Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (Filed November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan (U 39 E).	Application 00-11-056 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

OPINION REGARDING ASSEMBLY BILL 117'S EXPANDED REGISTRATION OF ELECTRIC SERVICE PROVIDERS AND REENTRY FEE

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Summary

Assembly Bill (AB) 117 (Stats. 2002, ch. 838) went into effect on January 1, 2003. As part of AB 117, Public Utilities Code § 394[1] was amended to expand the registration of electric service providers (ESPs). Prior to the amendment of this code section, only ESPs serving residential and small commercial customers (small ESPs) were required to register with the Commission. With certain exceptions, AB 117 expands the registration requirement to all entities offering electric service to customers within the service territory of an electrical corporation. AB 117 also amended § 394.25 by adding subdivision (e), which addresses the reentry procedures that might be obligatory as a demonstration of fitness to serve in the event that an ESP fails to meet its contractual obligations. Today's alternate decision addresses the expanded registration and re-application requirements. Unless specifically excluded, all entities that offer electric service to customers within the service territory of an electrical corporation in California shall be required to register with the Commission within 120 days, if they have not registered already. This expanded registration requirement primarily affects those ESPs who provide electric service to agricultural customers, medium to large commercial customers and/or industrial customers (large ESPs).

In order to register those additional ESPs, we direct all California electric utilities to provide a list to the Energy Division of all the entities offering electrical service to customers within their respective service territories. The Energy Division shall then notify all these entities of the expanded registration requirement and the deadline for complying with this decision. This decision

invites comments from interested persons on whether or not the current security deposit requirements (for a large ESP) provide adequate consumer protection. Also, the decision asks concerned individuals to suggest alternative mechanisms (instead of the security deposit) that could be used by the Commission to ensure that a large ESP is financially viable. Finally, the decision solicits comments from interested persons on whether the security deposit could be used to defray re-entry fees (if charged by an investor owned utility).

Background

The registration of certain ESPs was first mandated by statute when former § 394(a) was added by AB 1890 (Stats. 1996, ch. 854). Former § 394(a) required "each entity offering electrical service to residential and small commercial customers within the service territory of an electrical corporation," except for an electrical corporation as defined in § 218, to register with the Commission. The Commission adopted that registration requirement in Decision (D.) 97-05-040.

Senate Bill (SB) 477 (Stats. 1997, ch. 275) repealed § 394(a) as added by AB 1890, and replaced it with a new § 394(a). Section 394(a) as added by SB 477, states in pertinent part:

> "Each entity offering electrical service to residential and small commercial customers shall register with the commission, unless it is an electrical corporation as defined in Section 218, or a public agency offering electrical service to residential and small commercial customers within its own political jurisdiction, or within the service territory of a local publicly owned electric utility."

The effect of the revision to § 394(a) was to broaden the registration requirement to include ESPs offering electric services to residential and small commercial

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[1] Unless otherwise stated, all code section references are to the Public Utilities Code.

customers who operate in the service territories of publicly owned electric utilities.

The SB 477 revision to § 394 was addressed in D.98-03-072. D.98-03-072 also implemented the other SB 477 consumer protection safeguards by setting forth proposed permanent standards for proof of financial viability as well as proof of technical and operational ability. D.98-03-072 adopted interim standards for proof of financial viability and proof of technical and operational ability pending the adoption of permanent standards by the Commission. The proposed standards were then adopted as the permanent standards in D.99-05-034.

After the permanent standards were adopted, § 394 was further amended by AB 1658 (Stats. 1999, ch. 1005). AB 1658 added wording to § 394(a) which defines what an ESP means for the purpose of § 394.[2] AB 1658 also added a specific requirement in § 394(b)(8) that each ESP furnish fingerprints as part of the registration process. A fingerprint requirement was included as part of the proposed permanent standards, and adopted as part of the permanent standards in D.99-05-034.

AB 117 then broadened the definition of an ESP. As amended by AB 117, § 394(a) now reads:

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[2] As amended by AB 1658, § 394(a) states: "As used in this section, 'electric service provider' means an entity that offers electrical service to residential and small commercial customers, but does not include an electrical corporation, as defined in Section 218, or a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. 'Electric service provider' includes the unregulated affiliates and subsidiaries of an electrical corporation, as defined in Section 218."

> "As used in this section, 'electric service provider' means an entity that offers electrical service to customers within the service territory of an electrical corporation, but does not include an electrical corporation, as defined in Section 218, does not include an entity that offers electrical service solely to serve customer load consistent with subdivision (b) of Section 218, and does not include a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. 'Electric service provider' includes the unregulated affiliates and subsidiaries of an electrical corporation, as defined in Section 218."

All of the registration requirements, and proof of financial, technical, as well as operational ability that were adopted in D.97-05-040, D.98-03-072, and D.99-05-034, were issued in the electric restructuring dockets of Rulemaking (R.) 94-04-031, and in Investigation (I.) 94-04-032. D.03-01-034 closed those two proceedings because the issues in those proceedings were either moot or were being addressed elsewhere. Since those proceedings have been closed, the AB 117 expanded registration requirement will be considered in the rate stabilization proceedings, as shown in the above captions.

Discussion

A. Introduction

AB 117 amends § 394 by broadening the term ESP to include entities that provide electric service to all sizes of customers. That is, an ESP is no longer limited to an entity that provides electric service to residential and small commercial customers. As a result of AB 117, we need to expand our registration procedures to include all ESPs operating within California, except for those

entities who are specifically excluded from registration under § 394(a).[3] Where applicable, we presently have a registration framework that generally can be used to meet the expanded registration requirement. This existing registration framework was developed in D.97-05-040, D.98-03-072, and D.99-05-034. While it is true that the preconditions to registration were in effect when the Legislature enacted AB 117, it is also clear that we were authorized to use discretion in how we implement this statute (*See* Stats. 2002, ch. 838, § 6.) SB 477 mandated that we develop standards for proof of financial viability and proof of technical and operational ability. In D.98-03-072, the Commission proposed such standards and solicited comments from the parties. In D.99-05-034, the Commission adopted as the standards, the proposed requirements for proof of financial viability and proof of technical as well as operational ability, which appeared at pages 32 to 34 of D.98-03-072. (D.99-05-034, p. 136, OP 7.) The permanent standards are based on and conform to the guidelines that were set forth in §§ 394(b)(9) and (10) as added by SB 477. Where appropriate, the expanded ESP registration requirement made to § 394 by AB 117, also includes the standards for proof of financial viability and proof of technical as well as operational ability. However, AB 117 made slight changes to the language of § 394(b)(9), which, as discussed below, impact which ESPs are governed by the standards for proof of

[3] It appears that § 394, as amended by AB 117, only requires the registration of ESPs who operate in the service territories of the investor-owned utilities. § 394(a) currently provides: "As used in this section, 'electric service provider' means an entity that offers electrical service to **customers within the service territory of an electrical corporation**…(Emphasis added.) § 394(a) specifically excludes from registration a "public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publically owned electric utility."

financial viability that we adopted in D.99-05-034. In addition, D.99-05-034 was adopted when the only ESPs required to register were those who served residential and small commercial customers.

D.98-03-072 also discussed and implemented the other consumer protection safeguards that SB 477 mandated. These are found in §§ 394.1, 394.2, 394.25, 394.3, 394.4, 394.5, 394.7, and 396, among others. Again where feasible, these consumer protection safeguards remain in place.

B. Expanded Registration and Related Proof

AB 117 revised § 394(a) to require the registration of all ESPs, unless excluded by § 394(a). As a result of that legislative change, we are now required to register all those other entities who were not previously required to register. This expanded registration requirement primarily affects those entities who provide electric service to agricultural customers, medium and large commercial customers and to industrial customers.

Most of the registration procedures and ESP registration form that we adopted in D.97-05-040, as modified by D.98-03-072 and D.99-05-034, shall serve as the foundation for the registration of all ESPs in California who are required to register. Attached to this decision as Appendix A is the "9/03" revised version of the "Electric Service Provider Registration Application Form." This form shall serve as the ESP registration form starting today.

One of the requirements in the ESP registration form is that the ESP have an executed "Energy Service Provider Service Agreement" (Service Agreement) with each utility distribution company (UDC) in whose service territory the ESP plans to do business. The form of the Service Agreement was discussed and adopted in D.97-10-087. As part of the direct access tariff, all ESPs, regardless of

the type of customers they serve, are required to execute a Service Agreement with the UDC. (D.97-10-087, App. A, § D.)

We have made some revisions to the registration form that was approved in D.99-05-034. These revisions reflect that AB 117 broadened the registration of ESPs, that some code section requirements only apply to ESPs who serve residential and small commercial customers, and that standards were adopted in D.99-05-034 for ESPs who serve agricultural customers, residential and small commercial customers, and in this decision for those ESPs who serve agricultural customers, medium to large commercial customers and/or industrial customers.[4]

As noted earlier, AB 1658 added a specific requirement in § 394(b)(8) that each ESP provide fingerprints as part of their registration process. A fingerprint requirement was adopted as part of the standards in D.99-05-034 and was incorporated into the registration form (see Attachment A). Heretofore, the Commission believed that fingerprinting served a useful purpose by screening out individuals' most likely to defraud customers of small ESP's (D.99-05-034, at

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[4] The ESP registration form and the permanent standards were adopted by the Commission when § 394 only required the registration of ESPs who served residential and small commercial customers. Due to the statutes which existed at the time D.97-05-040, D.98-03-072, and D.99-05-034 were adopted, modification of those decisions to reflect the AB 117 revisions would be inappropriate because AB 117's broadening of which ESPs must register with the Commission did not go into effect until January 1, 2003. Thus, those three decisions need to be viewed in the context of the statutory enactments which existed at the time of adoption. However, the groundwork that was established in those decisions regarding the registration procedures and permanent standards (and the Legislature's recognition of those existing registration requirements when AB 117 was passed) can be used as the basis for establishing similar kinds of procedures and standards (where applicable) for ESPs who serve agricultural customers, medium to large commercial customers and/or industrial customers.

page 38). Additionally, this requirement was instituted to protect customers of small ESP's because they were not deemed to have the same ability as consumers of larger ESP's to ferret out provider's likely to act inappropriately.

At the time this standard was considered, there was a great deal of uncertainty in envisioning how restructuring of the electric industry would coalesce. Today, there is a body of knowledge that now exists regarding the move towards increased competition. Concomitantly, we, and, presumably consumers of electricity, are now more knowledgeable of which ESP's that are most likely to act inappropriately. Given this additional perspective, it would seem that we now can determine what standards are applicable to all electrical service providers.

To that end, as part of the expanded registration requirements mandated by AB 117: "each electric service provider shall furnish the commission with fingerprints…specified by any Commission decision *applicable* (italics added) to all electric service providers". This language suggests that we, should first and foremost, be concerned with the civil, criminal, or regulatory infractions of ESPs prior to registration. Once more (as noted earlier), the Commission developed an ESP registration application form to ensure that ESP's meet the preconditions to registration.

A quick review of this registration application reveals that this form requests the applicant to provide information on past felony convictions, or past violations of state and federal consumer protection laws (see Attachment A at page five). As this information goes to the heart of the matter, it is somewhat incongruous to believe that clients of ESPs which serve agricultural customers, medium, large commercial customers, and industrial customers would be more significantly protected by the use of indiscriminant fingerprinting. Hence, to

implement this statutory requirement in a sensible manner with respect to large ESP's, we should properly exercise our discretion by limiting fingerprinting to a designated corporate officer(s)[5]. Moreover, to augment this limited fingerprinting requirement for the larger ESP's, we also require a statement detailing whether the prospective applicant is currently under investigation for civil and consumer law violations.

The ESP registration form and procedures, and our discussion of the form and procedures in D.98-03-072 and in D.99-05-034, are integrally related to the standards that were adopted for proof of financial viability and proof of technical as well as operational ability. The standards that we adopted in D.99-05-034 are as follows:

> (1) Before an ESP may apply for an ESP registration number, and for those ESPs who have already received an ESP registration number, the ESPs are required to provide the Energy Division with a signed copy of their UDC-ESP service agreements for each UDC in whose service territory the ESP plans to do business.
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> (2) Prior to signing up and initiating a DASR [direct access service] request on behalf of any residential or small commercial customer, an ESP will be required to post a minimum cash security deposit (cashier's check) or financial guarantee bond in the amount of $25,000 with the Commission. In the alternative, the registered ESP may open a customer trust account in that amount which is in a format approved by the Commission's General Counsel, and which ensures that residential and small commercial customers have adequate recourse in the event of the ESP's fraud or non-performance. The deposit, bond or trust account shall be established when the Section 394.5 notice is first tendered to the Energy Division.

[5] The Energy Division must approve all corporate officers selected by the large ESP.

As the ESP's number of customers increase, the ESP shall be required to increase its security deposit in accordance with the following schedule:

# of Customers	Security Deposit Amount
1 – 250	$25,000
251 – 500	$50,000
501 – 1000	$75,000
1001 +	$100,000

The ESP will be required to increase the amount of the deposit, bond or trust account in accordance with the schedule above if the number of customers reported in the standard service plan filing raises the ESP to a different security deposit amount level.

If a cash security deposit is posted with the Commission, any interest earned on the deposit would be returned to the ESP on an annual basis.

(3) The ESP registration application form shall contain a section which requests the applicant to name the key technical and operational personnel, their titles, and a description, including the time period, of each key person's experience in the sale, procurement, metering, and billing of energy services or similar products. If someone other than the ESP will be doing the metering or billing on behalf of the ESP, the names of the companies providing those services and their experience shall be disclosed as well. If the applicant has been authorized by the California ISO to act as an SC [scheduling coordinator], this requirement is waived. The ESP who has been authorized as an SC shall submit a copy of such authorization as part of the ESP registration application form.

(4) Each registered ESP is required to submit a copy of its Section 394.5 notice to the Energy Division when the ESP signs up its first customer or when the first standard service plan filing of the ESP is due, whichever is earliest.

(5) Each ESP is required to submit a copy of all of its SC agreements or a signed declaration from each SC with which it has an agreement and which states that the ESP has entered into a SC agreement with the ESP. The copy or declaration shall be submitted to the Energy Division on or

> before the date when the ESP signs up its first customer. If the ESP is an SC authorized by the California ISO, this requirement is waived. (D.99-05-034, p. 136, OP 7; D.98-03-072, pp. 32-34.)

The interpretation of the proof of financial viability subsection, found in § 394(b)(9), is affected by AB 117's broadening of which entities must now register with the Commission. This is apparent from a review of how the proof of financial viability subsection was developed.

As added by SB 477, § 394(b)(9) stated as follows:

> "Proof of financial viability. The commission shall develop uniform standards for determining financial viability and shall publish those standards for public comment no later than March 31, 1998. In determining the financial viability of the entity, the commission shall take into account the number of customers the potential registrant expects to serve, the number of kilowatt hours of electricity it expects to provide, and any other appropriate criteria in order to ensure that residential and small commercial customers have adequate recourse in the event of fraud or nonperformance."

AB 1658 (Stats. 1999, ch. 1005, § 10) made three changes to § 394(b)(9), which are italicized below:

> "Proof of financial viability. The commission shall develop uniform standards for determining financial viability and shall publish those standards for public comment no later than March 31, 1998. In determining the financial viability of the *electric service provider*, the commission shall take into account the number of customers the potential registrant expects to serve, the number of *kilowatthours* of electricity it expects to provide, and any other appropriate *criteria to ensure* that residential and small commercial customers have adequate recourse in the event of fraud or nonperformance."

As a result of the change to § 394(b)(9) by AB 1658, two issues arise as we implement the requirements of AB 117. The first issue is whether the permanent standards for proof of financial viability apply to all ESPs as expanded by AB 117, or do they only apply to ESPs who serve residential and small commercial customers.[6] The second issue is if the permanent standards for proof of financial viability adopted in D.99-05-034 only apply to those ESPs who serve agricultural customers, residential and small commercial customers, then what, if any, standards for proof of financial viability should apply to ESPs who serve agricultural customers, medium and large commercial customers, and industrial customers.

To answer these issues, we examine the legislative enactments that were in place when D.98-03-072 and D.99-05-034 were adopted. When D.98-03-072 and D.99-05-034 addressed the proof of financial viability issue, the code section in effect at the time was § 394(a)(9) as added by SB 477. The term "entity" was used in § 394, instead of "electric service provider," and referred to an "entity offering electrical service to residential and small commercial customers…." (§ 394(a) as added by Stats. 1997, ch. 275, § 13.) Since § 394 only addressed the registration of entities offering electrical service to residential and small commercial customers, the discussion in D.98-03-072 and D.99-05-034 pertaining to proof of financial viability was only in reference to those ESPs serving residential and small commercial customers. (*See* D.98-03-072, pp. 12, 19, 27-31; D.99-05-034, pp. 2, 16-19.)

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[6] In the third sentence of § 394(b)(9), as revised by AB 1658, the reference to residential and small commercial customers suggests that the listed criteria only be used for those ESPs serving those kinds of customers.

AB 1658, which became effective on January 1, 2000, replaced the word "entity" with "electric service provider" in § 394, and added the definition of an ESP to § 218.3. However, AB 1658 did not affect which entities must register because registration was still limited to those entities, which provide electric service to residential and small commercial customers. Since the entities who were required to register remained the same, AB 1658's revision of § 394 did not affect the permanent standards for proof of financial viability.

Due to AB 117's broadening of the definition of which entities must now register with the Commission, and because of the revision to § 394(b)(9) by AB 1658, the two issues regarding subsection 394(b)(9) must now be addressed. Reading § 394 as revised by AB 117, it is clear that subdivision (b) requires, as a precondition to registration, that the ESP, regardless of who it serves, provide proof of financial viability.[7] Although D.98-03-072 and D.99-05-034 addressed the proof of financial viability standards, those standards were adopted in the context of ESPs who serve residential and small commercial customers. Thus, the answer to the first issue is that the standards for proof of financial viability that were developed and implemented in D.98-03-072 and D.99-05-034 apply to those ESPs who serve residential and small commercial customers.

That raises the second issue about what standards for proof of financial viability should apply to ESPs who serve larger customers. Although AB 117 revised § 394(a), the preconditions to registration were not altered in § 394(b). Therefore, we believe that the Legislature intended that all ESP's (both that serve

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[7] Section 394(b) currently reads: "Each electric service provider shall register with the commission. As a precondition to registration, the electric service provider shall

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large and small customers) provide evidence that demonstrates their financial viability Regardless, while maintaining uniformity in requiring that all ESP classes provide some form of proof of their financial viability, we believe that a one size fits all approach (in this instance) is improper.

We have reviewed the development of the interim and permanent financial viability standards in D.98-03-072 and D.99-05-034. Using a historical analysis, the standards that were adopted for ESPs who serve smaller customers were based on the following concerns: requiring an ESP to have a signed service agreement with the electric utility as a measure of the ESP's financial health and creditworthiness; that a mechanism be developed to ensure that customers have adequate recourse should an ESP defraud customers or go out of business, and that the mechanism be sized according to the number of customers; and that ESPs have sufficient capital to fund their operations. (*See* D.98-03-072, pp. 27-36; D.99-05-034, pp. 16-23.)

We have considered subdivisions (d), (e) and (f) of § 391 in our deliberations of what financial viability standards should apply to ESPs who serve larger customers. Subdivision (d) notes that "Larger commercial and industrial customers are sophisticated energy consumers that have adequate civil remedies and are adequately protected by existing commercial law…." Subdivision (e) notes that the market structure should not "unduly burden new entrants into the competitive electric market…." Subdivision (f) states that the system of registration and consumer protection be "designed to ensure sufficient protection for residential and small commercial consumers while simplifying

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provide, under oath, declaration, or affidavit, all of the following information to the commission: …," including proof of financial viability.

entry into the market for responsible entities serving larger, more sophisticated customers." Based on similar concerns about the financial well-being of ESPs who serve the larger customer classes, and balancing the Legislature's intent of ensuring that these ESP's are subject to proof of financial viability standards which are not unduly burdensome, we believe that adopting similar standards for proof of financial viability that we adopted in D.99-05-034 for ESP's who serve residential and small commercial customers as the standards for proof of financial viability for ESP's who serve agricultural customers, medium to large commercial customers and industrial customers is inappropriate.

Historically, the Commission attempted to regulate ESP's in a manner which balanced its mandate of protecting consumers while not imposing burdensome rules and regulations on ESP's that could hamper a competitive market (see R.94-04-031 at page nine). To that end, the Commission also believed that its efforts to protect consumers should not oblige rules and regulations on ESP's unless absolutely necessary. Applying this standard suggests that some change in the financial viability requirement (particularly of large ESP's) is warranted.

As noted earlier, past Commission decisions required a deposit by small ESP's to cover re-entry fees and to provide a measure of financial protection to their customers. Since these decisions were contemplated and adopted, re-entry fees have not been required. It is likely that the required security deposit still may provide safeguards to small ESP's. However, for larger ESP's, this required deposit is at best gratuitous (as there is no longer a re-entry fee) and at worst the deposit requirement provides a negligible level of protection to their customers (based on the current fee schedule as described on page 11).

Furthermore, it is not apparent as to how utilizing strictly uniform registration provisions which were created to ensure that residential and small commercial customers had adequate recourse in the event of fraud or non-performance apply to more sophisticated commercial and industrial customers. Given the comparatively larger contractual obligations between the large ESP and its customer, it seems that the likelihood of malfeasance is greatly diminished. Regardless, it cannot be denied that as a result of SB 477 and AB 117, both large and small ESP customers have a recourse (if the need should ever arise) to submit their complaints to the Commission or through litigation in a court process.

This may be time for the Commission to reconsider what offer of proof from ESP's (particularly large ones) is needed to demonstrate proof of financial viability. Some may argue that the minimum requirement of $25,000 up to a maximum ceiling of $100,000 possibly is not an adequate amount for large ESP's in providing consumer protection. To address this topic, comments regarding today's evolving markets, and the necessary level of protection needed by large ESP consumers are welcomed from the interested public. We believe that by soliciting comments from the affected public and in turn developing a record on this matter, we meet our obligation to enforce AB 117 in a pragmatic manner. We propose that comments be submitted within 30 days from the adoption of this proposed alternate decision. Once the Commission has received and evaluated these solicited comments, we will adopt standards accordingly for proof of financial viability for those ESP's who serve agricultural customers, medium and large commercial customers and industrial customers.

We turn next to the permanent standards for proof of technical and operational ability that should apply to ESPs who serve larger customers. The

proposed standards approved in D.98-03-072 and made permanent in D.99-05-034 were adopted in the context of ESPs who served residential and small commercial customers. Some of these standards may serve as the foundation for establishing permanent standards for proof of technical and operational ability for those ESPs who serve larger customers. The standards that were adopted for ESPs who serve smaller customers are based on similar concerns for ESPs who serve larger customers. These concerns include: requiring an ESP to have a signed service agreement with the electric utility will help measure the ESP's technical and operational experience in energy transactions; requiring a copy of the scheduling coordinator agreement or a signed declaration from each scheduling coordinator will assist in determining the ESP's technical and operational experience; requiring the ESPs to disclose the names and experience of key personnel will assist in screening out entities with little or no experience. (*See* D.98-03-072, pp. 26-29, 32-34; D.99-05-034, pp. 16-23.)

Based on similar concerns about the technical and operational ability of ESPs who serve the larger customers, and balancing the Legislature's intent in §§ 391 and 394(b) of ensuring that these ESPs are subject to proof of technical and operational ability standards which are not unduly burdensome, we will adopt three of the standards (moderately altered) for proof of technical and operational ability that we adopted in D.99-05-034 for ESPs serving agricultural customers, medium to large commercial customers and / or industrial customers. Accordingly, the standards labeled (1), (3),[8] and (5) (in some shape, form or

[8] In its comments to the draft decision, AREM opposes having to provide a description of "each key person's experience in the sale, procurement, metering, and billing of energy sources or similar products, including the time period of such experience." As a

Footnote continued on next page

fashion) shall be adopted as the standards for proof of technical and operational ability that apply to ESPs serving agricultural customers, medium to large commercial customers and / or industrial customers. The standard labeled "(4)" in D.98-03-072 and D.99-05-034 will not be adopted because the § 394.5 notice only applies to an ESP offering electric service to residential and small commercial customers. Standard (1) is listed above, and standards (3), and (5), which has been renumbered as (4), are as follows:

> (1) The ESP registration application form shall contain a section which requests the applicant to name the key technical and operational personnel, their titles, and a description, including the time period, of each key person's experience in the sale, procurement, metering, and billing of energy services or similar products. The larger ESP's also may be permitted to submit resumes of the key technical and operational personnel (if the resume includes the requested information). If someone other than the ESP will be doing the metering or billing on behalf of the ESP, the names of the companies providing those services and their experience shall be disclosed as well. If the applicant has been authorized by the California ISO to act as an SC [scheduling coordinator], this requirement is waived. The ESP who has been authorized as an SC shall submit a copy of such authorization as part of the ESP registration application form.
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> (2) Each ESP is required to submit a copy of all of its SC agreements or a signed declaration from each SC with which it has an agreement and which states that the ESP has entered into a SC agreement with the ESP. The copy or declaration shall be submitted to the Energy Division on or before the date when the ESP signs up its first customer. If

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compromise, AREM suggests rather than providing "a separate description of each person's key experience, the ESP applicant should instead provide the resumes of their key operating personnel."

> the ESP is an SC authorized by the California ISO, this requirement is waived.

We believe that the Legislature intended to ensure that both the smaller and large ESP's would be accountable for adhering to basic standards of performance. While maintaining uniformity by requiring that all ESP's provide documentation of their technical and operational proficiency, we believe that we can exercise discretion by allowing large ESP's to submit resumes for key personnel in lieu of providing an expansive list of names and exhaustive description of their qualifications (as required by the ALJ Draft Decision at Attachment A, Section 16[b])[9]. Given the sophistication of large customers, the value of protection afforded by this requirement is somewhat weakened and seems to be an unduly burdensome.

The Commission and the Legislature acknowledged the potential concerns of electric restructuring--such as market abuses. Hence, the registration process was designed to bar companies with the propensity to act as unprofessionally from entering into the energy market. The success of these consumer protection strategies and the benefits from increased competition on driving down California's electricity prices appears to be mixed. The Commission, in the past, believed that the market, the large ESP's, as well as their customers, were mature enough to decide what procedures were necessary to allow entry into the restructured electricity market (see D.97-05-040 at page 22 and 26). The Commission also believed that some amount of regulatory oversight was needed

[9] Resumes of the key technical and operational personnel can be substituted for the description of each key person's experience so long as the resume provides the information required by permanent standard (3).

to attempt to protect consumers of small ESP's from unscrupulous operators (D.99-05-034). If the pre-registration requirements failed, then, there were other mechanisms in place to provide consumers with additional protections as stipulated to by the Commission.

All entities offering electric service to customers within the service territory of an electrical corporation, except for the following: an electrical corporation as defined in § 218, an entity that offers electric service solely to serve customer load consistent with § 218(b), or a public agency that offers electric service to residential and small commercial customers within its jurisdiction or within the service territory of a local publicly owned electric utility, shall register with the Commission as an ESP. Those entities who are currently registered as ESP's with the Commission, and in good standing, do not need to re-register. All other ESP's, who were not required to register with the Commission prior to the effective date of AB 117, or who have failed to register, shall be required to register with the Commission within 120 days from today.

In order to accomplish the registration of ESP's who serve agricultural customers, medium to large commercial customers, and industrial customers, we shall direct all the electric utilities to supply the names and addresses of all ESPs who are operating in their service territories, or who have signed Service Agreements. This list of names and addresses shall be delivered to the Director of the Energy Division within 20 days of today's date. Within 30 days of today's date, the Energy Division shall notify all the ESPs on the list of their obligation to register pursuant to AB 117 and this decision, and that such registration must occur within 120 days of this decision.

The Energy Division shall ensure that all of the ESPs, appearing on the lists compiled by the utilities, have registered with the Commission within the

120 days. If an ESP fails to register within the time allotted, the Energy Division is directed to take all necessary action to prevent the unregistered ESP from engaging in the sale of electricity to California customers.

The Energy Division shall also update its registration records in accordance with the provisions of § 392.1, and make the necessary changes to appropriate documents and web pages to reflect the expanded registration requirements, and the permanent standards for proof of financial ability and proof of technical and operational ability for ESPs who serve agricultural customers, medium to large commercial customers and/or industrial customers.

C. Use of Electric Service Provider in Other Code Sections

Due to AB 117's expanded registration requirement, clarification of the use of the term "ESP" in other code sections is needed. It is clear from the introductory phrase, "As used in this section," found in Section 394(a) as revised by AB 117, that the term ESP is being defined only for the purpose of § 394. Since the term "ESP" is referred to in other code sections besides § 394(a) as revised by AB 117, there is a need to clarify whether the other references to "ESP" have the same meaning as used in § 394(a,) or whether the references have some other meaning. This clarification is important because some of the other code sections generically refer to all ESPs, while other code sections only apply to those ESPs who serve residential and small commercial customers.

We have reviewed and compared the various legislative enactments, which addressed the registration of ESPs and the related consumer protection safeguards. For the most part, these registration requirements and consumer protection safeguards, as implemented in D.98-03-072 and D.99-05-034, have

remained unchanged, even though the registration of which ESPs must register with the Commission has been expanded.

Our research, discussed below, reveals that the term "ESP," as used in § 394, has the same meaning as used in other code sections, except when the other code sections specifically refer to an ESP that serves residential and small commercial customers.

When the direct access rules were first adopted, we relied on the language set forth in § 394(a), as added by AB 1890, as to which entities had to register with the Commission. We stated the following in D.97-05-040:

> "AB 1890 requires that the Commission establish a registration system for 'each entity offering electrical service to residential and small commercial customers within the service territory of an electrical corporation.'
>
> "The Legislature appears to have intended that only those entities offering electrical service to residential and small commercial customers need to register with the Commission. There is no requirement in AB 1890 that those entities offering electrical service to large commercial customers and industrial customers need to register with the Commission." (D.97-05-040, p. 54 [72 CPUC2d 441, 477].)

In AB 1658, § 218.3 was added to the code, effective January 1, 2000. Section 218.3 set forth the following definition of an ESP:

> " 'Electric service provider' means an entity that offers electrical service to residential and small commercial customers, but does not include an electrical corporation, as defined in Section 218, or a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. 'Electric service provider' includes the unregulated affiliates and

> subsidiaries of an electrical corporation, as defined in Section 218."

When AB 117 revised the definition of an ESP in § 394, that legislation also revised the definition of an ESP that appears in § 218.3 as follows:

> " 'Electric service provider' means an entity that offers electrical service to customers within the service territory of an electrical corporation, as defined in Section 218, but does not include an entity that offers electrical service solely to service customer load consistent with subdivision (b) of Section 218, and does not include an electrical corporation, as defined in Section 218, or a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. 'Electric service provider' includes the unregulated affiliates and subsidiaries of an electrical corporation, as defined in Section 218."

In the Legislative Counsel's Digest to AB 117, the revisions to §§ 218.3 and 394 were noted as follows:

> "Existing law defines 'electric service provider' as an entity that offers electrical service to residential and small commercial customers, but not including an electrical corporation and requires these providers to register with the commission.
>
> "This bill would instead define 'electric service provider' as an entity that offers electrical service to customers within the service territory of an electrical corporation, but not including an electrical corporation or a person employing cogeneration technology or producing electricity from other than conventional power sources, for its own use or the use of its tenants or an adjacent property and not for sale of transmission to others."

A comparison of the revisions to § 218.3 and 394, in particular how an ESP is defined, reveals that the definitions in both code sections are the same. Thus,

the references to an ESP in code sections other than § 394 has the same meaning as an ESP as defined in §§ 218.3 and 394, except when the code section references an ESP that serves residential and small commercial customers.

The distinction between the generic reference to an ESP, and to an ESP that serves residential and small commercial customers, is important for determining what code sections apply to an entity who provides electric service in California. The following is a list of the major code sections, which apply to all entities offering electric service in California, except as noted in §§ 218.3 and 394(a).

> Public Utilities Code §§ 218.3; 394; 394.1; 394.2(a), (c), (d); 394.25; 394.3; 396.

The above list of code sections is not exhaustive, and it is incumbent upon each ESP to determine whether other code section provisions that reference the term ESP apply to the electric services it is offering.

The following is a list of the major code sections, which apply to those entities who offer electric service to residential and small commercial customers, except as noted in §§ 218.3 and 394(a):

Public Utilities Code §§ 366.5; 392.1; 394.2(b); 394.4; 394.5; 394.7; 395.

D. Reentry Fee

AB 117 amended § 394.25 by adding subdivision (e). Section 394.25(e) states:

> "If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, any reentry fee imposed on that customer that the commission deems is necessary to avoid imposing costs on other customers of the electric corporation shall be the obligation of the electric service provider or a community choice aggregator, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer's contract has expired. As a condition of its registration, an electric service provider or a community

> choice aggregator shall post a bond or demonstrate insurance sufficient to cover those reentry fees. In the event that an electric service provider becomes insolvent and is unable to discharge its obligation to pay reentry fees, the fees shall be allocated to the returning customers."

The addition of subdivision (e) to § 394.25 requires that if a customer of an ESP or a community choice aggregator is returned to utility electric service due to the fault of the ESP or community choice aggregator, any reentry fee imposed by the utility, [if]deemed necessary by the Commission to avoid imposing costs on other customers of the utility, must be paid for by the ESP or the community choice aggregator. In the past, we required ESP's that served small residential and small commercial customers to post a minimum cash security deposit or a financial guarantee bond in the minimum amount of $25,000 with the Commission, or to open a customer trust account.[10] (D.99-05-034, pp. 16-24.) Since we already require the posting of a minimum of a $25,000 cash security deposit or a financial guarantee bond as part of the small ESP registration requirement, the issue we need to address is whether the current schedule for deposits could be used to to cover any reentry fee that might be imposed on the large ESP.

The draft decision of the Administrative Law Judge (ALJ) in this matter will be mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. In addition to comments on whether maintaining the current fee schedule of security deposits for larger ESP's is an

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[10] Under the permanent proof of financial viability standards, as the number of customers increases, the ESP is required to increase the security deposit level as set forth in the schedule in D.99-05-034 and in this decision.

adequate means of consumer protection, interested persons are invited to file written comments on the use of the security deposit to cover reentry fees (if ever required) (§ 394.25[e]).[11] Opening comments on this issue shall be filed on or before January 1, 2004, and reply comments shall be filed on or before January 22, 2004. Depending on the type and number of comments, the Commission may either increase the schedule of the deposit amounts; eliminate the fee schedule for large ESP's altogether, or leave the deposit requirement as is. Accordingly, interested parties are put on notice in accordance with § 1708 that the schedule of deposit amounts adopted in D.99-05-034 and in this decision may be revised.

Comments on Draft Alternate Decision

The draft alternate decision of Commissioner Peevey in this matter was mailed to the parties in accordance with Rule 77.6 of Rules of Practice and Procedure on November 18, 2003. Comments were timely filed by Coral Power, L.L.C, and Alliance for Retail Energy Markets.

The comments of the parties have been considered, and appropriate changes have been made to the decision.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner, and John S. Wong is the assigned ALJ in this proceeding.

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[11] The implementation of AB 117 regarding community choice aggregation is being addressed in Rulemaking 03-09-007.

Findings of Fact

1. Section 394(a), as added by AB 1890, required the registration of each entity offering electric service to residential and small commercial customers within the service territory of an electrical corporation.

2. Section 394(a), as added by AB 1890, was implemented in D.97-05-040.

3. Section 394(a), as added by SB 477, broadened the registration requirement to include ESPs offering electric service to residential and small commercial customers who operate in the service territories of publicly owned electric utilities.

4. D.98-03-072 addressed § 394(a), as added by SB 477, and also implemented the other SB 477 consumer protection safeguards by setting forth proposed permanent standards for proof of financial viability and proof of technical and operational ability.

5. The proposed permanent standards for proof of financial viability and proof of technical and operational ability were adopted in D.99-05-034 as the permanent standards.

6. Section 394, as amended by AB 1658, added wording to define that an ESP means an entity that offers electric service to residential and small commercial customers.

7. AB 1658 also added a fingerprint requirement as part of the registration process.

8. Due to AB 117, our registration procedures need to be expanded to include all ESPs who were not previously required to register with the Commission.

9. The expanded registration requirement will primarily affect those entities who provide electric service to agricultural customers, medium to large commercial customers and/or to industrial customers.

10. Most of the registration procedures and ESP registration form that we adopted in D.97-05-040, as modified by D.98-03-072 and D.99-05-034, will serve as the foundation for the registration of all ESP's who are required to register.

11. One of the requirements of the ESP registration form is that the ESP have an executed Service Agreement with each UDC in whose service territory the ESP plans to do business. The Energy Division can confirm the execution of the ESP's Service Agreement without having copies of executed agreements furnished by each ESP. The related item on the ESP Application form is sufficient.

12. As part of the direct access tariff, all ESPs, regardless of the type of customers they serve, are required to execute a Service Agreement with the UDC.

13. Several revisions have been made to the ESP registration form to reflect the following: AB 117's broadening of the registration requirement; that some code section requirements only apply to ESPs who serve residential and small commercial customers; and that permanent standards were adopted in D.99-05-034 for ESPs who serve residential and small commercial customers, and in this decision for those ESPs who serve agricultural customers, medium to large commercial customers and industrial customers.

14. As part of the expanded registration requirements mandated by AB 117: "each electric service provider shall furnish the commission with fingerprints as specified by any Commission decision *applicable* (italics added) to all electric service providers".

15. Changes in the electricity market warrant another look at the fingerprinting requirements applicable to all large ESPs. A pragmatic

application of this requirement would limit fingerprinting to a designated corporate officer(s) approved by the Energy Division.

16. A statement from a large ESP that discloses whether the company or its officers are currently under investigation for civil and consumer law violations is required.

17. The ESP registration form and procedures satisfy the permanent standards for proof of financial viability and proof of technical and operational ability.

18. Applying the same standards for proof of financial viability to large ESP's that serve agricultural customers, medium to large commercial customers and industrial customers as applicable to small ESP's that serve residential and small commercial customers is inappropriate.

19. Soliciting comments regarding appropriate standards for proof of financial viability for large ESP's is reasonable.

20. The distinction between the generic reference to an ESP, and to an ESP that serves residential and small commercial customers, is important for determining what code sections apply to an entity who provides electric service in California.

21. AB 117 amended § 394.25 by adding subdivision (e).

22. Section 394.25(e) requires that if a customer of an ESP or a community choice aggregator is returned to utility electric service due to the fault of the ESP or community choice aggregator, that the reentry fee imposed by the utility may be paid for by the ESP or community choice aggregator.

23. The ESP security deposit requirement to date has been satisfied by the posting of a bond or cash deposit or demonstrating insurance sufficient to cover the customer in the event of the ESP's fraud or nonperformance.

24. Interested parties are put on notice that the schedule of the deposit amounts adopted in D.99-05-034 and in this decision may be revised.

Conclusions of Law

1. Section 394, as amended by AB 117, expanded the registration of ESPs, with certain exceptions, to include entities that offer electric service to all sizes of customers.

2. The Electric Service Provider Registration Application Form, revised "9/03"and attached to this decision as Appendix A, shall serve as the ESP registration form for all ESPs starting today.

3. Due to the statutes, which existed at the time D.97-05-040, D.98-03-072, and D.99-05-034 were adopted; modification of those decisions to reflect the AB 117 revisions would be inappropriate because AB 117 did not go into effect until January 1, 2003.

4. The interpretation of the proof of financial viability in § 394(b)(9), is affected by AB 117's broadening of which entities must now register with the Commission.

5. except as modified herein, the permanent standards for proof of financial viability that were developed and implemented in D.98-03-072 and D.99-05-034 apply to those ESPs who serve residential and small commercial customers.

6. Even though § 394 was revised by AB 117, the preconditions to registration were not altered in § 394(b).

7. The Legislature's intent is that the proof of financial viability requirement in § 394(b) also applies to ESP's that serve agricultural customers, and the larger commercial customers and industrial customers.

8. Section 391 expresses a concern that the market structure for ESP's that serve larger customers should not be unduly burdensome.

9. Permanent standards labeled (1) and (2), (adopted in D.99-05-034 for ESP's that serve residential and small commercial customers), should be adopted, with

modifications (after solicited comments), as the standards for proof of financial viability for ESP's that serve agricultural customers, medium to large commercial customers and industrial customers.

10. The permanent standards for proof of technical and operational ability that were developed and implemented in D.98-03-072 and D.99-05-034, apply to those ESP's that serve residential and small commercial customers.

11. Permanent standards labeled (1), (3) and (5), adopted in D.99-05-034 for ESP's that serve residential and small commercial customers, may be adopted with modifications (after solicited comments) as the standards for proof of technical and operational ability for ESP's that serve agricultural customers, medium to large commercial customers and/or industrial customers.

12. All entities offering electric service to customers within the service territory of an electrical corporation, except as specifically excluded in § 394, should be required to register with the Commission as an ESP within 120 days of today's date unless the ESP is currently registered and in good standing.

13. The electric utilities subject to our jurisdiction should be directed, within 30 days of today's date, to supply the names and addresses of all ESP's that are operating in their service territories or that have signed Service Agreements.

14. Within 40 days of today's date, the Energy Division should notify all the ESP's on the list of their obligation to register pursuant to AB 117 and this decision, monitor their compliance, take all necessary action to prevent unregistered ESP's from engaging in the sale of electricity to California customers, and update its records and documents to reflect the expanded registration requirements.

15. The term "ESP," as used in § 394, has the same meaning as used in other code sections, except when the other code sections specifically refer to an ESP that serves residential and small commercial customers.

16. Comments on whether the current schedule of the deposit amounts are sufficient to cover the reentry fee required under § 394.25(e) should be solicited.

O R D E R

IT IS ORDERED that:

1. Except for those electric service providers (ESPs) that have previously registered with the Commission and are in good standing, and as specified in Public Utilities Code § 394 as amended by Assembly Bill (AB) 117 (Stats. 2002, ch. 838), all entities that offer electric service to customers in California are required to register with the Commission.

   a. All such entities that are required to register with the Commission shall do so within 120 days from today's date using the Electric Service Provider Registration Application Form, which is attached to this decision as Appendix A.

   b. All entities who are required to register with the Commission shall provide all of the information, documents, fees, and deposits required by Public Utilities Code §§ 394 and 394.3, which requirements have been incorporated into the Electric Service Provider Registration Application Form.

2. The permanent standards for proof of financial viability and proof of technical and operational ability that were adopted in Decision (D.) 99-05-034 shall continue to apply to all ESP's that offer electric service to residential and small commercial customers.

3. The following standards for proof of financial viability and proof of technical and operational ability are adopted as the standards for all ESP's that offer electric service to agricultural customers, medium to large commercial customers and / or to industrial customers unless solicited comments are received and used to develop permanent standards to be issued later:

(1) Before an ESP may apply for an ESP registration number, and for those ESPs that have already received an ESP registration number, the ESPs are required to execute a UDC-ESP service agreements for each UDC in whose service territory the ESP plans to do business.

(2) At the time of registration with the CPUC, an ESP serving agricultural customers, medium to large commercial customers and / or industrial customers shall be required to post a minimum cash security deposit (cashier's check) or financial guarantee bond in the amount of $25,000 with the Commission. In the alternative, the registered ESP may open a customer trust account in that amount which is in a format approved by the Commission's General Counsel, and which ensures that the customers have adequate recourse in the event of the ESP's fraud or non-performance, and to pay any applicable re-entry fee. If the actual number of customers served by the ESP exceeds 250, the ESP shall be required to immediately increase its cash deposit, financial guarantee bond, or trust account in accordance with the following schedule when its number of customers raises the ESP to the different security deposit amount level.

# of Customers	Security Deposit Amount
1 – 250	$25,000
251 – 500	$50,000
501 – 1000	$75,000

1001 +	$100,000

If a cash security deposit is posted with the Commission, any interest earned on the deposit will be returned to the ESP on an annual basis.

(3) The ESP registration application form shall contain a section which requests the applicant to name one or more key technical and operational personnel, their titles, and a description, including the time period, of each key person's experience in the sale, procurement, metering, and billing of energy services or similar products. If someone other than the ESP will be doing the metering or billing on behalf of the ESP, the names of the companies providing those services and their experience shall be disclosed as well. If the applicant has been authorized by the California ISO to act as an SC [scheduling coordinator], this requirement is waived. The ESP that has been authorized as an SC shall submit a copy of such authorization as part of the ESP registration application form.

(4) Each ESP is required to submit a copy of all of its SC agreements or a signed declaration from each SC with which it has an agreement and which states that the ESP has entered into a SC agreement with the ESP. The copy or declaration shall be submitted to the Energy Division on or before the date when the ESP signs up its first customer. If the ESP is an SC authorized by the California ISO, this requirement is waived.

4. Within 30 days of today's date, PacifiCorp, Pacific Gas and Electric Company, San Diego Gas & Electric Company, Sierra Pacific Power Company, Southern California Edison Company, and Southern California Water Company, shall provide the Director of the Energy Division with the names and addresses

of all ESP's providing electric service in their respective service territories, or who have signed an Energy Service Provider Service Agreement.

5. Within 40 days of today's date, the Energy Division, using the names and addresses of the ESP's supplied by the electric utilities, shall notify all ESP's in writing of the expanded registration requirement in Public Utilities Code § 394, as amended by AB 117, and of this decision, the process and deadline for registering with the Commission if they have not already registered, and their opportunity to comment on the current schedule of deposits and its relationship to the reentry fee.

   a. The Energy Division shall ensure that all of the ESP's, providing electric service to customers in the applicable utility service territories have registered with the Commission within 120 days.
   b. If an ESP fails to register within the time allotted, the Energy Division is directed to take all necessary action to prevent the unregistered ESP from engaging in the sale of electricity to California customers.
   c. The Energy Division shall update its registration records in accordance with the provisions of Public Utilities Code § 392.1, and make the necessary changes to all documents to reflect the expanded registration requirements and permanent standards for proof of financial viability and proof of technical and operational ability for ESP's that serve agricultural customers, medium to large commercial customers and/or industrial customers.

6. Interested persons are invited to file written comments on (1) the consumer protection value of the security deposit (as currently designed), (2) Alternate means of proof that could be used in lieu of the current security deposit by large ESP's, (3) is it appropriate to change the fee schedule to reflect the greater exposure of the large ESP customer and (4) could the security deposit be used to cover the reentry fee (if required) in accordance with Pub. Util. Code § 394.25(e).

(1) Opening comments shall be filed with the Commission's Docket Office, and served on the parties to this proceeding, on or before January 4, 2004.

(2) Reply comments shall be filed with the Docket Office on or before January 22, 2004, and served on the parties.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT A