

Position Paper

Support the IOU Code of Conduct: No Roll Backs!



The California Alliance for Community Energy supports the Code of Conduct¹ governing Investor Owned Utility (IOU) treatment of Community Choice providers. We strongly condemn any effort to weaken or modify the current Code of Conduct.

Specifically, we call on the California Public Utilities Commission (CPUC) to reject the IOU's effort to enable unlimited anti-Community Choice lobbying at rate-payer expense. We also call on the Commission to enforce the mandated biennial IOU Code compliance audits and change the expedited complaint process to make it more practicable.

The Issue: IOUs attempting to “gut” the Code of Conduct

On January 30, 2018, the investor-owned utilities (IOUs) filed a joint petition with the California Public Utilities Commission (CPUC) to modify what is known as the “CCA Code of Conduct” by entirely removing its restrictions against IOU lobbying against Community Choice programs.² In a 24-page filing, they argue a First Amendment right to communicate with elected officials regarding formation of Community Choice programs.

Origins of the Code of Conduct

The Code of Conduct was mandated by California legislation, SB 790³, passed in 2011, in response to IOU attempts to block the formation of Community Choice programs, in violation of the Community Choice law, AB 117. The most egregious example was PG&E's efforts to prevent formation of MCE Clean Energy (Marin) in 2009-10. These actions culminated in PG&E's Prop 16 in 2010, an effort to change the California Constitution to require a 2/3 popular vote to form a Community Choice program. PG&E lost the Prop 16 battle decisively, despite having outspent its opposition by well over 50 to 1.⁴

The intent of SB 790 was to prevent the IOU's from lobbying against Community Choice programs. It regarded such lobbying as an abuse of their “... inherent market power derived from, among other things, name recognition among customers, longstanding relationships with customers, joint control over regulated operations and competitive generation services, [and] access to competitive customer information...”⁵

Provisions of the Code of Conduct

The result of SB 790 was a Code of Conduct enacted by the CPUC in December 2012. It requires IOUs to be neutral toward Community Choice programs in any activity that is paid for with rate-

1 [CPUC decision implementing the Code of Conduct](#) (Amendment 1)

2 [Petition for Modification of Decision 12-12-036.](#)

3 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB790

4 500 to 1, according to [HuffPost, June 2, 2010](#)

5 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB790, Section 1 (c)

payer funds. Among other things, the Code of Conduct says:

- IOUs cannot use ratepayer funds to "market against" community choice. All IOU communications must be factual and neutral.
- IOUs cannot use confidential customer information against Community Choice programs.
- IOUs cannot offer "conditional services" or other inducements to entice municipalities to reject Community Choice.
- IOUs wishing to express an opinion about Community Choice must do so through an "independent marketing division" supported 100% through shareholder funds.
- The Code of Conduct also established two enforcement mechanisms, an "Expedited Complaint Procedure"⁶ and a mandatory biennial audit of IOU compliance with the Code, beginning in 2014.⁷ The CPUC decision announcing the Code relied heavily on these two mechanisms to ensure its effectiveness.⁸

Central to the neutrality provisions of the Code is the CPUC's definition of "lobbying". Simply stated, "lobbying" is defined as ... Communicate(ions) .with public officials or the public...for the purpose of convincing (them) not to participate in...a community choice program."⁹

The Code, therefore, defines lobbying by intent. If it is the intent of the IOU to dissuade audiences from formation of a Community Choice program, it is by definition engaged in the kind of non-neutral activity the Code of Conduct is meant to prohibit.

Code of Conduct Violations: San Diego Gas and Electric

In 2015, San Diego Gas and Electric (SDGE) became the first IOU to announce its intention to lobby against Community Choice, using shareholder funds as required under the Code. On November 20, 2015, SDGE filed a plan to establish an independent marketing division (IMD). Per the Code, the IMD could lobby against Community Choice as long as the utility could demonstrate to the CPUC exactly how that division would be completely separate from SDGE.

Though SDGE's petition was filed as an "Advice Letter" to go into effect 30 days after filing, the outcry against this action was strong. The CPUC subsequently required numerous revisions to clarify SDGE's plans for the separate shareholder-funded IMD, before approving SDGE's request to commence operations.

Before CPUC approval of its plans for the IMD, however, SDGE took "anti-Community Choice action" paid for with ratepayer funds, as documented by the California Community Choice Alliance (CalCCA) in their March 1, 2017, "Request to Show Cause....why SDGE should not be sanctioned for violating the Code of Conduct by lobbying against CCA programs." In this

6 [Op. Cit.](#) Attachment 1, Rules #24-29

7 [Op. Cit.](#) Attachment 1, Rules #23

8 [Op. Cit.](#) CPUC responses throughout.

9 [Op. Cit.](#) D.12-12-036, Attachment 1, at A1-2, Code of Conduct, Rule 1b (definition of "Lobby").

request, CalCCA sought full Commission review of SDGE’s failures to address shortcomings in their independent marketing division plan and of their continued violations of the Code of Conduct.

Finally, on April 6, after multiple rounds of changes to SDGE’s draft plan, but before all required revisions were implemented, the CPUC granted “conditional approval” of SDGE’s marketing plan. On April 17, 2017, CalCCA filed a second request for formal CPUC review and reply to its March 1 “Order to Show Cause”, repeating concerns about SDGE marketing activities in violation of the Code of Conduct.¹⁰ To the best of our research, as of October 2018, this request has not been fulfilled.

Code of Conduct Violations: Southern California Edison

The City of Lancaster filed a formal complaint against Southern California Edison (SCE) on June 7, 2016, under the Code of Conduct’s Expedited Complaint Procedures.¹¹ The complaint alleged that SCE refused to implement timely billing system changes and discriminated against Lancaster’s Community Choice customers. The complaint reportedly led to negotiations, but no CPUC sanctions were taken against SCE.

Subsequently, California Choice Energy Authority (CCEA) documented violations of the Code of Conduct by SCE in a September 25, 2017 letter.¹² As CCEA charged, “... SCE's government affairs representatives are actively communicating with local government and community leaders... urging support to...address the rise of CCA programs.” SCE has denied this charge.

A Loophole in the Code of Conduct: Third-Party Anti-Community Choice Actions

Since 2015, the IOUs have separately and collectively violated the spirit and the letter of the Code of Conduct neutrality provisions by creating political front groups that speak “freely” against aspects of Community Choice operations and their financial viability:

- **“Clean Energy Advisors”** – This is the official independent marketing division formed by SDGE under the CPUC's conditionally-approved plan (the conditions for which have not actually been met). Nonetheless, this group has been meeting with businesses and elected officials since some time in 2016.
- **“Clear the Air Coalition”** – This is a “third-party” coalition formed by Sempra/SDGE of “like-minded businesses,” most of which have been the recipient of SDGE ratepayer-funded grants over the years. This group has spoken repeatedly against Community Choice throughout San Diego, depicting it as “risky”, including before the County of San Diego's Supervisors as they prepared to vote on the County's Climate Action Plan--which subsequently failed to propose formation of a Community Choice program.

10 [CalCCA “Request for Full Commission Review”](#) April 17, 2017

11 [City of Lancaster complaint](#) filed June 7, 2016.

12 [California Choice Energy Authority complaint](#) filed September 25, 2017.

- **“Equitable Energy Choice for Californians”** – This was formed in mid-2017 by the three IOUs to apply pressure on the CPUC’s proceeding on the Power Charge Indifference Adjustment (PCIA). Its “member list” is comprised almost entirely of businesses and non-profits that have been the beneficiaries of rate-payer funds over the years.

CPUC Failures vis a vis the Code of Conduct

The CPUC’s 2012 decision implementing the Code of Conduct relies heavily on two enforcement mechanisms: the biennial audit of IOU compliance and the Expedited Complaint Process. However, it is clear from the frequency of violations of the Code that, as implemented, these mechanisms do not adequately ensure compliance.

- **Failure to Audit** -- The Legislature directed the CPUC to ensure that biennial third-party audits of the IOUs compliance with the Code were conducted. However, as of mid-2018, only one such audit has been filed with the CPUC.¹³ Clearly the CPUC does not have a good track record of enforcing this provision and therefore has failed to fulfill the terms of SB 790.
- **Failure of the Expedited Complaint Process** -- In spite of numerous IOU violations of the Code of Conduct, we have found only one formal, “expedited” complaint—the one filed by the City of Lancaster, cited above. There are flaws in the complaint procedure that might contribute to the low number of formal complaints:
 - Under the Code, formal complaints alleging non-compliance can be filed only by “... an existing or prospective community choice aggregator or community choice aggregation program...”¹⁴. Jurisdictions exploring Community Choice program formation are required to remain neutral until a public process results in a vote to proceed. However, most violations of the Code--IOU-funded lobbying of public officials against choosing Community Choice programs--take place before a decision has been made. The jurisdictions therefore lack standing to file a formal complaint alleging IOU interference during the process.
 - The expedited complaint process requires a “meet and confer” between the party filing the complaint and the IOU in question. This provides a major delaying opportunity for the IOU, while placing additional burden on the emerging or new Community Choice program.

Current Status of the IOUs’ Petition to Modify

So far, the CPUC has not responded to the IOU petition to modify. According to CPUC rules, such a petition, to be valid, should have been filed within one year of the original rule. Because the current petition was filed almost six years after the original decision, the IOUs' filing is well outside that window of eligibility.

13 California State Controller (SCO) conducted the audit, dated June 2017, covering 2013-14. [PG&E’s performance](#) was rated “adequate” and “reasonably in compliance” with the Code.

14 [Op.Cit.](#) Attachment 1, Rule #24

CalCCA filed a strong rebuttal to the IOUs' joint petition to modify the Code of Conduct, March 1, 2018.¹⁵ In it they point out that, because IOU lobbying costs are included in distribution charges, should the IOUs' petition be granted, Community Choice customers would be forced to pay for IOU lobbying against Community Choice.

Petition Poses a Significant Threat

The California Alliance for Community Energy opposes the IOUs' petition to roll back the Code of Conduct. In addition, we call for measures to address the failure of the CPUC to enforce the Code.

The IOUs seek to remove the Legislature's restrictions on their ability to lobby against Community Choice with elected officials, customers, and the media. Their petition before the CPUC comes in the context of on-going IOU violations of provisions in the existing Code, and rate-payer-funded lobbying against Community Choice, directly and through third-party "coalitions." The Alliance has documented violations that took place in 2016 and 2017, without any consequences from the CPUC.

If the CPUC acts on the IOUs' petition to modify by striking the lobbying prohibitions of the Code of Conduct, it will open the door to widespread, intensive IOU lobbying against Community Choice, contravening the legislative mandate provided for in SB790, to protect this popular, public alternative from that kind of threat.

A Call to Action

The California Alliance for Community Energy calls on members of our communities, their local elected officials and their elected officials in Sacramento to join with us in demanding that the CPUC:

1. Deny the IOUs' "Petition to Modify" the Code of Conduct.
2. Address failures of current enforcement mechanisms: the biennial audit and the expedited complaint process.
 - o Ensure that biennial IOU compliance audits are conducted and filed as mandated in the existing Code.
 - o Revise the Expedited Complaint Procedure to include organizations advocating for Community Choice as groups that have standing to file complaints alleging IOU lobbying against Community Choice formation.
 - o Tighten enforcement timetables for the mandated "meet and confer" step in the complaint process, and shorten the timetable for resolution of these complaints from a potential 8 months to 4 months.
3. Prohibit IOUs from using ratepayer funds to support third-party groups that lobby against Community Choice.

15 [CalCCA Response to Petition for Modification](#), filed March 1, 2018.