hours a year for CFLs installed in businesses — *exaggerating CFL energy savings by 600%*.

CFLs account for over 60% of all utility energy savings claims in small business programs, and a huge part of residential programs, too. Ratepayers have been cheated out of hundreds of millions of dollars of bill reductions — it may turn out to be billions. (Independent experts on energy-savings measurement say there are a number of other energy savings claims that also lack credibility.)

Utilities are the only winners in this game — everyone else loses, but the utilities are now trying to entice businesses to accept this situation by giving them extra big rebates this spring and potentially cutting back on residential programs in the future.

H. Phantom energy savings may lead to energy crisis.

Utility gaming of the Energy Efficiency system has serious consequences for the electricity system. The grid operator warns of possible energy shortages this summer because CA energy use is much higher than predicted. *This crisis, like the last one, could have been avoided if we were getting real energy savings for our public dollars.*

I. PG&E used energy efficiency funds for political purposes.

WEM Reply Comment, 12/28/04, (p. 4) described PG&E's provision of CFLs for a campaign event for San Francisco supervisor candidate Andrew Lee in 2002.

J. Analogy between procurement of supply-side and demand side resources is flawed.

Finding of Fact #12 states:

Placing IOUs in the role of program choice and portfolio management, as proposed by the IOUs Coalition and the NRDC/LIF Coalition, is consistent with the hybrid market structure established by the Commission in the Procurement Rulemaking for supply-side resource acquisition. In contrast, the ORA/TURN Coalition and WEM/SESCO Coalition proposals create a dichotomy between supply-side and demand-side resources in terms of the role of IOUs in portfolio selection and management. (p. 133)

As WEM pointed out in its 12/20/04 Comments, the Decision cites the market manipulations of the energy crisis as the reason to prevent competition in energy efficiency programs. This is a false analogy that does not transfer to EE. *In EE it's the Utilities — not the competition — who are the manipulators.*

In procurement, the question was whether IOUs would be allowed to design and build power plants — *in EE, the question is whether anyone BUT the IOUs would be allowed to do so.* This Decision, if translated into procurement, would put a utility in

charge of choosing and overseeing Calpine to build a power plant that the utility has designed. Of course, Calpine does those things itself...

The Decision's corollary with procurement is invalid on other counts. Unlike supply-side procurement, the utility has no "choice" about whether to accept the power "produced" by EE, it's in their system whether they want it or not. However, if the utility controls what, where, and by whom the EE work is performed, it can greatly influence both the amount of "negawatts" produced, and whether or not they present any real "competition" to its own supply side resources, including transmission (existing or planned).

The Decision references the energy crisis as reason to avoid "competitive market manipulations or abuse":

[T]he Commission determined that IOUs should participate in both functions "in order to have the assurance of more state control over resources and an effective check against competitive market manipulations and abuses." (p. 59)

Independent generators were involved in the energy crisis manipulations and abuse — and there is also evidence of utility involvement — *but independent energy efficiency providers had absolutely nothing to do with the energy crisis*. The IOUs' failure to provide substantial energy savings in the years prior to the crisis — failure to even spend all their EE dollars — was a cause of the crisis. In fact, this Rulemaking was instituted for the purpose of developing competition amongst EE providers in order to escape the failures of EE programs under IOU monopoly control.

The Decision insinuates that independent EE providers will manipulate the market like independent generators did and uses that excuse to strip them of their independence and force them into a charade of competition against utilities, with the IOUs in control of the bidding--choosing what to put out to bid, choosing the criteria for evaluating bids, and choosing the winners of the bids.

Further, there is far greater need for independence from the IOUs on the EE side than on the power supply side. On the supply side, the Commission can see whether an IOU that chooses its own power plant over those of competitors is actually producing cost-effective energy, because both the cost (as included in rate requests) and the output (in kW and kWh) are precisely and objectively measurable. On the EE side, however, measurement of savings is often a jumble of "what-if" assumptions, coupled with failures to inspect the work done or its longevity, performed by consultants who, even if not hired by the IOUs, are otherwise under the IOU thumb due to other contracts and programs.

K. Integrated Resources Planning does not solve the problem of utility bias.

The Decision justifies utility control as necessary for integrated resources planning.

Returning the IOUs to the program choice and portfolio management roles for energy efficiency is also a logical corollary to the market structure we have recently adopted for supply-side resource procurement. (p. 58).

The Decision argues that the need to do integrated resources planning means that the utility itself has to control EE program choice rather than have them “handed down” from an outside entity. By that reasoning, the Commission should not deny Community Choice Aggregators (CCAs) the right to control their own programs. But instead, it put CCAs in the position of having their EE programs “handed down” from utilities.

In WEM’s 4/26/04 Comment, Attachment 1, Paul Fenn (original author of the Community Choice law) argues that, by contrast with utilities, Community Choice cities are truly motivated and capable of doing genuine integrated resources planning. Because Community Choice Aggregators represent customers, not transmission and power suppliers, they have the incentive to pursue least-cost and least-polluting resources.

L. The Decision misread WEM’s proposed structure and wrongly dismissed it.

The Decision improperly disqualifies the California Standard Offer proposal by WEM’s coalition based on multiple errors. (See WEM 12/20/04 comment, pp. 10-11).

For example, Finding of Fact 22 states:

The WEM/SESCO Coalition proposal relies exclusively on standard offers that use “deemed savings” calculations to estimate per measure savings.

In actuality, WEM proposed a robust and varied measurement system. (CCEE’s California Standard Offer Proposal for Energy Efficiency Administrative Structure, 4/8/04, p. 7) Other misstatements and misunderstandings in the Decision’s discussion of the proposal (pp. 71-73) include:

While the proponents of this approach consider competition and de-centralized decision making to be an advantage, we see clear disadvantages to relying exclusively on this administrative model to meet our aggressive energy savings goals in California. We note that standard offer programs have never been used to support energy appliances or building standards, which are cornerstones of California’s energy policies.

The California Standard Offer proposal did not rely “exclusively” on standard offers. We proposed a Special Administrator (p. 5) to develop other types of programs, such as these, with a typical RFP process such as the Commission currently uses.

The experience in Texas to date reinforces our concerns. While supporters of the WEM/SESCO Coalition proposal contend that it is a great success in Texas, we need to view that success in proper perspective. In particular, the goals of the program are extremely modest by California standards.

The size of the goals is irrelevant. What matters is the ability to deliver savings to meet whatever the goal is. The Texas standard offer system delivers 40% more energy savings per dollar than the current California system, and furthermore, there’s a money-back guarantee.

Moreover, experience to date also suggests that standard offers may not be well suited to tapping the full potential of cost-effective energy efficiency, particularly large commercial and industrial installations.

The bulk of California’s current large commercial and industrial programs, which are thought to be very successful, rely on a standard offer system (the Standard Performance Contract), which is similar to WEM/CCEE’s proposed system.

CONCLUSION

The IOUs’ control of the EM&V system as well as the bulk of implementation has enabled them to deceive the Commission as to their effectiveness. By preventing Commissioners from getting a clear picture of the extent of their false energy savings claims, the utilities have prevented Commissioners from understanding why they should not control energy efficiency administration.

Dated: March 7, 2005

Respectfully Submitted,

Barbara George, Executive Director
Women’s Energy Matters
P.O. Box 883723
San Francisco CA 94188-3723
510-915-6215
wem@igc.org

CERTIFICATION OF SERVICE
R.0108028

I, Barbara George, certify that on this day March 7, 2005 I caused copies of the attached WOMEN'S ENERGY MATTERS APPLICATION FOR REHEARING OF D050105 to be served on all parties by emailing a copy to all parties identified on the electronic service list provided by the California Public Utilities Commission for this proceeding, and also by hand-delivering an original and six paper copies to the CPUC Docket office, with a copy to Administrative Law Judge Kim Malcolm, ALJ Meg Gottstein and Presiding Commissioner Susan Kennedy.

Dated: March 7, 2005 at San Francisco, California.

DECLARANT

(Electronic service List attached to original only)