Decision **DRAFT DECISION OF ALJ MALCOLM** **(Mailed 4/20/2006)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement AB117 Concerning Community Choice Aggregation.	Rulemaking 03-10-003 (Filed October 2, 2003)
Order Instituting Rulemaking Regarding Policies, Procedures and Incentives for Distributed Generation and Distributed Energy Resources.	Rulemaking 04-03-017 (Filed March 16, 2004)

DECISION DENYING THE MOTION OF MICHAEL KYES TO IMPLEMENT PUBLIC UTILITIES SECTION 366(b)

This decision denies the motion of Michael Kyes, filed September 7, 2005. The motion asks the Commission to permit the purchase and sale of power by private aggregators based on Kyes' interpretation of Public Utilities Code Section 366(b). This decision finds the Commission is barred from permitting private aggregation by Water Code Section 80110.

I. Background

Section 366(b) provides that:

> "Aggregation of customer electrical load shall be authorized by the commission for all customer classes, including, but not limited, to small commercial or residential customers. Aggregation may be accomplished by private market aggregators, special districts, or on any other basis made available by market opportunities and agreeable by positive written declaration by individual customers, except aggregation

> by community choice aggregators, which shall be accomplished pursuant to Section 366.2."

This code section was originally enacted in 1996 as part of Assembly Bill (AB) 1890, which restructured the electric industry in various ways. The policy enacted in this section has been informally referred to by this Commission as "direct access." Since the original enactment of Section 366, the Legislature suspended direct access in 2001, following enactment of Section 80110 of the California Water Code.[1] The suspension is effective "until the department (the California Department of Water Resources or DWR) no longer supplies power…" according to its provisions. DWR still provides power pursuant to Water Code Section 80110.

Section 366 was subsequently amended in 2002 with the passage of AB 117, which directs this Commission to implement community choice aggregation. Community choice aggregation refers to the purchase of power on behalf of a city or county's residents and businesses. AB 117 amended Section 366(b) to permit community choice aggregators (CCA) to serve local customers without having received an affirmative election by the customer. That is, CCA customers need not "opt in" to receive service from the CCA, unlike direct access customers. CCA customers must "opt out" in order to remain a bundled customer of the serving utility.

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[1] The Commission implemented the suspension mandated by Water Code Section 80110 in *Direct Access Suspension*, D.01-09-060, 2001 Cal. PUC LEXIS 846, as modified by *Decision Denying Rehearing of D.01-09-060*, D.01-10-036, 1001 Cal. PUC LEXIS 957.

II. Kyes' Motion

Kyes' motion asserts that by amending Section 366 as part of AB 117, the Legislature intended to reauthorize private aggregation of electrical load, or direct access, as well as addressing the "opt out" issue for CCAs.

Kyes states that aggregation of electrical load would benefit California customers by promoting more a reliable electrical infrastructure. The motion refers specifically to renewable energy generation systems, suggesting that aggregation would promote the installation of photovoltaic energy systems.

Southern California Edison Company, San Diego Gas & Electric Company and Pacific Gas and Electric Company filed a reply in opposition to Kyes' motion. They argue that the suspension of Section 366(b) remains in effect under Section 80110 of the Water Code.

Kyes filed a response to the utilities' reply. Kyes distinguishes Section 366(a) from Section 366(b). He believes that while Section 366(a) refers explicitly to "direct transactions" between customers and suppliers, Section 366(b) refers only to the "aggregation of customer electrical load." He states that the latter does not anticipate a change in the entity that provides power: it merely changes the method of billing. Kyes believes aggregation would promote cost-effective power production and delivery by permitting customers to take advantage of economies of scale.

III. Discussion

This decision denies Kyes' motion for the Commission to implement Section 366(b) to permit load aggregation.

Section 366(a) provides that customers may engage in "direct transactions" with alternative providers of power. During the late 1990s, a number of customers took advantage of this arrangement, also called "direct access." The

utilities are correct that the opportunity for customers to take advantage of "direct transactions" as they are described in Section 366(a) is suspended and remains suspended by Section 80110 of the Water Code, as follows:

> the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code ***to acquire service from other providers*** shall be suspended until the department no longer supplies power hereunder. (Emphasis added.)

We find that Kyes' has not made a compelling showing that Section 366(b) distinguishes "direct transactions" from "aggregation of customer load" as he interprets them. Aggregation of customer load, like direct transactions, would require the customer to "acquire service from other providers" because the entity that serves as aggregator would be effectively reselling power to aggregated customers.

The Legislature's modification of Section 366(b) was accomplished concurrent with its passage of Section 366.2 to implement the CCA program. Its modification to Section 366 provides that CCAs need not receive affirmative authorization from customers before switching them over to CCA service. We find no evidence that the Legislature intended to modify its suspension of direct access or variations of it.

There may be circumstances under which customers may benefit from aggregating load. As Kyes explains, customers may benefit from load aggregation for purposes of purchasing and operating their own solar systems or to qualify for better rates or more tailored services from the utility. Whether or not the Commission finds merit in Kyes' proposal from a policy standpoint, however, the law does not permit us to implement it.

We deny Kyes' motion.

IV. Comments on the Draft Decision

The draft decision of the assigned Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) and

Rule 77.7. Only Southern California Edison Company filed comments, which were in support of the proposed decision.

V. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. Aggregation of customer load implies that customers will receive energy service from providers other than the serving utility.

2. The Department of Water Resources continues to provide power to utility customers pursuant to contracts signed during the energy crisis and now administered by SCE, PG&E and SDG&E.

3. The Legislature modified Section 366(b) to provide that community choice aggregators empowered by Section 366.2 to sell electricity do not have to receive an affirmative authorization from the customer before serving that customer.

Conclusions of Law

1. Section 80110 of the California Water Code suspends a customer's ability to acquire service from other providers until the Department of Water Resources no longer supplies power to utility customers.

2. For purposes of carving out an exception to Section 80110 of the Water Code, there is no relevant distinction between the terms "direct transactions" and "aggregation of customer load."

3. The Legislature's modification of Section 366(b) does not affect the application of Section 80110 with regard to "direct transaction" or "aggregation of customer load" except with regard to customer choice aggregators empowered to provide electricity service pursuant to Section 366.2.

4. The Commission should deny the motion of Michael Kyes.

O R D E R

IT IS ORDERED that:

1. The motion of Michael Kyes dated September 7, 2005 is denied as set forth herein.

2. Rulemaking (R.) 03-10-003 and R.04-03-017 are closed.

This order is effective today.

Dated _____, at San Francisco, California.