

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE**

**WOMEN'S ENERGY MATTERS,
INC.**

Petitioner,

v.

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

Respondent.

Case No. A105529

CPUC Decision Nos.

04-01-032

03-07-034

REPLY OF WOMEN'S ENERGY MATTERS

May 19, 2004

DANIEL W. MEEK
CSB No. 97029
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 voice
(503) 293-9099 fax
dan@mEEK.net

Attorney for Petitioner
Women's Energy Matters, Inc.

TABLE OF CONTENTS

STANDARD OF REVIEW 1

PRESERVATION OF ISSUES 4

PROVISION OF THE RECORD ON REVIEW 6

I. CPUC DECISION 03-07-034 DOES NOT COMPLY WITH THE REQUIREMENT OF AB 117 (2002) THAT ANY PARTY CAN APPLY TO BECOME AN ADMINISTRATOR FOR PUBLIC GOODS CHARGE-FUNDED ENERGY EFFICIENCY PROGRAMS. 6

 B. THE PLAIN MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE PLAIN MEANING OF "IMPLEMENTATION." 11

 1. ADMINISTRATOR OR ADMINISTRATION. 12

 2. IMPLEMENTOR OR IMPLEMENTATION. 13

 3. CONFLATION OF THE TERMS. 13

 C. IN STATUTORY CONTEXT, THE MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE MEANING OF "IMPLEMENTATION" 14

 D. IN LEGISLATIVE HISTORY, THE MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE MEANING OF "IMPLEMENTATION" 16

 E. THERE IS NO LEGAL BARRIER TO ADMINISTRATION OF ENERGY EFFICIENCY BY ENTITIES OTHER THAN UTILITIES. 19

 1. THE COURT SHOULD NOT ENTERTAIN THE NEW RATIONALE. 19

 2. THE NEW RATIONALE IS WRONG. 21

 F. VARIOUS FAULTY CLAIMS OF THE IOUs. 28

II. CPUC DECISION 03-07-034 ESTABLISHES NO SCHEDULE FOR COMPLYING WITH AB 117. 29

III. CPUC DECISION 03-07-034 SEEKS TO AVOID THE REQUIREMENTS OF AB 117 BY REDEFINING "ADMINISTRATOR" AS "IMPLEMENTOR," WHEN THE LEGISLATURE CLEARLY USED THE TERM "ADMINISTRATOR." .. 29

IV. CPUC DECISION 03-07-034 FAILS TO IMPLEMENT THE REQUIREMENTS OF AB 117 (2002) PERTAINING TO COMMUNITY CHOICE AGGREGATORS. 30

V. CPUC DECISION 03-07-034 FAILS TO IMPLEMENT THE REQUIREMENTS OF AB 117 (2002) PERTAINING TO COMMUNITY CHOICE AGGREGATORS BY GIVING SPECIAL TREATMENT TO UTILITIES. 31

Pursuant to California Rule of Court, Rule 58(c), and the Court's order of April 27, 2004, granting an extension of time, petitioner Women's Energy Matters (WEM) submits this reply to the answers filed by respondent California Public Utilities Commission (CPUC) and by real parties in interest Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) [hereinafter the Utilities or Investor-Owned Utilities or IOUs]. We refer to the answer of the CPUC as "Answer of CPUC" and to the answer of the utilities as "Answer of IOUs."¹

This reply focuses upon the most important exception by WEM to D.03-07-034 (with rehearing denied by D.04-01-032): that these Commission orders are in violation of the requirement of Assembly Bill 117 (2002) ["AB 117"], codified at California PUC Code § 381.1, which states:

(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.

STANDARD OF REVIEW

We concur with the standard of review, as stated in the CPUC Answer, pp. 6-7. We do not agree with what amounts to the asserted standard of non-reviewability presented in the Answer of IOUs, pp. 5, 11. The IOUs cite *Southern Cal. Edison Co. v. Peevey*, 31 Cal. 4th (2003) 781, 796 (quoting *Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal.2d 406, 410-411). Those cases state that the CPUC's interpretation of the Public Utilities Code

1. "IOU" is not meant to be a deliberately pejorative term. The CPUC routinely uses "IOU" as the acronym for the investor-owned utilities. See, e.g., CPUC Energy Efficiency Policy Manual (November 2001), p. 6 (definition of IOUs) [Exhibits of IOUs, Volume 1, Tab 3].

"should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." We believe that D.03-07-034 and D.04-01-032 do not meet the standard of reasonableness.

Further, the *Peavy* decision pertained to the CPUC's interpretation of a term, "uneconomic costs," the definition of which was by statute committed to the CPUC. Cal PUC Code § 367.² Here, the Legislature did not delegate to the CPUC the definition of "administrator," so the same level of deference should not apply.

In addition, *Peavy* case was not a petition for writ of review of a CPUC order. It was a suit for declaratory and injunction relief against the Commissioners, brought in federal court, with certain questions later certified to the California Supreme Court. The current matter is a petition for writ of review of CPUC orders. The courts have emphasized that such petitions are not to be taken lightly. *Pacific Bell Telephone Co. v. P.U.C.*, 79 Cal.App.4th 269, 282, 93 Cal.Rptr.2d 910 (2000), stated:

Any suspicions that the courts may deny writ petitions capriciously are unfounded. As explained in *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 901 and footnote 3, 160 Cal.Rptr. 124, 603 P.2d 41, these petitions in PUC cases "serve [] in effect the office of an appeal." Therefore, unlike prerogative writs such as prohibition or mandate, they are not to be summarily denied "on policy grounds unrelated to their procedural or substantive merits." (See also *In re Rose* (2000) 22 Cal.4th 430, 448-455, 93 Cal.Rptr.2d 298, 993 P.2d 956.)

2. Cal PUC Code §367 delegated to the Commission the determination of "uneconomic" costs:

The Commission shall identify and determine those costs and categories of costs for generation-related assets and obligations, consisting of generation facilities, generation-related regulatory assets, nuclear settlements, and power purchase contracts, including, but not limited to, restructurings, renegotiations or terminations thereof approved by the commission, that were being collected in commission-approved rates on December 20, 1995, and that may become **uneconomic** as a result of a competitive generation market . . .

This is known as a "delegative" term.

Further, at Section 9 of Stats.2000, c. 953 (AB 1398), the Legislature stated an intent "to conform judicial review of the Public Utilities Commission decisions * * * to be consistent with judicial review of the other state agencies." In *Southern California Edison Co. v. P.U.C.*, 85 Cal.App.4th 1086, 102 Cal.Rptr.2d 684 (2000), the court found that CPUC interpretations of the California Public Utilities Code are not sacrosanct.

It is true that an administrative agency's interpretation of its own regulation is entitled to consideration and respect, especially where, as here, the agency has a special familiarity and expertise with the issues. (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 7, 11-12, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) However, an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision. (*Redding Medical Center v. Bonta* (1999) 75 Cal.App.4th 478, 484, 89 Cal.Rptr.2d 348; *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195, 59 Cal.Rptr.2d 608 [the principle of agency deference "does not permit the agency to disregard the regulation's plain language"].) Moreover, while we may defer to an administrative agency's construction of its own regulation, if the language of the rule does not require administrative expertise, we apply the regulation as we understand it. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1520, 84 Cal.Rptr.2d 621.) As explained in *Yamaha*: "Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, at pp. 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Here, the PUC offers us no basis for its reading of either section 455 or GO 96-A. The PUC asserts that it has long insisted upon approving memorandum accounts, but gives us no explanation of how it squares section 455 or GO 96-A with its current practice. Thus, in this instance, we have nothing to which we can meaningfully defer.

Id., 85 Cal.App.4th at 1105-06, 102 Cal.Rptr.2d at 698. The court also noted that *Greyhound* stood for the proposition that the "PUC's decision on procedural matters will not be disturbed absent an abuse of discretion or unreasonable interpretation of relevant statute." *Id.*, 85 Cal.App.4th at 1096-97, 102 Cal.Rptr.2d at 692. Here, we are not

challenging a CPUC decision on procedural matters but instead the agencies substantive decision not allowing parties other than the IOUs to become administrators of PGE EE funds.

PRESERVATION OF ISSUES

A significant portion of the Answer of CPUC consists of argument that WEM cannot raise virtually any issue with this Court, because it failed to set forth specifically those grounds in its Application for Rehearing of D.03-07-034. This is erroneous. The WEM Application for Rehearing of Community Choice Energy Efficiency Decision 03-07-034 and Motion to Stay (August 13, 2003) specifically and expressly incorporated by reference the Application for Rehearing of Decision 03-07-034 by Residential Energy Service Companies' United Effort (RESCUE) (August 13, 2003).³ In combination, all of the issues raised before this Court were raised, in great detail, in these applications for rehearing, which mutually incorporated the other. Thus, WEM has satisfied the issue preservation requirements of Cal PUC Code § 1732.

The CPUC offers no reason why WEM could not incorporate by reference into its application for rehearing the simultaneously filed application for rehearing of another party. The CPUC offers no authority for this legal proposition. Instead, D.04-01-032 (p. 3) itself duly notes, without objection or rejection: "WEM, in its application for rehearing, incorporates by reference RESCUE's application for rehearing." If the CPUC had rejected the incorporation by reference, then WEM would have assigned that rejection as error in its Petition for Writ of Review.

3. Supplemental Exhibit to Petition for Writ of Review, p. 1.

The Answer of CPUC (p. 8) then complains that WEM did not cite legal authorities in the text of its Application for Rehearing. That is because the legal authorities were cited in the RESCUE Application for Rehearing, which was incorporated into the WEM Application for Rehearing by reference. The CPUC Answer (pp. 8-9) then offers a critique of the WEM Application for Rehearing, but the CPUC fails to note that the legal points presented to this Court were all in the incorporated RESCUE Application for Rehearing. **The CPUC Answer fails to identify even one issue now before this Court that was not raised and argued in the WEM and/or incorporated RESCUE applications for hearing of D.03-07-034.** While the CPUC claims that the WEM Application for Rehearing was "a collection of vague assertions, insinuations and policy arguments," the CPUC fails to address at all the content of the RESCUE Application for Rehearing, which the WEM Application for Rehearing fully incorporated.

The CPUC Answer (pp. 12-16) then continues for several additional pages with its false assertion that WEM failed to raise various issues in its Application for Rehearing. Every issue described in the CPUC Answer was in fact raised in the WEM Application for Rehearing and/or the incorporated RESCUE Application for Rehearing.

The CPUC Answer (p. 13) claims that WEM did not present any argument in its Application for Rehearing alleging error in D.02-05-046. Why the CPUC would so note is a mystery, since WEM is not challenging D.02-05-046.

The CPUC Answer (p. 20) also claims that the WEM Petition for Writ of Review cited cases that it did not cite in its Application for Rehearing of D.03-07-034. First, there is no law that a party cannot bring relevant cases to the attention of this Court, whether or not they are cited to the agency. Second, all of these cases were in fact cited

to the agency, since the WEM Application for Rehearing incorporated the RESCUE Application for Rehearing, which cited all of these cases.

PROVISION OF THE RECORD ON REVIEW

The Answer of IOUs (pp. 7-8) contends that WEM did not comply with Rule 56(c), California Rule of Court, because WEM did not provide various documents "submitted to the trial court." By its own terms, Rule 56(c) is applicable only to "a petition for a writ that seeks review of a trial court ruling." In fact, Rule 56 as a whole is not applicable to petitions for writ of review of a CPUC decision. Rule 56(i) specifically exempts "petitions for review pursuant to rules 57, 58, and 59." The WEM Petition was pursuant to Rule 58. Review of Public Utilities Commission cases.

I. CPUC DECISION 03-07-034 DOES NOT COMPLY WITH THE REQUIREMENT OF AB 117 (2002) THAT ANY PARTY CAN APPLY TO BECOME AN ADMINISTRATOR FOR PUBLIC GOODS CHARGE-FUNDED ENERGY EFFICIENCY PROGRAMS.

The Court should disregard all statements and implications in the Answers that somehow the problem has been solved by later actions taken by the Commission, because they are not true. **The Commission has left 100% of the administration of Energy Efficiency (EE) funding in the hands of the IOUs. None of the funds are administered by independent third parties.** The Commission in Rulemaking Docket No. 01-08-028 is considering how it might, or might not, change this structure for the period beginning in 2006, but the outcome of that rulemaking remains unknown. In the meantime, AB 117's requirement that "any party . . . may apply to become administrators" has been in effect for nearly a year, without Commission compliance.

The Answers also frequently conflate the terms "administration" and "implementation" as if they have the same meaning.⁴ In fact, these terms have quite different meanings, as recognized in dictionaries, in their specific statutory context, and in many CPUC orders prior to enactment of AB 117. The differences between these terms are set forth in detail in the dissent of Commissioner Loretta Lynch to D.04-01-032 (the order denying rehearing which is the subject of this Petition for Writ of review).⁵

Commissioner Lynch stated:

AB 117 (Migden, 2002) requires the Commission to open up energy efficiency program administration to all providers, including Community Choice Aggregators (CCAs), rather than confining program administration solely to the utilities. The majority decision on the rehearing of the Commission's July 2003 decision interpreting AB 117 [D.04-01-032] runs afoul of the clear intent of that legislation by continuing to conflate the implementation of energy efficiency programs with program administration and by avoiding the statutory directive to make third parties eligible to apply to administer energy efficiency programs. While I supported the initial decision on this matter (D.03-07-034), upon further review of the statute I realized the error of this interpretation [p. 1]

. . .

In its decisions construing AB 117, as codified in relevant part at § 381.1(a) of the Public Utilities Code, the Commission has conflated the meanings of "administration" and "implementation," construing administration to mean implementation. In D.03-07-034, under consideration for rehearing in this order, the Commission explicitly equated "administer" as used in § 381.1, with "implement":

The Commission's existing policies and procedures for selecting energy efficiency programs and administrators (or "implementers" as defined by the Commission's energy efficiency policy manual)

-
4. The Answers also incorrectly refer to "program funding" as if that also is the same as "administration," an error discussed *infra*.
 5. Commissioner Lynch's Dissent is included in the Supplemental Exhibits to the Petition for Writ of Review, filed this day. It could not have been included in the original Exhibit provided with the Petition, because the dissenting opinion was not issued until March 17, 2004, which was 34 days after the Petition was filed. It is, however, an official Dissent to the D.04-01-032, which is the subject of the Petition for Writ of Review. To the extent necessary, we incorporate by reference the entire Dissent into this Reply.

generally fulfill those portions of AB 117 that require the Commission to permit non-utilities to apply for program funding and that articulate policy criteria for selecting programs to be funded with revenues collected pursuant to Section 381.

D.03-07-034, Finding of Fact 2, slip op. at 19. . . . This conflation of the meanings of the two terms appears to be inconsistent with the plain meaning of the statute, and with past Commission decisions. [pp. 3-4]

The Answers also repeatedly state or imply that independent third parties can "administer" EE funds because they are allowed to apply for such funds for programs. Answer of CPUC, pp. 4, 5, 6, 15; Answer of IOUs, pp. 4, 7, 8, 9, 10, 13, 14, 15, 17, 21, 24.⁶ This also is not true. **Applying for program funding is not applying to become an "administrator". All funded program implementers remain under the thumb of the IOU administrators.** The "administrator" of the EE funds is the party that is in charge of contracting for the EE improvements or other EE work to be done. The "implementor" is the firm or other entity that actually does the work, under the control of the "administrator." Under various Commission orders, implementers have been allowed to propose "programs" for funding, and the Commission has accepted a limited number of those programs (never more than 20% of the EE funds available and often less). **But that has nothing to do with "administration" of the EE funds.** In every event that a non-

6. The Answer of IOUs (p. 10) offers a particularly misleading statement: "Ultimately, the Commission allocated approximately 23% of the 2004-2005 budget to programs being administered by third parties." As noted below (in the Dissent of Commissioner Lynch and otherwise), all of the programs are being "administered" by the IOUs, and none are being "administered" by third parties, as that term was consistently used by the CPUC prior to enactment of AB 117. Further, after the IOUs complained about the record accompanying the WEM Petition, they see no problem in citing for facts later CPUC decisions that obviously could not be part of the record on review.

The IOUs (p. 15) states that WEM's "claims that the Commission improperly denied non-utilities the opportunity to apply to administer energy efficiency funds are clearly refuted by the Commission's actual selection of energy efficiency measures to be funded for the 2004- 2005 program years." Selection of "measures" is not the selection of "administrators."

The IOUs (p. 17) quote a CPUC order that "non-utility parties wishing to apply for 2004-05 EE program funding must do so no later than September 23, 2003." Applying for program funding is not applying to become an "administrator."

IOU implementer program has been approved for funding, that program has been assigned to one of the IOUs as administrator. It is the Commission's decision to assign to the IOUs all administration of all EE programs (whether those programs are implemented by the IOUs or by independent third parties) that most clearly violates AB 117.

This is most easily illustrated by referring to D.03-12-060 (December 18, 2003) [Exhibits of IOUs, Tab 11]. This decision allocated \$506,569,724 of Public Good Charge (PGC) EE funds for programs during the years 2004-05. Of that, \$99,389,399 (19.5% of the total) was allocated for "Non-utility Programs." D.03-12-060, p. 4.⁷ This is the "program funding" opportunity that is referenced in the CPUC and IOU answers. **But this has nothing to do with the opportunity for non-utilities to act as "administrators" of the EE funds.** For all of the funds, 100% of them, the Commission appoints the utilities (IOUs) as the administrators of the funds. All of the non-utilities selected for funding must go to one of the IOUs, sign a contract, and be subject to control by the IOU. This is noted in several sections of D.03-12-060, which states:

B. Utility Contracts with Third Parties and Costs for Administration of Non-Utility Contracts.

Each non-utility program implementer has been assigned to a single utility that will administer their contract(s). The assigned utility is identified in Attachment 1, along with the list of approved programs. [p. 30]⁸

We have required the utility administering a non-utility program by way of a Standard Contract to provide information provided by non-utility program implementers to all program implementers with whom it holds contracts. [p. 31]

-
7. With an additional \$4,969,470 to be paid to the utilities for administering the non-utility programs (5%).
 8. The version of D.03-12-060 included in the Exhibits filed with the Answer of the IOUs did not include the attachments to that CPUC decision. The complete decision, with attachments, is available. The entire D.03-12-060 is available at http://www.cpuc.ca.gov/published/final_decision/32828.htm. Attachment 1 to that decision are tables showing that every program being implemented by a non-utility program is specifically assigned to one of the IOUs ("Contract IOU") for administration.

We are requiring a shorter turnaround time for initial submissions by non-utilities for two reasons: (1) to ensure that contracts can be signed in time for programs to commence as close to the beginning of 2004 as possible, and (2) to provide the utilities with the ability to first finalize non-utility program contracts and then concentrate on finalizing their own program plans. [pp. 32-33]

Non-utility programs - Revised PIP⁹ shall be submitted first to the utility contract administrator and then to Commission staff; revisions must be made to the proposal narrative and workbook that were originally submitted, and shall not include, any changes not expressly set forth in this decision. Non-utilities must submit revised PIP to the utilities within 15 days if the effective date of this Decision. The utilities have 10 calendar days from receipt of the revised plan to review and resolve questions with program implementers. The utilities and program implementers will then submit the revised PIP to Energy Division staff indicating any unresolved issues, if any. The utility shall execute its contract with the implementer within 10 calendar days of receipt of Energy Division staff approval of the revised PIP. We strongly encourage the utilities and non-utility program implementers to coordinate and resolve any areas of duplication and overlap among their respective programs during the course of PIP revision and initial program implementation to reduce potential for customer confusion and double dipping. [pp. 33-34]

6. Where non-parties¹⁰ receive funding, the utilities shall administer the party contracts as set forth in Attachment 1. Edison shall continue to administer the contract for the three statewide marketing and outreach programs. [Conclusion of Law 6, p. 40]

Thus, Commission decisions (even after the decision at issue) distinguish between two entirely different functions:

1. The function of program implementer (which can include non-utilities), which designed EE programs and applies for funding to the CPUC; and
2. The function of administrator, which is the entity that contracts with and effectively dictates to the program implementer.

9. PIP means program implementation plan.

10. We believe this is a typographical error and that the Commission meant to refer to "non-utility parties." Nowhere else in D.03-12-060 is there mention of "non-parties," and that literal term would not make sense.

The question is this: What function did the Legislature intend to be open for the application of "any party," including "a local entity that establishes a community choice aggregation program"?

- a. Was it the opportunity for "any party . . . to become administrators for cost-effective energy efficiency and conservation programs, as AB 117 states and as the term "administrator" had been consistently used by the CPUC in past decisions at the time AB 117 was enacted?
- b. Or was it the opportunity for the CPUC to retain all "administration" in the hands of the IOUs, with all other parties, including CCAs, relegated to the subservient role of contracting with an IOU in order to receive EE program funds?

B. THE PLAIN MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE PLAIN MEANING OF "IMPLEMENTATION."

California agencies and courts are to implement the laws according to their plain meaning.

Our primary task in construing a statute is to determine the Legislature's intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 257 Cal.Rptr. 708, 771 P.2d 406.) Where possible, "we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law...." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632, 59 Cal.Rptr.2d 671, 927 P.2d 1175.)

Jarrow Formulas, Inc. v. LaMarche, 31 Cal.4th 728, 733, 3 Cal.Rptr.3d 636, 640 74 P.3d 737 (2003).

"The plain language of the statute establishes what was intended by the Legislature." (*People v. Statum* (2002) 28 Cal.4th 682, 690, 122 Cal.Rptr.2d 572, 50 P.3d 355.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to [extrinsic] indicia of the intent of the Legislature...." (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1154, 119 Cal.Rptr.2d 922, 46 P.3d 388.)

Id., 31 Cal.4th at 735, 3 Cal.Rptr.3d at 641.

When interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law.... "This court has no power to

rewrite the statute so as to make it conform to a presumed intention which is not expressed." ' " (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 75, 124 Cal.Rptr.2d 519, 52 P.3d 695.)

Id., 31 Cal.4th at 737, 3 Cal.Rptr.3d at 643.

1. ADMINISTRATOR OR ADMINISTRATION.

AB 117 uses the term "administrator," not "administration." But the CPUC decisions at issue, including Commissioner Lynch's Dissent, and all parties in briefing before this Court use interchangeably the terms "administrator" and "administration," since the plain meaning of "administrator" is one who engages in "administration."

The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4TH ED. 2000) defines "administrator" as:

1. One who administers, especially one who works as a manager in a business, government agency, or school.
2. Law. One appointed to administer an estate.

WEBSTER'S REVISED UNABRIDGED DICTIONARY (1996, 1998) defines "administrator" as:

1. One who administers affairs; one who directs, manages, executes, or dispenses, whether in civil, judicial, political, or ecclesiastical affairs; a manager.
2. (Law) A man who manages or settles the estate of an intestate, or of a testator when there is no competent executor; one to whom the right of administration has been committed by competent authority.

Thus, an "administrator" is one who "administers" affairs at a "director" or managerial level. The same dictionary first defines "administer" as:

To manage or conduct, as public affairs; to direct or superintend the execution, application, or conduct of; as, to administer the government or the state.

Similarly, the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4TH ED. 2000) first defines "administer" as:

To have charge of; manage.

Thus, an "administrator" is one who directs or superintends affairs, whether government, business, or other.

2. IMPLEMENTOR OR IMPLEMENTATION.

In the Decisions at issue, the CPUC decided it would define "administrator" as including a function it had consistently earlier referred to as "implementor."

The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4TH ED. 2000) defines "implementation" as "to put into practical effect; carry out." The WORDNET DICTIONARY [PRINCETON UNIV. 1997] defines it as: "the act of accomplishing some aim or executing some order" or "the act of implementing (providing a practical means for accomplishing something").

3. CONFLATION OF THE TERMS.

Thus, the terms "administration" and "implementation" are distinct and difficult to confuse. The Dissent of Commissioner Lynch noted other applicable definitions to support her conclusion that the Decisions at issue have unlawfully conflated the two terms:

First, "administration," as used in PU Code § 381.1, means oversight and management, not implementation. In construing a statute, the ordinary meaning of words controls, unless the statute is ambiguous . . . *Pratt v. Vencor, Inc.*, 105 Cal. App. 4th 905, 909 (2003).

Here, the meaning of "administer" in § 381.1 is clear and unambiguous – and it does not comport with the meaning the majority has ascribed to it in the underlying decision. In a similar context, the California Court of Appeal recently described the difference between those who oversee programs, and those who actually implement the programs this way:

"Administration" is commonly defined as "the act or process of administering; performance of executive duties: management."

(Webster's New Collegiate Dictionary (9th ed.1988) p. 57.) "Management" is defined as "the act or art of managing: the conducting or supervising of something (as a business)." (Id. at p. 722, 150 Cal. Rptr. 250, 586 P.2d 564.) Black's Law Dictionary (6th ed.1990) at page 44 defines "administration" as "Management or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like." . . .

"Performance" is defined as "the execution of an action, . . . something accomplished, . . . the fulfillment of a claim, promise or request" (Webster's New Collegiate Dict., supra, at p. 873) and "[t]he fulfillment or accomplishment of a promise, contract, or other obligation according to its terms. . . ." (Black's Law Dict., supra, at p. 1137.)

Southern Cal. Underground Contractors, Inc. v. City of San Diego, 108 Cal. App. 4th 533, 552-53 (2003). Thus, "administration" involves oversight and management, whereas "implementation" involves actual performance.

Thus, the Commission erred in interpreting the term "administrator" in AB 117 as if it were the term "implementer."

C. IN STATUTORY CONTEXT, THE MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE MEANING OF "IMPLEMENTATION"

As noted in the Dissent of Commissioner Lynch (pp. 5-7):

Besides the requirement that words in a statute must be given their ordinary meaning, courts "must construe identical words in different parts of the same act or in different statutes relating to the same subject matter as having the same meaning." *Balasubramanian v. San Diego Community College Dist.*, 95 80 Cal. App. 4th 977, 988 (2000). Here, the ordinary meaning of the word, as described above, is the only meaning that harmonizes other sections of the PU Code that use "administer" in the context of energy efficiency programs. Specifically, § 399.4 of the PU Code charges the Commission to "administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority." Because the Commission does not implement these programs, but simply supervises them, it is clear that "administer" as used in this section entails supervision, not actual performance of the energy efficiency programs.

Second, there are apparent inconsistencies between the relevant statutes and the underlying Commission decisions in this rehearing order. Consistent with the plain meaning of the statutory terms, prior to the decision under

discussion, the Commission regularly has carefully distinguished between administration and implementation of energy efficiency programs. As one example, in D.01-11-066, the initial decision in this energy efficiency rulemaking, the Commission made clear that program administration means oversight:

[T]he IOUs will be responsible for day-to-day contract administration for all electric and gas PGC-funded energy efficiency programs. This is an interim solution while we examine a range of energy efficiency administration options during the course of this proceeding.

D.01-11-066, slip op. at 32 (Nov. 29, 2001).

In that same decision, the Commission made equally clear that implementation of specific energy efficiency programs means performance of specific programs either by the IOUs or by third parties. *See, e.g., id.* at 16 (referring to “local programs implemented by non-utilities”); *id.* at 20 (referring to “third-party program implementers”).

...

As a final example, the same distinction between implementers and administrators is embodied in the actual contracts entered into between the IOUs (as program administrators), and third parties (as implementers). *See, e.g.,* ALJ Thomas' Second Ruling Regarding Contract Template For 2002-03 Local Energy Efficiency Programs - Local Programs Attachment, http://www.cpuc.ca.gov/word_pdf/RULINGS/17058.DOC, sections 3 (Implementer's Obligations) and 4 (Utility Obligations).

Other decisions on the same subjects include D.02-04-063; D.02-06-026; and D.02-08-076. In construing AB 117, however, the majority decision on rehearing continues to abandon the Commission's consistent distinction between program administration and program implementation, without explanation.

The most clear indicator of how the Commission was using the terms "administrator" and "implementer" was presented in its Energy Efficiency Policy Manual (October 2001), which governs these programs and was in effect at the time the Legislature enacted AB 117:

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)

...

Implementer: An entity or person selected and contracted with or qualified by a program administrator or by the Commission to receive PGC funds for providing products and services to Customers.

This clearly distinguishes between an administrator, which is selected by the CPUC to receive PGC funds to contract for and administer energy efficiency programs, and an implementor, which is subservient to the administrator.

There is no basis for assuming that the Legislature in AB 117 meant to use the term "administrator" in any way different from the CPUC's definition of "administrator" at the time AB 117 was enacted. There is certainly no basis for assuming that AB 117 used the term "administrator" but actually meant "implementer"--a conclusion necessary for the validity of D.03-07-034 and D.04-01-032.

D. IN LEGISLATIVE HISTORY, THE MEANING OF "ADMINISTRATION" IS DIFFERENT FROM THE MEANING OF "IMPLEMENTATION"

The WEM Petition for Writ of Review reviewed the legislative history of AB 117, but the case was perhaps best expressed in the Dissent of Commissioner Lynch (pp. 7-8):

The distinction between administration and implementation is significant and is reflected in the legislative history of § 381.1, which reveals that the concern of all involved was administration of energy efficiency funds and programs in the ordinary sense of the term discussed above. At the time AB 117 was being considered, the Commission had already begun to make funds available to third parties to implement energy efficiency programs but the utilities were still administering all energy efficiency funding, including controlling fund disbursement and determining how program funds should be spent within guidelines established by the Commission. *See* D.01-11-060. That is, no third party program had administrative control over energy efficiency funds. The legislative history of the bill, including documents from the author's files, indicates that the concern all parties sought to address was whether entities other than the utilities should be awarded a portion of energy efficiency funds to administer themselves.

The concern was not merely with allowing third parties to receive funds as program implementers, as third parties *already* were eligible to receive such funds. Thus, for example, PG&E, which supported the bill if amended, objected to the provisions of § 381.1 that allow third parties to administer programs, noting that if the bill was aimed at ensuring third parties can share in energy efficiency funds if they propose cost-effective programs, the bill would be solving a problem that does not exist. Similarly, San Francisco lobbied for the bill, arguing that it needed the ability to have a sum of money that it could manage itself. San Francisco argued that while the utilities were initially selected as the administrators of the energy efficiency programs because they already had an administrative structure in place, it was expected that others could take on the responsibility of managing these programs but that the Commission had not yet developed a process for evaluating alternatives to the utility management function. In a similar vein, Local Power noted that the goal of the bill was to see that there was local control of a share of the energy efficiency funds.

The Commission's interpretation of § 381.1(a), focusing on requirements for allocating funding for implementation of energy efficiency programs, is at odds with the language of the statute, past Commission decisions on energy efficiency, and the arguments in favor on the legislation.

Commissioner Lynch concluded (p. 9):

The majority seems to believe that the language on program continuity in the statute allows the Commission to make these decisions allowing the vast majority of the energy efficiency funds to go the utilities. However, this argument misses the point of the statutory language because the issue is whether the statute requires that energy efficiency funds are available for third parties to administer programs rather than just to implement energy efficiency. Ultimately, the Commission must choose a portfolio of such programs – programs that it believes best meet the needs of California businesses and families. However, in the underlying decision considered today, the Commission did not even grant third parties the opportunity to apply to become administrators of energy efficiency programs, as required by statute, but rather only granted them the opportunity to implement a small portion of the total funds. By denying third parties even the opportunity to administer energy efficiency funds, the majority is skirting the clear intent of the Legislature.

Ultimately, what the underlying decision does is to establish guidelines for third parties to *implement* energy efficiency funds but does not require or even allow third parties to administer such funds. This interpretation, if carried to its logical extreme, would allow guidelines to be adopted but no funds ever to be awarded to third parties. This is illogical and a clear contravention of what the Legislature intended in this bill, which was to make a variety of entities available to administer energy efficiency programs.

The CPUC Answer (pp. 14-15) claims we need to prove conflict of interest with facts. No, we need only show that D.03-07-034 does not comply with the requirements of AB 117, which by its own language evinces concern about unfair competition between utilities and others by expressing a preference for "allowing competitive opportunities for potentially new administrators." And while any administrator would have great power, administrators that are not also the IOUs would not have the conflict of interest of depending upon selling the product of the utility (electricity) as their main source of revenue or the IOUs' current conflict of interest in serving as both administrators and implementors (who as administrators naturally favor implementation of their own programs).

This conflict has been found to exist by the Commission itself:

However, none of the comments have lessened our fundamental concerns over a continued role of utilities in the administration of energy efficiency programs over the longer term. In particular, we still believe that utilities as program administrators are not motivated to create the independent energy efficiency industry that we envision for the future. The concerns we articulated in D.97-02-014 bear repeating:

"...electric utilities are entering a period where their interest in increasing sales volumes (as opposed to decreasing them via energy efficiency) had never been greater. As a result of the rate cap and competition transition charge (CTC) provisions of AB 1890, customer actions that reduce electrical usage will threaten utility profits by reducing the revenues collected to pay for transition costs (e.g., uneconomic generating assets). Conversely, customer actions that increase electric usage will accelerate or facilitate the full recovery of transition costs during the transition cost recovery period.

"This environment does not give utilities any motivation, and in fact provides greater disincentives than in the past, to develop an independent industry which will directly compete with the electricity services they provide. With the enactment of AB 1890, utilities are motivated to promote their own relationship with customers, rather than that of their competitors in the private market. In view of these structural conflicts, we disagree with

SoCal and Coalition members that utilities are the clear choice for energy efficiency administrators of the future.

D.99-03-056, pp. 10-11.

The CPUC Answer then cites a later Commission decision (D.03-08-067) for the proposition that it is the Commission staff that chooses the EE programs, not the IOUs. First, as of the issuance of D.03-07-034, the identity of the program choosers was not known. Second, it is immaterial. Allowing the IOUs to administer all of the PGC EE funds, including all funds supposedly devoted to non-utility implementors' programs, is where the conflict of interest is manifest.

E. THERE IS NO LEGAL BARRIER TO ADMINISTRATION OF ENERGY EFFICIENCY BY ENTITIES OTHER THAN UTILITIES.

The Answer of CPUC (pp. 18-21) offers an entirely new rationale, never before stated, for its refusal to comply with the requirement of AB 117 that "any party . . . may apply to become administrators." The new rationale is that only regulated utilities can be PGC EE fund administrators, because the Commission would have no way to control PGC EE funds administered by entities that are not subject to the Commission's regulatory jurisdiction.

1. THE COURT SHOULD NOT ENTERTAIN THE NEW RATIONALE.

This rationale is not supported by any findings in D.03-07-034 or D.04-01-032, because it is not expressed in those orders. The Commission cannot rely upon an entirely new rationale, not mentioned below. The CPUC's new rationale is a new argument without factual basis, raised for the first time upon appeal. The

general rule confining the parties upon appeal to the theories and facts advanced below

is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that “contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.” *Panopulas v. Maderis* 47 Cal.2d 337, 340-341, 303 P2d 738 (1956).

Ward v. Taggart, 51 Cal.2d 736, 742, 336 P.2d 534(1959), cited and approved, **Carpenters 46 Northern Cal. Counties Conf. Bd. v. Zweigle** 130 Cal.App.3d 337, 348, 181 Cal.Rptr. 805,811 (1982). Such new matter should not be addressed. **Reichardt v. Hoffman**, 52 Cal.App.4th 754, 764-766, 60 Cal.Rptr.2d 770 (1997); **Radovich v. Locke-Paddon**, 35 Cal.App.4th 946, 979, 41 Cal.Rptr.2d 573 (1995).

This doctrine is based on rules of fairness and due process.

One of the reasons parties are not normally allowed to raise new issues on appeal is that it is unfair to their opponents who did not have the opportunity to attack that theory factually or legally in the trial court, and to the trial court itself, which may be required to retry issues that might have been handled more efficiently the first time around.

In re Marriage of Moschetta, 25 Cal.App.4th 1218, 1227, 30 Cal.Rptr.2d 893 (1994). Here, of course, the CPUC was the fact finding court and had every opportunity to announce its theory and make findings in support of it. As the Commission did not do that, the unfairness to Petitioner is insurmountable, as it faces a changing target. What would prevent the agency from mounting yet another rationale at oral argument? One "may not change their theory of the case on appeal by raising a brand-new argument that [litigants] * * * never got the chance to address." **North Coast Business Park v. Nielsen Construction Co.**, 17

Cal.App.4th 22, 29 (1993); *Neighbors v. Buzz Oates Enterprises*, 217 Cal.App.3d 325, 335, n.8 (1990).

Upon “appeals” of administrative decisions through the writ of review process, the same principles of fairness, opportunity to rebut evidence, and respond to legal argument is encompassed in the very standard of review before this court: a CPUC decision must be based upon findings related to that decision.¹¹ Here, there are no factual findings to support the newly advanced conclusion, nor is there substantial evidence upon the non-existent findings necessary to make the new case.

2. THE NEW RATIONALE IS WRONG.

Further, the new rationale is wrong. The Commission can allocate EE funds to non-utilities and retain complete control of such funds through contracting. The CPUC's existing ENERGY EFFICIENCY POLICY MANUAL (p. 38) defines "Implementer" to include an "entity or person selected and contracted with or qualified by a program administrator **or by the Commission to receive PGC funds** for providing products and services to Customers."¹² Thus, the Commission understands that it does have authority to use PGC funds to contract with entities other than the utilities. The problem is that the Commission is forcing the non-

11. Public Utilities Code § 1757.1 lists as warranting relief either of these conclusions by the court:

- (3) The decision of the commission is not supported by the findings.
- (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.

Since the Commission is now offering a new rationale for its decision, that rationale is not supported by any findings in the underlying CPUC decision.

12. The current version of the Energy Efficiency Policy Manual is at Tab 8 of the Exhibits provided with the Answer of IOUs.

utilities to contract with the IOUs as administrators, rather than the Commission contracting directly with the non-utilities to perform the administrator function.

The Answer of CPUC (p. 18) incorrectly states that the "PGC funds have not been, and will not be, in the Commission's possession or the state treasury or fiscal system." In fact, a significant portion of the PGC funds do pass through the state treasury and fiscal system. The Commission decisions pertaining to allocation of and use of PGC funds include both funds derived from utility electricity sales and funds derived from utility gas sales.¹³ The gas surcharge funds are possessed by the state's fiscal system, pursuant to Cal PUC Code §§ 890 et seq.¹⁴ The funds are continuously "are continuously appropriated, without regard to fiscal years, as follows:

- (a) To the commission or an entity designated by the commission to fund programs described in subdivision (a) of Section 890.

13. See, e.g., D.03-08-067, p. 3 n.1 (Tab 10 in Exhibits of IOUs).

14. 890. (a) On and after January 1, 2001, there shall be imposed a surcharge on all natural gas consumed in this state. The commission shall establish a surcharge to fund low-income assistance programs required by Sections 739.1, 739.2, and 2790 and cost-effective energy efficiency and conservation activities and public interest research and development authorized by Section 740 and not adequately provided by the competitive and regulated markets.

...

892. The revenue from the surcharge imposed pursuant to this article and collected by a public utility gas corporation shall be paid to the State Board of Equalization in the form of remittances. Persons consuming natural gas delivered by an interstate pipeline shall pay the surcharge to the State Board of Equalization in the form of remittances. The board shall transmit the payments to the Treasurer who shall deposit the payments in the Gas Consumption Surcharge Fund, which is hereby created in the State Treasury.

...

895. Notwithstanding Section 13340 of the Government *Code*, funds in the Gas Consumption Surcharge Fund are continuously appropriated, without regard to fiscal years, as follows:

- (a) To the commission or an entity designated by the commission to fund programs described in subdivision (a) of Section 890. . . .

Cal PUC Code § 895. Section 890(a) does not mention the IOUs as the recipient of these appropriated funds. There is nothing preventing the Commission from allocating these PGC funds to "entities" whose tasks and responsibilities are defined by contract and who are not regulated utilities.

Nor is the Commission precluded from allocating through contracts the electricity PGC funds. Cal PUC Code § 381(c) directs:

- (c) The Public Utilities Commission shall order the respective electrical corporations to collect and spend these funds, as follows:

The Commission has issued several orders to the IOUs on how to spend these funds, such as D.03-08-067, D.03-12-060, and D.04-02-059 (Tabs 10, 11, 13 to Exhibits of IOUs). Those orders directed the IOUs to spend the funds on (1) administration of EE programs implemented by the IOUs themselves and (2) administration of EE programs implemented by others. Obviously, there is nothing in the statute that would preclude the CPUC from ordering the IOUs to pay the funds to other, non-utility entities that the CPUC selects as "administrators" of EE programs. In fact, the CPUC already orders the IOUs to pay the funds to EE program measurement and evaluation contractors selected by the Commission itself.

- 8. Public Utilities Code Sections 281 and 890 directs the Commission to supervise the spending of public goods charge and thereby authorizes the Commission to contract with experts to evaluate program implementation and verify spending.

D.03-12-060, p. 38 (Conclusion of Law No. 8). The same broad authority the Commission uses to contract with and pay non-utility experts is equally available to contract with and pay non-utility administrators.

In denying various IOU applications for rehearing, the Commission has concluded that the IOUs serve as trustees of the PGC EE funds and can be ordered to spend the funds as the CPUC directs and under terms specified by the CPUC itself.

The Commission is in charge of regulating disposition of the EE funds according to its statutory authority under sections 381, 399.4(a)(1), 399.8(d) and (e) of the Public Utilities Code. Section 381(b) states that "[t]he Commission shall allocate funds . . . to programs which enhance system reliability and provide in-state benefits as follows . . . (1) Cost-effective energy efficiency and conservation activities." (Cal. Pub. Util. Code 381(b); see Cal. Pub. Util. Code 399.8(e) (providing that "[t]he commission . . . shall retain and continue [its] oversight responsibilities as set forth in Section[] 381 . . .).) In addition, the Public Utilities Code declares that " . . . it is the policy of this state and the intent of the Legislature that the commission shall continue to administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority." (Pub. Util. Code 399.4(a)(1).) The Commission acted consistent with its oversight responsibilities for the collection of EE funds and implementation of the local EE programs. . . .

Finally, PG&E's claim that the EE Contracts are unconscionable overlooks the important fact that the funds to be disbursed under the third party contracts are not the property of the IOUs, but instead are monies the IOUs have collected in rates by means of the PGC for a specific purpose designated by the Legislature. **The nature of the IOUs' role in this regard is virtually that of a trustee.**

CPUC, D.02-08-076 (August 22, 2002), pp. 8-9, 11.¹⁵

The Commission already commits up to 20% of the PGC EE funds to non-utilities for implementation of EE programs. The obligations of the non-utilities receiving these funds are purely contractual, as they are not entities under the regulatory jurisdiction of the CPUC. If, as the CPUC now contends, contract law

15. D.02-08-076 is available at:

http://www.cpuc.ca.gov/word_pdf/final_decision/18641.pdf
http://www.cpuc.ca.gov/word_pdf/final_decision/18641.doc

is an effective means for controlling how PGC EE funds are spent, then the Commission must already be wasting up to 20% of the funds on uncontrollable programs. This, of course, is not true. The programs are fully controlled by the terms of the contracts.

Also, if CPUC argument were correct, then 100% of the PGC funds would have to be both administered by and implemented by the IOUs, because the Commission by contract alone could not control the implementers. If, on the other hand, the CPUC can direct how the IOUs are to spend the money (e.g., for contracts with non-utilities for the performance of certain duties), there is no barrier to the use of the IOUs as trustees or fiscal agents for the CPUC. The CPUC can order them to pay the PGC EE funds to non-utilities for administration duties under contract terms specified by the CPUC.

The CPUC Answer (p. 20) states that, if non-utilities were allowed to be administrators, "the Commission or the public utilities could neither protect nor account for ratepayers' funds if they were turned over to non-jurisdictional entities." But those funds are already being turned over to non-jurisdictional entities, namely the non-utility implementers, pursuant to contracts that the CPUC requires the IOUs to sign with the non-utility implementers. The CPUC must be arguing that it currently is turning over funds to non-jurisdictional entities with no control or accountability. But that would not be true. The non-jurisdictional entities are accountable to the Commission by means of the contracts that the non-jurisdictional entities sign with the IOUs, who sign at the order of the Commission. Nothing would prevent the CPUC from ordering the IOUs to sign contracts with non-utility entities, obligating the IOUs to pay over PGC EE funds to those entities

and obligating those entities to administer EE programs, including contracting with other entities as implementors, with the CPUC an express third-party beneficiary on all of these contracts.

The CPUC Answer (p. 20) claims that there is no "legislation authorizing public utilities, which collect and hold such funds for their ratepayers, to turn those funds over to third parties." This is entirely false. That is exactly what the utilities are doing right now, under orders by the CPUC. See, e.g., D.02-08-076 (*supra*), D.03-08-067, D.03-12-060, D.04-02-059 (Tabs 10, 11, 13, Exhibits of IOUs). The IOUs are collecting the PGC EE funds and are specifically required by the CPUC to turn over a bit less than 20% of those funds (for the 2004-05 period) to the non-utility implementers.

The CPUC Answer (p. 21) claims that D.03-07-034 was somehow a contemporaneous interpretation of "administrator." This does not make sense. When AB 117 was enacted, the CPUC's definition of "administrator" was manifest in the Energy Efficiency Policy Manual (November 2001) and in numerous prior CPUC decisions (as listed in the Dissent of Commissioner Lynch and the WEM Petition for Writ of Review, p. 8). The Legislature, when enacting AB 117, could not possibly have in mind how the Commission might seek to redefine "administrator" in July 2003, some 9 months after the law was passed.¹⁶

16. On this topic, the Answer of IOUs (p. 19) offers a most unique analysis (emphasis added):

Further, the case law relied upon by Petitioner in support is its claim is not on point. Specifically, ***Robinson v. Fair Employment & Housing Com.*** (1992) 2 Cal. 4th 226, ***City of Los Angeles v. P.U.C.*** (1975) 15 Cal. 3d 680 and ***Wotton v. Bush*** (1953) 41 Cal.2d 460 articulate the principle that administrative construction of a statute over many years is generally entitled to great weight by the courts. This principle does not support Petitioner's claim that the Legislature relied upon the Policy Manual's definition of "administrator" in enacting Assem. Bill No. 117, nor does it establish that the Commission, in interpreting Assem. Bill No. 117, should have presumed the Legislature's (continued...)

The CPUC Answer (p. 21) then claims that "administrator" in AB 117 must mean something other than "administrator," because of the "lack of legislation authorizing non-jurisdictional entities to control or otherwise manage ratepayer funds, or authorizing public utilities to turn such funds over to non-public utility entities." This statement will come as a shock to the firms and local governments that have been implementing PGC-funded EE programs since 2002. Several CPUC orders have expressly ordered the utilities to "turn such funds over to non-public utility entities"--those entities serving as implementors of CPUC-approved EE local programs. These funds have amounted to over \$100 million to date. The Commission's own practices entirely contradict its position on the law in the CPUC Answer.

While the effectiveness of contracts is often determined by the skill with which they are drafted, they have provided the basis for a flourishing U.S. economy for more than 200 years. Contracts are very flexible and can be written to include a myriad of mechanisms to ensure compliance and to appropriately allocate risks. Further, the existence of an option to terminate a contract is an advantage of contracts over regulation. Ultimately, if a party does not perform in

(...continued)

reliance upon such definition. **The Commission had not, prior to Dec. 03-07-034, interpreted Assem. Bill No. 117's use of the term "administrator." Therefore, no such interpretation or construction existed upon which the Legislature could have relied in enacting Assem. Bill No. 117.**

The point of the cases is that, if the Legislature uses a term that has long been defined and interpreted in a particular manner by the agency having jurisdiction, then the courts rightfully assume that the Legislature meant that term to have the same, long-standing meaning. The IOUs offer a Catch-22: The Legislature somehow had to wait for the CPUC to interpret AB 117, before that law was enacted.

accordance with a contract, the party can be replaced, whereas this option is not generally available in the case of public utilities.

F. VARIOUS FAULTY CLAIMS OF THE IOUs.

The Answer of IOUs (p. 11) claims that WEM argues that AB 117 "limits the Commission's discretion to allocate PGC funds by requiring the Commission to allow any party to apply to administer all PGC funds." This is not correct. WEM's contention is that the Commission must adopt procedures and policies under which "any party" may become an "administrator." Never has WEM stated that "any party" gets to "administer all PGC funds."¹⁷

The IOUs (pp. 11-12) then go on to discuss the various statutory criteria applicable to the selection of EE programs. This is not relevant to the Commission's refusal to adopt the required procedures and policies so that "any party" can apply to become an "administrator". Selecting "programs" is not selecting "administrators."

The IOUs (p. 18) quote the Energy Efficiency Policy Manual's definition of "administrator" and then draw the conclusion that it means that "The Commission would be entitled to fund entities that act in either 'administrator' or 'implementer' role." The Manual's definition of "administrator" includes both a prime administrator and those to whom the administrator may subcontract administration tasks ("contract for and administer energy efficiency programs"). The definition does not state that the administrator is also the "implementer." Instead, the

17. The Answer of IOUs (p. 13) makes the same incorrect statement that WEM contends that AB 117 requires "any party absolute access to *all* PGC funds."

"implementer" functions are distinctly stated under the Manual's definition of "implementer." An administrator (or its subcontractor) "contracts for and administer[s], while the implementer contracts for "providing products and services to Customers."

II. CPUC DECISION 03-07-034 ESTABLISHES NO SCHEDULE FOR COMPLYING WITH AB 117.

It remains true that **no party can today go to the Commission and apply to become an administrator, except an IOU.** The Commission's existing policies and procedures do not even allow such an application. The Commission has no process for parties other than the utilities to become "administrators" at all.

Even if D.03-07-034 did allow non-IOUs to become "administrators," the Commission has established no schedule at all for any non-IOU to become an "administrator." Adopting procedures that allow a party to apply for a role that may be allowed to that party 20 years from now (or never) does not constitute compliance with the statutory deadline.

AB 117 states that the CPUC by July 15, 2003, must have established policies and procedures by which any party may apply to become administrator for cost-effective energy efficiency programs. That does not mean adopting an empty vessel calling for a procedure to allow applications to be made at some unknown future date for a status different from that of "administrator."

III. CPUC DECISION 03-07-034 SEEKS TO AVOID THE REQUIREMENTS OF AB 117 BY REDEFINING "ADMINISTRATOR" AS "IMPLEMENTOR," WHEN THE LEGISLATURE CLEARLY USED THE TERM "ADMINISTRATOR."

This point is now subsumed in part I, above.

IV. CPUC DECISION 03-07-034 FAILS TO IMPLEMENT THE REQUIREMENTS OF AB 117 (2002) PERTAINING TO COMMUNITY CHOICE AGGREGATORS.

The Answer of CPUC (p. 25) contends that WEM "contends that section 381.1(a) specifically prohibits public utilities from serving as administrators." WEM made no such contention. Instead, WEM contends that D.03-07-034 erroneously interprets AB 117, because it treats Community Choice Aggregators (CCAs) as if they were suppliers of utility-related services and not as aggregations of customers. The CCAs must be the administrators of EE programs within their jurisdictions, because the law provides that each CCA develop an integrated plan and solicit suppliers to bid to fulfill the CCA's plan. This suppliers can include suppliers of energy or suppliers of energy efficiency services. Or the CCA can implement EE programs on its own. Designating only the IOUs as "administrators" destroys the intent of AB 117 to enable CCA's to comprehensively plan and fulfill the energy service needs of the customers it aggregates.

V. CPUC DECISION 03-07-034 FAILS TO IMPLEMENT THE REQUIREMENTS OF AB 117 (2002) PERTAINING TO COMMUNITY CHOICE AGGREGATORS BY GIVING SPECIAL TREATMENT TO UTILITIES.

By only allowing IOUs to be "administrators" of PGC EE funds, and relegating CCAs solely to the role of "implementers" under the control of the IOUs that CCAs are designed to counter, D.03-07-034 destroys the legislative scheme for functioning customer aggregators that can operate as a check on the monopoly power of the IOUs. As noted in the Petition, the Legislature envisioned CCAs as competitors with the IOUs. Placing them under the thumbs of the IOUs does not carry out the statutory purpose.

Dated: May 19, 2004

Respectfully Submitted,

DANIEL W. MEEK
Attorney
CSB No. 97029
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@mEEK.net

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE OF COURT 14(c)(1)

I certify that, pursuant to California Rule of Court 14(c)(1), this brief contains fewer than 10,000 words, which is less than the 14,000 word limit.

Dated: May 19, 2004

Daniel W. Meek

DECLARATION OF DANIEL W. MEEK, ESQ.

I, the undersigned, declare:

1. I am one of the attorneys of record for petitioner, Women's Energy Matters, Inc.
2. The copies of pleadings and exhibits served herewith are true and correct copies of the documents, or portions thereof, that they purport to be.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 19, 2004, at Portland, Oregon.

Daniel W. Meek, Esq.

CERTIFICATE OF SERVICE

Daniel W. Meek
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@meeek.net

I am a citizen of the United States and a resident of the County of Multnomah, Oregon; I am over the age of 18 years and not a party to the above-numbered action; my business address is shown above.

I hereby certify that I served the foregoing REPLY OF WOMEN'S ENERGY MATTERS by depositing with the U.S. Postal Service, with first class postage affixed, certified, a sealed envelope containing said document, to:

Emy Youngsmith California Public Utilities Commission 505 Van Ness Avenue #4300 San Francisco, CA 94102	Georgetta Baker Sempra Energy 101 Ash Street San Diego, CA 92101-3017
Roger J. Peters Pacific Gas & Electric Company P.O. Box 7742 San Francisco, CA 94120	Michael D. Montoya Southern California Edison Co. 2244 Walnut Grove Avenue Los Angeles, CA 91770

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 19, 2004, at Portland, Oregon.

Daniel W. Meek