

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

Order Instituting Rulemaking Pursuant to
Senate Bill No. 790 to Consider and Adopt a
Code of Conduct, Rules and Enforcement
Procedures Governing the Conduct of
Electrical Corporations Relative to the
Consideration, Formation and Implementation
of Community Choice Aggregation Programs.

Rulemaking 12-02-009
(Filed February 16, 2012)

**RESPONSE OF THE CALIFORNIA COMMUNITY CHOICE
ASSOCIATION (CALCCA) TO THE JOINT UTILITIES' PETITION FOR
MODIFICATION OF D.12-12-036 (THE CCA CODE OF CONDUCT)**

Dawn Weisz, President
Beth Vaughan, Executive Director
CALIFORNIA COMMUNITY CHOICE
ASSOCIATION
1125 Tamalpais Ave.
San Rafael, CA 94960
Tel: (415) 464-6189
Email: beth@cal-cca.org

Scott Blaising
Braun Blaising Smith Wynne, P.C.
915 L Street, Suite 1480
Sacramento, CA 95814
Tel. (916) 993-3165
Email: blaising@braunlegal.com

Patrick Ferguson
Vidhya Prabhakaran
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Email: patrickferguson@dwt.com
Email: vidhyaprabhakaran@dwt.com

Bruce E. H. Johnson
Tim Cunningham
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Tel: (206) 622-3150
Email: brucejohnson@dwt.com
Email: timcunningham@dwt.com

Attorneys for CalCCA

March 1, 2018

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I. INTRODUCTION

Pursuant to Rule 16.4 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, the California Community Choice Association ("CalCCA") respectfully submits this response to the Joint Utilities'¹ Petition for Modification of Decision ("D.") 12-12-036 ("Petition").²

CalCCA urges the Commission to deny the Petition. The Commission lawfully and correctly imposed certain lobbying restrictions on the Joint Utilities by approving the CCA Code of Conduct. No legal or factual changes require the Commission to revisit that decision.

More importantly, granting the Joint Utilities' request to abolish all lobbying restrictions in the Code of Conduct would: (a) contradict the Commission's statutory mandate to ensure a level playing field for CCA programs; (b) allow the Joint Utilities' to engage in unreported, ratepayer-funded lobbying against CCA programs; and (c) violate all ratepayers' fundamental

¹ The "Joint Utilities" are Pacific Gas and Electric Company ("PG&E"), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("SCE").

² CalCCA was not a party to R.12-02-009 because it did not exist at the time of the rulemaking and adoption of the Code of Conduct. One of CalCCA's members, MCE Clean Energy, was a party to the proceeding, known at that time as the Marin Energy Authority. CalCCA does not believe that under the Commission's Rules of Practice and Procedure it needs to have been a party to file this response to the Joint Utilities' Petition, but to the extent deemed necessary it can do so at any time.

Constitutional right not to be compelled to subsidize the speech of a third party. If the Joint Utilities want to increase their anti-CCA lobbying efforts, they should comply with the existing regulations in the Code of Conduct by forming an independent marketing division funded by shareholders. The Joint Utilities cannot use their refusal to form an independent marketing division as justification for eliminating the lobbying restrictions.

Alternatively, if the Joint Utilities merely wish to communicate in a *neutral*-CCA manner, as the Joint Utilities claim, there is no need to modify the Code of Conduct because it already allows various forms of communication by the Joint Utilities to local governments and the press. In this regard, the Petition is particularly troubling. The Petition is supported by sworn declarations that provide numerous statements to the effect that SCE has “self-censored” communications with local governments about CCA programs. These statements are wholly contradicted by formal comments made by one of SCE’s CCA experts at a city council presentation on January 23, 2018, just a few days earlier than the sworn statements.³ CalCCA urges the Commission to view the SCE CCA Presentation.

II. EXECUTIVE SUMMARY

To facilitate CCA programs, the California legislature mandated that the Commission develop a code of conduct, rules, and enforcement mechanisms to prevent the Joint Utilities from using their inherent market power and influence to lobby against CCA programs and to cross-subsidize the Joint Utilities’ competitive services, including generation and energy efficiency services. The Commission developed these rules—referred to as the “Code of Conduct”—through a lengthy rulemaking in which the Joint Utilities and many other parties participated.

³ SCE’s formal presentation and comments (“SCE CCA Presentation”) at the January 23, 2018 City of San Dimas City Council Meeting may be viewed at the following website (starts at the 41:51 mark and continues through the 1:24 mark). Available at: <https://cityofsandimas.viebit.com/player.php?hash=irmMchhCfqL1> (Item 5A).

The legislature and Commission imposed the Code of Conduct to address the Joint Utilities using their inherent market power, incumbent position, and resources to exert undue influence on local governmental officials considering CCA formation. Several documented incidents of PG&E attempting to coerce local governments not to form CCAs informed Senate Bill (“SB”) 790’s enactment in 2011.

Given the legislature’s broad mandate in SB 790, codified in Section 707 of the California Public Utilities Code (“Section 707”), the Commission developed a comprehensive set of rules to govern the conduct of the Joint Utilities with respect to CCA programs. A key feature of the Code of Conduct is the limitation it imposes on the Joint Utilities’ “lobbying” activities. The lobbying rules are clear—the Joint Utilities cannot use ratepayer funds to communicate with local government officials or the public *for the purpose of* “convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.”⁴ All other communications are allowed. Notwithstanding the Joint Utilities’ claim, these other forms of communications by the Joint Utilities are still occurring, as described below in reference to the SCE CCA Presentation.

If the Joint Utilities want to engage in anti-CCA lobbying activities, nothing prevents them from doing so. The Joint Utilities can form an independent marketing division funded by shareholders to engage in this type of lobbying behavior at any time. They have decided not to do so for their own reasons. There are also very broad exceptions to the definition of “lobbying” in the Code of Conduct, which clearly allow the Joint Utilities to provide factual information to local governments regarding utility programs, tariffs, and CCA formation issues (which they do on a regular basis). Such communications do not constitute lobbying under the Code of Conduct.

⁴ D.12-12-036, Attachment 1, mimeo at A1-2, Code of Conduct, Rule 1b (definition of “Lobby”).

In their Petition, the Joint Utilities ask the Commission to eliminate the lobbying rules set forth in the Code of Conduct. The Joint Utilities have advanced several purported justifications for eliminating the lobbying rules, but none are persuasive.

The Joint Utilities' first justification for their request is that the word "lobby" does not appear in SB 790 or Section 707. This exercise in semantics should be rejected. When viewed in the proper historical context, there can be no doubt that the California legislature intended to place limits on the very types of behavior defined as lobbying in the Code of Conduct. Similarly, there can be no doubt that the Commission has broad statutory authority to regulate the Joint Utilities, including by imposing limited restrictions on the Joint Utilities anti-CCA lobbying activities.

The Joint Utilities also attempt to justify their request by raising a hypothetical concern that some local government officials may not be getting access to necessary information when considering CCA formation, because consultants are supposedly providing false and incomplete information, and/or the local government officials simply do not know who to ask to get such information. Notably, the Petition does not include any declaration from *any* local government about this hypothetical lack of information. The Joint Utilities' concern is simply unfounded. As detailed below, local governments have access to significant amounts of information and resources when considering CCA formation, and they regularly seek information from the Joint Utilities during the CCA formation process. The fact that the Joint Utilities are already meeting with local governments on a regular basis to discuss CCA issues belies their feigned concern that such conduct could constitute prohibited lobbying.

Lastly, the Joint Utilities argue that the lobbying restrictions are an unconstitutional restriction on their right to free speech. Yet, as the Commission properly recognized when

developing the Code of Conduct, it has broad authority to regulate both the Joint Utilities' economic activity and their associated commercial speech. A utility's communications to local governments (which are current and/or potential customers) for the purpose of convincing such local governments not to take electric services from a competitor (i.e. a CCA) is undoubtedly commercial in nature. And the Commission's regulation of the Joint Utilities' commercial speech is entirely consistent with Supreme Court precedent and case law.

Lastly, granting the Joint Utilities' request and forcing ratepayers to subsidize lobbying expenditures would violate ratepayers' First Amendment rights. If the lobbying rules were eliminated, CCA customers (who pay distribution rates to the Joint Utilities) would be forced to pay most of the bill for the Joint Utilities' anti-CCA lobbying efforts. This outcome would contradict the "bedrock [First Amendment] principle that, except in perhaps the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."⁵ The Code of Conduct's requirement that the Joint Utilities lobby against CCAs only through an independent marketing organization funded by shareholders is a necessary protection of all ratepayers' rights to be free from compelled speech.

As further detailed in the sections below, the Commission can and should reject the Joint Utilities' Petition and continue to enforce the existing lobbying rules in the Code of Conduct.

III. THE JOINT UTILITIES' PETITION SHOULD BE DENIED

A. The California Legislature and Commission Imposed Lobbying Restrictions on the Joint Utilities for Valid and Lawful Reasons.

The Petition gives little context for why the legislature and Commission rightly determined that imposing lobbying restrictions on the Joint Utilities was necessary and in the public interest. The Joint Utilities claim that the Code of Conduct is an "outlier" among states

⁵ *Harris v. Quinn*, 134 S.Ct. 2618, 2639, 189 L.Ed.2d 620 (2014).

that have community choice and an aberration in regard to its treatment of lobbying.⁶ Not only is the Code of Conduct consistent with other regulatory regimes, but the Commission adopted the Code of Conduct to restrict cross-subsidization, address the Joint Utilities' documented anti-CCA misconduct, and address the Joint Utilities' inherent market power. Consideration of these animating principles is necessary to put the Joint Utilities' current request for modification in the proper context.

1. The Code of Conduct Prevents Unlawful Cross-Subsidization.

The Commission developed the Code of Conduct to prevent the Joint Utilities' from using anti-CCA lobbying and marketing activities to cross-subsidize their competitive services.⁷ The legislature declared the need to establish a code of conduct "to protect against cross-subsidization by ratepayers"⁸ and directed that the code "protect against cross-subsidization paid by ratepayers."⁹ In D.12-12-036, the Commission applied these directives in establishing the Code of Conduct. The Commission directed that lobbying activity be conducted at shareholder cost, and that periodic audits and reports be provided regarding such funding.¹⁰

In the context of lobbying, cross-subsidization can occur on two levels. First, cross-subsidization occurs when the Joint Utilities use utility personnel and resources, which are paid for by ratepayers, to attempt to benefit their competitive services. The basis for protection

⁶ See Petition, at 4 ("The Code of Conduct's restrictions on CCA-related communications between the Joint Utilities and local government officials appear to be an outlier.").

⁷ See SB 790, Sec. 2(c). Again, merely the fact that the *potential* exists for the Joint Utilities to use this inherent market power was sufficient for the legislature to direct protective measures.

⁸ SB 790, Sec. 2(h).

⁹ SB 790, Sec. 10 (pertaining to Section 707(a)(4)(A)).

¹⁰ See *generally* Code of Conduct Rules 2 and 23.

against this form of cross-subsidization is found in SB 790¹¹ and California Public Utilities Code section 451.¹² Second, and more subtly, cross-subsidization can also occur when the Joint Utilities are allowed to use utility personnel and resources, which are *paid for by CCA customers* (through distribution rates), to support the Joint Utilities' competitive activities.

SB 350 (2015)¹³ provides the basis for protection against this second form of cross-subsidization. Sections 365.2 and 366.3 require the Commission to “ensure that departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load.” In this regard, the Commission has previously stated that it would “not permit allocations of generation cost to distribution customers [because t]o do so would compromise market efficiency by producing artificially low utility generation rates [...] and provide competitive advantages, which would stifle competition to the utilities.”¹⁴

The Commission must protect against both forms of cross-subsidization. Noticeably absent from the Petition is any mention of how the Joint Utilities would protect against cross-subsidization if the Commission were to abolish the lobbying restrictions. Under the Joint Utilities' proposal, no protection against cross-subsidization would exist because the Joint Utilities would no longer be required to use only shareholder funds for lobbying purposes or to submit such activities to periodic audits. Instead, under the Joint Utilities' proposal, once the

¹¹ See, e.g., SB 790, Sec. 2(c) (declaring that the Joint Utilities have inherent market power derived from, among other things, “the potential to cross-subsidize competitive generation services.”); see also SB 790, Sec. 10 (pertaining to Section 707(a)(4)(A) [directing that the Commission establish rules that “protect against cross-subsidization paid by ratepayers.”]).

¹² Utility rates that are not related to the provision of a utility service violate the principle in Pub.Util. Code § 451 that all utility rates to be just and reasonable. See also D.18-01-022, mimeo at 30-41 (stating that legislation is required to authorize rate recovery for expenses not related to provision of a utility service).

¹³ Stats. 2015, Ch. 547 (adding Cal. Pub. Util. Code §§ 365.2 and 366.3).

¹⁴ D.97-08-056, mimeo at 8.

Commission “eliminate[s] the Code’s lobbying restrictions in their entirety,”¹⁵ all costs of lobbying would be shouldered by ratepayers (including both bundled and unbundled customers).¹⁶

Even if the Commission correctly rejects the Joint Utilities’ proposed modifications to the Code of Conduct, the Commission must give greater attention to cross-subsidization already occurring in contravention of SB 350. This frivolous Petition for Modification provides a case in point. The regulatory costs associated with the Joint Utilities’ filing, which involve an outside law firm, are almost certainly being accounted for in a manner that will result in CCA customers bearing costs that were not incurred on their behalf. In the case of SCE, CalCCA understands that SCE allocates approximately 84 percent of its regulatory costs to distribution rates, which are paid for by CCA customers. As a result, CCA customers presumably will bear 84 percent of the cost of the Joint Utilities’ frivolous Petition, not to mention the *additional* costs that CCA customers had to bear in responding to the Petition.

The Commission described this problem with cross-subsidization in D.00-02-046:

The relative advantage of utilities in ratemaking litigation has long been recognized. One writer observed the following [**in 1926**]:

‘Successful regulation of great public utility corporations, with their properties and their services ramifying in every direction, with vast revenues flowing in continuously, with nationwide alliances, and clearing-houses of technical information and expert service, is no simple and easy matter. *** [A] loosely associated group of municipalities, working from the outside with no funds except what ‘they dig out of their jeans’ with no hope of ever getting it back, are pitted against the companies having all the inside experience and knowledge, and able to tap the consumers’ till with confidence that whatever they spend to defeat the consumers will be added to the cost of service and taxed back in the rates which the consumers themselves will have to pay. If the

¹⁵ See Petition, at 21.

¹⁶ See Petition, at 20, fn. 50.

municipalities... spend a dollar of their own money, the utility will spend two and make them pay in the bargain.¹⁷

The Joint Utilities' proposal that all ratepayers incur the cost of their anti-CCA lobbying is patently unfair, anti-competitive, and flatly contradicts the legislature's intent and the Commission's prior decisions.

2. The Code of Conduct Was Required to Address the Joint Utilities' Documented Misconduct with Respect to CCA Programs.

The Commission included lobbying restrictions in the Code of Conduct based on the extensive administrative record developed in R.12-02-009.¹⁸ In developing the Code of Conduct, the Commission explained that its overall "goal, consistent with [Section 707], is to provide CCAs with the opportunity to compete on a fair and equal basis with other [LSEs], and to prevent utilities from using their position or market power to gain unfair advantage."¹⁹ The Commission explained that the definitions of "marketing" and "lobbying" in the Code of Conduct "were the subject of significant comment in th[e] proceeding."²⁰

The Petition does not provide necessary historical context for the definition of "lobbying" within the Code of Conduct. "Lobbying" activities were the centerpiece of PG&E's misconduct with respect to CCA programs, the principal type of behavior addressed by the Commission in its seminal CCA decisions, and the central focus of the legislative response in SB 790.

"Lobbying" within the Code of Conduct is a term of art relating solely to utility conduct with respect to CCA programs. The term originated from a 2008 settlement agreement between

¹⁷ D.00-02-046, 2000 Cal. PUC LEXIS 239, at *50.

¹⁸ See D.12-12-036, mimeo at 5.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 9.

PG&E and the San Joaquin Valley Power Authority (“SJVPA”) (“SJVPA Settlement”).²¹ The Joint Utilities erroneously state that “[a]lthough [the SJVPA] settlement did address lobbying activities, it was primarily aimed at PG&E’s marketing activities.”²² This statement is not correct. In fact, a review of the relevant record established at the Commission demonstrates that lobbying of the type prohibited within the Code of Conduct was the principal focus of the SJVPA Settlement. PG&E’s communications to local government representatives discouraging the formation of SJVPA was the primary issue addressed in the settlement.

While the terms “marketing” and “customers” were used in SJVPA’s *complaint*,²³ the conduct at issue was “lobbying” as defined in the Code of Conduct.²⁴ As such, the *settlement agreement* that PG&E and SJVPA ultimately agreed to, and which the Commission approved in D.08-06-016, included a definition of “lobbying/petitioning” which the parties used to define PG&E’s communication with local government officials.²⁵

²¹ The SJVPA Settlement was approved in D.08-06-016. The Decision came about after SJVPA alleged that, after forming its CCA, PG&E “unlawfully interfered with SJVPA’s efforts to begin providing electricity to its communities by contacting SJVPA’s customers, disparaging SJVPA and persuading SJVPA’s member cities and counties to drop out of the program” and that PG&E convinced two of SJVPA’s largest members to drop out. *See* D.08-06-016, mimeo at 2.

²² Petition, at 23, fn. 55.

²³ As the SJVPA complaint explained, the term “marketing” was used throughout the complaint because it was the term used in D.05-12-041, which was the principal decision at that time on CCA issues and set forth the complaint procedures that SJVPA was required to use to seek redress of PG&E’s misconduct. Similarly, the term “customers” was used throughout the SJVPA complaint because local governments were the first phase of customers in SJVPA’s phase-in plan and also because local government execution of a program agreement was needed to expand service to non-government customers. *See* SJVPA Complaint 07-06-025.

²⁴ Indeed, the entirety of SJVPA’s assertions relate to PG&E’s communications to **local government representatives**. (*See* SJVPA Complaint, mimeo at 12- 15 (Paragraph 22 (and associated subparagraphs)).

²⁵ *See* D.08-06-016, Appendix A, mimeo at 3 (Settlement Agreement), SJVPA Settlement (“Lobbying/Petitioning” means communications of any kind, regardless of the geographic location in which the communication occurs, which are reasonably related to SJVPA’s CCA program and are with (a) the city and county governments that comprise the Participating and Regional Communities, including public officials and personnel of such governments in their professional capacities, and including candidates for elected public office of such governments and their staffs in their capacities as political

After the Commission approved the SJVPA Settlement in 2008, PG&E engaged in similar misconduct opposing the nascent CCA in Marin County. However, PG&E added new tactics and egregious marketing ploys aimed at customer “opt-outs” and misinformation.²⁶ For example, as the Commission recounted, PG&E distributed mailers that “warn[ed] ‘don’t be left in the dark,’ described the CCA program as a ‘risky scheme’ that was ‘[c]reated by Sacramento legislation’ that ‘automatically enrolls you – whether you like it or not – unless you opt out’ at the cost of ‘unspecified exit fees,’ and as a ‘costly and unnecessary energy scheme’ with bills ‘24% higher under CCA’ than from the utility.”²⁷

PG&E also continued to engage in “lobbying” activities. For instance, PG&E attempted to influence local government officials by linking PG&E’s support for various energy efficiency services, funds, and programs to an agreement by local government representatives to not pursue a CCA program.²⁸ Examples of PG&E’s improper lobbying activities in Marin County were plentiful.²⁹ San Francisco also provided poignant examples of PG&E’s meddling in local government decisions to form CCA programs.³⁰

candidates and/or (b) state and federal public officials and their staffs in their professional capacities who live or conduct business in the Participating or Regional communities, and candidates for elected public office of such governments and their staffs in their capacities as political candidates.”).

²⁶ See generally Resolution E-4250.

²⁷ D.10-05-050, mimeo at 3.

²⁸ See, e.g., D.09-09-047, mimeo at 272 (describing how concerns from several participants at a Public Participation Hearing prompted the Commission to “require utilities not to use energy efficiency funds in any way which would discourage or interfere with a local government’s efforts to consider or to become a Community Choice Aggregator.”). See also Resolution E-4250, at 20 (Findings and Conclusions No. 9) (“PG&E has sent at least one letter to Novato’s City Manager, appearing to link the utility’s provision of services to a decision by a local government not to participate in a CCA.”)

²⁹ See CCA Alliance Opening Comments in this rulemaking proceeding, dated March 26, 2012, at 18, fn. 44 (providing representative samples of PG&E’s anti-CCA lobbying activities).

³⁰ See, e.g., D.10-05-050, mimeo at 3.

Given these documented examples of anti-CCA lobbying efforts, in D.10-05-050 the Commission determined the “undisputed fact[s]” that (a) “PG&E has engaged in conduct encouraging customers to oppose their local government’s participation in a CCA program,” and (b) PG&E has “encourage[ed] local governments not to participate in a CCA program.”³¹ Given the extensive record of PG&E’s anti-CCA lobbying activities documented in the prior Commission decisions, the Joint Utilities’ assertion that “[SB 790] does not mention lobbying or communications with local government officials” cannot be taken seriously.

3. The Code of Conduct Addresses the Joint Utilities’ Inherent Market Power Relative to CCAs.

The Code of Conduct also carries out the legislature’s mandate to prevent Joint Utilities’ using their inherent market power, influence, and significant resources to lobby against CCAs.

In D.12-12-036, the Commission reiterated the legislature’s finding: “SB 790 finds that ‘[e]lectrical corporations have inherent market power derived from, among other things, name recognition among customers, longstanding relationships with customers, ... [and] access to competitive customer information.’”³² The Commission further determined that:

One major focus of both SB 790 and [the Code of Conduct] is to prevent utilities from using their structural advantages to influence customers or local governments against investigation of or participation in CCAs. Towards this end, the Code of Conduct adopted in this decision defines and places limits on utility marketing and lobbying activities that could discourage exploration of or interest in a CCA.³³

³¹ D.10-05-050, mimeo at 5-6 (emphasis added). *See also* D.10-05-050, mimeo at 18 (Findings of Fact No. 2) (“Starting in mid-2007, PG&E has opposed local governments’ participation in CCA programs...”)

³² D.12-12-036, mimeo at 8 (citing SB 790, Sec. 2(c)).

³³ D.12-12-036, mimeo at 8-9 (emphasis added). The Commission’s finding of statutory intent is to be given great weight. *Southern California Edison Co. v. Peevey*, 31 Cal.4th 781, 796 (2003); *see also Pacific Gas & Electric Corp. v. Pub. Util. Com.*, 118 Cal. App. 4th 1174, 1194 (2004) (“[Ordinarily, the California Public Utilities Commission’s] interpretation of the California Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”)

Accordingly, it was not simply PG&E's documented misconduct that concerned the legislature when it directed the Commission to develop the Code of Conduct. The legislature also targeted Joint Utilities' *inherent* "structural advantages" over CCAs and directed the Commission to minimize Joint Utilities' improper influence. These multiple, well-documented concerns animate and justify the Commission's imposition of lobbying requirements, and provide the proper context to evaluate Joint Utilities' Petition for Modification.

B. The Commission Has Ample Legal Authority to Impose Marketing and Lobbying Restrictions on the Joint Utilities.

The Joint Utilities' argument that the Commission should eliminate the lobbying restrictions in the Code of Conduct proceeds from their incorrect assertion that the Commission does not have the statutory authority to impose such restrictions (or, at the very least, that the Commission was not *required* to impose such restrictions). According to the Joint Utilities, because Section 707 does not expressly contain the word "lobby," the Commission need not and should not have imposed any lobbying restrictions on the Joint Utilities.³⁴

The Joint Utilities focus on semantics is misplaced. As explained below, the Joint Utilities' argument is contradicted by: (1) the Commission's broad authority to do all things necessary to supervise and regulate the Joint Utilities; (2) the Commission's broad authority to implement any rules it deems necessary, advisable, or convenient to govern the Joint Utilities' conduct with respect to CCAs; and (3) the similar lobbying restrictions that exist in other states that have CCAs such as Illinois.

³⁴ See Petition, at 10-12.

1. The Commission Has Broad Authority to Supervise and Regulate the Conduct of the Joint Utilities.

The California Constitution confers broad power on the Commission to regulate public utilities, which includes fixing rates and establishing rules for utilities.³⁵ Courts have determined that the Commission’s powers to regulate utilities are “not limited to those expressly enumerated in the Constitution [because] the legislature has ‘plenary power’ to confer additional authority on the [C]PUC.”³⁶

Pursuant to its plenary power, the California legislature enacted Section 701 of the Public Utilities Code, which gives the Commission expansive authority to take any action to “supervise and regulate” the Joint Utilities and to “do all things, whether specifically designated in [Section 701] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”³⁷ Only two factors limit the Commission’s broad jurisdiction to regulate the Joint Utilities: (1) the Commission’s action must be “cognate and germane” to utility regulation; and (2) the Commission’s action cannot be “specifically barred” by any other statute.³⁸

In addition to the Commission’s vast, inherent power to take any action that is cognate and germane to utility regulation, supervision, and ratesetting, unless specifically barred by

³⁵ Cal. Const., art XII, § 6 (“[t]he commission may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt ... for all public utilities subject to its jurisdiction”).

³⁶ *Southern California Edison Co. v. Pub. Util. Comm’n*, 227 Cal.App.4th 172, 186 (2014), citing Cal. Const., art XII, § 5 (The Legislature has *plenary power, unlimited by the other provisions of this constitution* but consistent with this article, to confer additional authority and jurisdiction upon the commission....”) (emphasis in original).

³⁷ Cal. Pub. Util. Code § 701; *see also Southern California Edison*, 227 Cal.App.4th at 193 (“the [C]PUC’s authority extends beyond mere rate[-]making. To ‘regulate’ means to ‘govern or direct according to rule’ or ‘to bring under the controls of law or constituted authority.’”)

³⁸ *Southern California Edison*, Cal.App.4th at 186-187.

statute, the Commission has additional authority over the Joint Utilities pursuant to federal law.³⁹ In particular, the Federal Public Utility Regulatory Policies Act of 1978 (“PURPA”) establishes a federal standard that the Commission must enforce—electric utilities must use shareholder funds, not ratepayer funds, for the purpose of promotional or political advertising.⁴⁰

The Joint Utilities’ Petition does not offer any credible explanation for why the Commission’s general authority to supervise and regulate does not allow reasonable restrictions on the Joint Utilities anti-CCA activities – whether defined as lobbying, marketing or something else. The Commission’s regulation of a utility’s anti-competitive use of monopoly power and ratepayer-funded resources against their competition for utility service is clearly “cognate and germane” to utility regulation. Moreover, CalCCA is not aware of any statute (and the Joint Utilities have not cited one) that specifically bars the CPUC from regulating the Joint Utilities’ anti-CCA/anti-competition activities.⁴¹

2. The Commission Has a Statutory Mandate to Implement all Rules it Deems “Necessary,” “Advisable,” or “Convenient” to Govern the Joint Utilities’ Conduct with Respect to CCAs.

In SB 790, the legislature specifically directed the Commission to develop a code of conduct, rules, and enforcement procedures that would govern the conduct of the Joint Utilities relative to CCAs. The legislature amended Section 707 to provide the Commission with broad authority to develop the CCA Code of Conduct, including specifically directing that the Commission should:

- “[C]onsider[] and adopt[] *a code* of conduct, associated *rules, and enforcement procedures, to govern* the *conduct* of the [Joint Utilities]

³⁹ See e.g., Section 714 of the Energy Policy Act of 1992, 16 U.S.C. § 824(g); see generally *Southern California Edison Co. v. Pub. Util. Comm’n*, 227 Cal.App.4th 172, 186-196 (2014).

⁴⁰ See 16 U.S.C. § 2623(b)(5).

⁴¹ CalCCA addresses the Joint Utilities’ First Amendment claims. See *infra* Section E.

relative to the consideration, formation, and implementation of community choice aggregation programs.” Section 707(a) (emphasis added)

- **“*Incorporate rules that the commission finds to be necessary or convenient* in order to facilitate the development of community choice aggregation programs, to foster fair competition, and to protect against cross-subsidization paid by ratepayers.”** Section 707(a)(4)(A) (emphasis added)
- **“*Provide for any other matter that the commission determines to be necessary or advisable* to protect a ratepayer’s right to be free from forced speech or to implement that portion of [PURPA] that establishes the federal standard that no electric utility may recover from any person other than the shareholders or other owners of the utility, any direct or indirect expenditure by the electric utility for promotional or political advertising.”** Section 707(a)(5) (emphasis added)

In addition to the Commission’s incredibly-broad general authority to regulate the conduct of the Joint Utilities pursuant to the state Constitution and Section 701, the legislature directed the Commission to develop and enforce a set of rules that broadly govern the conduct of the Joint Utilities relative to the CCAs. In creating this Code of Conduct, the Commission was given an express mandate to include any protections it deems “necessary,” “convenient” or “advisable” to facilitate the development of CCAs, foster fair competition, and/or protect ratepayers from subsidizing the Joint Utilities’ competitive generation services.

The Joint Utilities argument centers on the fact that Section 707 does not expressly mention the word “lobby.”⁴² This argument is unconvincing for several reasons. First, as explained above, the Commission’s power to regulate the Joint Utilities is not limited to the specific words or concepts set forth in the Public Utilities Code.⁴³ Rather, the Commission has vast, inherent power to take any action that is cognate and germane to utility regulation, supervision, and ratesetting, unless it is specifically barred by statute.

⁴² See Petition, at 10-12.

⁴³ See *supra* fn. 36.

In addition, there can be no real debate that the express wording of Section 707 gives the Commission authority to regulate *any* of the Joint Utilities’ conduct regarding the consideration, formation, and implementation of CCAs, unless the Commission is specifically barred from doing so. In SB 790, the legislature expressly declared that “[t]he Public Utilities Commission has found that *conduct* by electrical corporations to oppose community choice aggregation programs has had the effect of causing community choice aggregation programs to be abandoned.”⁴⁴ The legislature’s declaration echoed similar findings made by the Commission in D.10-05-050 relating to PG&E’s lobbying activity. The legislature’s overarching requirement in SB 790 relates to the “conduct” of the Joint Utilities relative to the “consideration” and “formation” of a CCA program. These are functions that can only be administered by local governments, and which could be negatively affected by the Joint Utilities’ lobbying of local government officials.

The legislature also expressly stated in SB 790 its intent that the Commission’s Code of Conduct should include “in whole or in part, the rules approved by the commission in...Decision 08-06-016.”⁴⁵ By expressly referencing D.08-06-016 (the Commission’s decision approving the SJVPA Settlement), the legislature affirmed the Commission’s use of rules relating to the utilities interaction with local government officials (which the Code of Conduct terms as “lobbying”). The Commission later underscored this point.⁴⁶

More broadly, the word “lobby” is simply a term the Commission used to describe the type of behavior the Joint Utilities must avoid under the Code of Conduct (i.e. unsolicited

⁴⁴ SB 790, Sec. 2(d) (emphasis added).

⁴⁵ SB 790, Sec. 10 (pertaining to Section 707(a)(4)).

⁴⁶ *See generally* D.12-07-023, mimeo at 15-16 (describing express references to D.08-06-016 in SB 790 and the prominence of D.08-06-016 in statutory provisions relating to the code of conduct).

activities aimed at influencing or swaying public officials regarding CCA issues).⁴⁷ Given the extensive legislative history of SB 790 and the Commission decisions on which it is based,⁴⁸ it is irrelevant from a legal perspective that the word “lobby” does not appear in Section 707.

3. The Lobbying Restrictions in the Code of Conduct Are Similar to Restrictions in Place in Other States that Have Comparable Programs.

The Joint Utilities brand the CCA Code of Conduct as an “outlier,” stating that “[a]lthough some states impose certain limits on marketing to CCA customers, the Joint Utilities are not aware of any jurisdiction that restricts a utility from communicating with local government officials regarding CCAs.”⁴⁹ This statement is misleading. The activities defined as lobbying under the Code of Conduct—i.e., communications “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, [retail service]”—would be regulated under various other states’ regulations. In fact, such communication would likely face stricter restrictions and regulations in other states that have CCAs.

In 2001, the Illinois Commerce Commission (“ICC”) adopted an order addressing functional separation between generation services and delivery services of Illinois’ electric utilities.⁵⁰ The ICC Order approved rules relating to standards of conduct and functional separation of Illinois’ electric utilities. The Illinois rules have various similarities to California’s

⁴⁷ The term “lobbyist” is defined in the Merriam-Webster dictionary as “one who conducts activities aimed at influencing or swaying public officials and especially members of a legislative body on legislation.”

⁴⁸ *See supra* Section III.A.

⁴⁹ Petition, at 4.

⁵⁰ The ICC adopted an order implementing Section 16-119A(b) of the Illinois Public Utilities Act regarding functional separation between generation services and delivery services of Illinois’ electric utilities (“ICC Order”). The rules are codified at 83 Ill. Adm. Code 452 (“ICC Code”). Illinois’ rules clearly restrict and regulate “communication through any medium...for the purpose of requesting or retaining patronage from a customer or prospective customer.” ICC Code § 452.220, definition of Advertising.

CCA Code of Conduct. For example, similar to the view expressed in SB 790, the ICC stated that the Illinois rules intended to “curb the utilities’ exploitation of their inherent advantages as the monopoly provider of delivery services.”⁵¹ Additionally, after extensive debate, the ICC adopted a two-path system depending on whether the utility wished to influence customers’ choice with respect to their retail supplier. Similar to California, Illinois electric utilities have two options. A utility can operate as a functionally separated utility, and be subject to functional separation and various standards of conduct, or the utility could operate as an Integrated Distribution Company (“IDC”), and be subject to different standards of conduct.⁵²

Although the Joint Utilities repeatedly bemoan the “burdensome” nature of the Commission’s Code of Conduct,⁵³ the Joint Utilities would face significantly more stringent regulations under Illinois’ standards. Indeed, California is hardly an outlier. The following points are worth noting:

- Unlike in California, a non-marketing utility in Illinois must nevertheless file a written implementation plan that is sufficiently detailed to allow the ICC to reasonably ascertain the systems, policies, and practices that the utility will use to satisfy the ongoing requirements imposed on IDCs. The implementation plan must be approved by the ICC.⁵⁴
- The IDC rules expressly prohibit advertising, promotional and marketing activities.⁵⁵ Two elements are particularly noteworthy:
 - “No [IDC] employee or agent shall affirmatively prompt customer inquiries about the quality of the [IDC’s] retail electric supply services ...and no IDC employee or agent shall disparage the quality of an alternative retail electric supplier’s services.”⁵⁶

⁵¹ ICC Order, 2001 Ill PUC LEXIS 167, *28, fn. 5 (February 15, 2001).

⁵² See ICC Order at *5-6.

⁵³ See Petition, at 20-21.

⁵⁴ See ICC Order at *6; ICC Code § 452.220.

⁵⁵ ICC Order at *64; ICC Code § 452.240.

⁵⁶ ICC Order at *65, ICC Code § 452.240(d).

- While the ICC approved image advertising for the IDCs as transmission and distribution companies, the ICC expressly prohibited image advertising for the IDC as a corporate whole, which would inherently benefit the IDC’s generation services business. The ICC stated that its IDC rules require “that advertisements promoting the general image of the IDC must clearly and solely pertain to the attributes of a distribution company.”⁵⁷
- The IDC rules imposed heightened requirements with respect cross-subsidization.⁵⁸

As currently drafted, if there is any “outlier” element to the Code of Conduct it may be that the Commission merely requires the Joint Utilities to make an information-only advice letter filing, with no support or plans. This information-only approach was determined to be insufficient for utilities in Illinois, where state regulators were concerned that it may not be possible to construct a sufficiently rigorous and robust definition of what it means to not market or lobby against a CCA program.

C. The Code of Conduct Already Permits the Joint Utilities to Communicate with Local Government Officials and the Press.

The Joint Utilities seek to abolish the lobbying restrictions in the Code of Conduct based on the false premise that they are currently not able to speak to local government officials or the press about CCA issues. In reality, the Code of Conduct already provides the Joint Utilities with significant latitude to communicate with local governmental officials on CCA-related topics, and the Joint Utilities may communicate with the press as long as their activities are not designed to discourage adoption of CCAs.

⁵⁷ ICC Order at *68.

⁵⁸ ICC Order at *82; ICC Code § 452.300. Additional reporting required with respect to separate books and records for generation services and delivery services.

1. The Joint Utilities Are Allowed to Form an Independent Marketing Division.

As an initial matter, the Joint Utilities can, at any time, form an independent marketing division funded by shareholders, and then use that independent marketing division to engage in any activities they choose regarding CCA issues, including communications “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, [retail service].” The only noteworthy prerequisite to forming an independent marketing division is that it operates in a fair and transparent manner by filing a marketing plan and submitting to ongoing Commission audit of its activities and funding.⁵⁹

The Joint Utilities—which have *not* actually formed independent marketing divisions—speculate about “significant financial and logistical burdens”⁶⁰ associated with compliance, but ignore the many valid reasons for the Commission’s decision to require the use of an independent marketing division (among other things, the Commission was concerned about the utilities’ transparency and accountability, the potential use of ratepayer funds to cross-subsidize the utilities’ competitive generation services, and the utilities’ use of ratepayer funds to engage promotional or political advertising).⁶¹

The Joint Utilities’ own decisions not to form independent marketing divisions cannot justify entirely eliminating the Code of Conduct’s lobbying rules.

⁵⁹ See D.12-12-036, Attachment 1, mimeo at A1-4, Code of Conduct, Rule 4. Pursuant to its Section 707 authority to develop any rules necessary to regulate the conduct of the Joint Utilities relative to CCAs, and given the prior history of PG&E’s misconduct with respect to CCAs, the Commission deemed it necessary to require that any such independent marketing make certain information public regarding its funding sources and activities.

⁶⁰ Petition, at 20.

⁶¹ D.12-12-036, Attachment 1, mimeo at A1-6, Code of Conduct, Rule 13 citing D.97-12-088, App. A, Part V.E.

2. The Commission Has Limited the Definition of “Lobbying”.

Assuming the Joint Utilities would prefer to communicate with local government officials without establishing an independent marketing division, the Code of Conduct provides several ways to do so. Communications are deemed to constitute “lobbying” under the Code of Conduct *only if* the communications are “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a [CCA] program.”⁶²

While the Joint Utilities are correct that this standard focuses on the Joint Utilities’ intentions, it is incredulous for the Joint Utilities to claim that such a standard is “fraught with peril.”⁶³ Understanding the utilities’ intent with respect to any challenged communication is critical, and it is hard to imagine how the Commission could have implemented an “objective” Code of Conduct (i.e. one that did not require the Commission to make a subjective determination about the intent behind a utility communication). This is particularly true for the lobbying rules because it was PG&E’s own prior misconduct with respect to CCA formation that necessitated SB 790 and the creation of the Code of Conduct. Moreover, the mere allegation or supposed “accusation” of intent is insufficient; as a complainant under the Commission’s rules, the CCA bears the burden of proving that the utility’s conduct constitutes impermissible lobbying under the Code of Conduct.⁶⁴

⁶² D.12-12-036, Attachment 1, mimeo at A1-2, Code of Conduct, Rule 1b (definition of “Lobby”).

⁶³ Petition, at 18.

⁶⁴ See D.12-12-036, Attachment 1, mimeo at A1-2 and A1-10, Code of Conduct, Rule 22(c). The Joint Utilities’ statement that they have “self-censored their communication to localities” as “a result of the risk of being accused of violating the Code” is incredulous, at best. See Petition, at 19. The mere expression of concern by a CCA should hardly prompt such a response by SCE. In fact, as shown below, SCE has neither self-censored nor limited its communication to localities as a result of this supposed “risk.”

3. There Are Two Major Exceptions to the Definition of Lobbying.

The Code of Conduct also provides two major exceptions to the definition of “lobbying” which allow the Joint Utilities to engage in robust communications with local governments. In particular, the Joint Utilities can provide “factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to questions from a government agency or its representative.”⁶⁵ In addition, the Joint Utilities can provide “information to potential [CCAs] related to Community Choice Aggregation program formation rules and processes.”⁶⁶

In practice, these exceptions should address much of the information imbalance that the Joint Utilities claim as justification for their Petition (i.e. if local government officials want information about utility programs or tariffs, all they have to do is ask and the Joint Utilities are permitted to provide fact-based answers). For instance, the Joint Utilities are clearly permitted when asked to provide factual information to local government officials regarding procurement, customer migration, non-bypassable charges, and a myriad of other issues related to the Joint Utilities’ tariffs and programs.

While the Joint Utilities feign concern about the potential chilling effects of the Code of Conduct on their ability to communicate with local government officials, the Commission has already made clear that the Code of Conduct does not limit the Joint Utilities’ right to provide factual information about CCAs to local government officials when asked.

⁶⁵ D.12-12-036, Attachment 1, mimeo at A1-2, Code of Conduct, Rule 1b (definition of “Lobby”).

⁶⁶ *Id.*

4. The Code of Conduct Allows the Joint Utilities to Communicate with the Press, as Long as such Communications Do Not Qualify as Prohibited Lobbying.

The Joint Utilities' Petition expressly acknowledges that "no change to the wording of the Code [of Conduct] is necessary to address utility communications with the press."⁶⁷ Nevertheless, the Joint Utilities seek a ruling from the Commission that their communications with the press are not restricted. The Commission should ignore this request.

As detailed above, the current lobbying rules are quite clear: the Joint Utilities cannot use ratepayer funds to communicate "with public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program."⁶⁸ Members of the press undeniably fall within the categories of "the public" or "any portion of the public" (and certain members of the press could even be "public officials").

Thus, the Joint Utilities cannot communicate with the press if their purpose is to convince a government agency not to participate in a CCA program. At the same time, the exceptions to the "lobbying" definition permit the Joint Utilities to provide factual information to the press regarding "utility programs or tariff", "rate analyses" or issues regarding "[CCA] program formation rules and processes." In addition, the Joint Utilities can at any time form an independent marketing division for the purpose of lobbying members of the press with respect to CCA issues.

More fundamentally, there is no functional difference between the Joint Utilities communicating with local governments and the press when it comes to CCA lobbying-related conduct. After all, communicating with the press *is akin to* communicating with customers,

⁶⁷ Petition, at 10.

⁶⁸ D.12-12-036, Attachment 1, mimeo at A1-2, Code of Conduct, Rule 1b (definition of "Lobby").

because residential, commercial, and municipal customers are the primary audience for the press. Accordingly, the Commission should reject the Joint Utilities request to “lobby” the press for the same reasons it should reject their request to “lobby” local governments.

D. The Joint Utilities Have Failed To Show that Local Governments Lack Sufficient Information – Either from the Joint Utilities or from Other Sources.

The Joint Utilities’ principal justification for relaxing the Code of Conduct is their speculation that local governments “may” lack sufficient information to make informed decisions about forming a CCA program.⁶⁹ But the Petition does not contain any declaration from a local government about a perceived lack of information. Instead, the Joint Utilities rely on a single comment from The Utility Reform Network (“TURN”) to support their view that “[l]ocalities apparently are not being fully informed on these issues.”⁷⁰ To remedy this supposed problem, and because “[t]he Joint Utilities have significant expertise regarding many of the issues relevant to CCA programs and would like to share that information with local governments”,⁷¹ the Joint Utilities propose to eliminate *all* lobbying restrictions.

The factual predicate underlying the Petition has not been supported by the Joint Utilities. Moreover, the Joint Utilities’ speculation is incorrect; there is a significant amount of information from many sources that local governmental officials consider relative to CCAs. The Joint Utilities’ views regarding the muzzled nature of their communication is similarly at odds with facts. The Joint Utilities are, in fact, communicating – and quite effectively. Finally, while the Joint Utilities may genuinely believe they could be “helpful” to local governments, the Joint

⁶⁹ See generally Petition; Section III.C.

⁷⁰ Petition, at 15-16 (citing TURN’s opening comments in R.17-06-026, dated July 31, 2017).

⁷¹ See Petition, at 17.

Utilities' inherent market power militates against the Joint Utilities' request to abolish lobbying restrictions.

1. Local Governments Rely On Extensive Information When Considering Formation Of CCA Programs.

The Joint Utilities state that, because they cannot send information to local governments regarding CCA issues, local governments are forced to rely on biased information from outside consultants.⁷² In this regard, the Joint Utilities assume that local governments are making “uninformed decisions because they have been able to hear only from certain constituencies.”⁷³ In making these assertions, the Joint Utilities disparage, if not wholly disregard, the extensive work undertaken by local government staff to research and support recommendations for or against CCA programs. Moreover, the Joint Utilities ignore the significant body of information considered by local governments.

The City of Torrance provides one example of the extensive analysis performed by local governments considering CCA formation. In September 2017, the Torrance city council considered whether to form or join a CCA. The city council examined a detailed, 200-page presentation that comprehensively described the risks and benefits of CCA formation.⁷⁴ The information provided to local government officials included:

- City of Torrance staff's analysis of the existing South Bay Clean Power (“SBCP”) and Los Angeles Community Choice Energy (“LACCE”) Programs;
- An analysis of SBCP's financial strategy
- SBCP's responses to questions posed by Torrance staff
- The SBCP Joint Powers Agreement
- The LACCE Updated Business Plan

⁷² See, e.g., Petition, at 3 (“Absent access to information from the utility, local governments' primary source of information is often external advisory firms that potentially anticipate having a role in implementing the CCA entity after the feasibility study.”).

⁷³ Petition, at 2.

⁷⁴ See http://torrance.granicus.com/MetaViewer.php?view_id=8&clip_id=13336&meta_id=269590

- The LACCE Info Packet for Cities
- The LACCE Joint Powers Agreement
- The LACCE Enabling Ordinance; and
- A memorandum Lancaster Clean Energy provided to the Torrance staff.

The City of Solana Beach provides another example of the extensive analysis performed by local governments considering CCA formation.⁷⁵ Solana Beach has a dedicated website at which it has posted numerous CCA-related documents, reports, and analyses.⁷⁶ The documents posted on the website give evidence of the extensive process undertaken by Solana Beach to inform itself about CCA programs, including the risks of CCA programs. Like other communities, Solana Beach conducted a peer review of the CCA plan in order to obtain additional information about benefits and risks associated with CCA programs.⁷⁷

In other instances, peer review is unsolicited, and is the natural byproduct of an open public process before local governing boards. For example, as part of its consideration of a CCA program, the Santa Monica City Council received and considered an extensive report from a third party group because it determined that “[e]lected officials need to proceed with caution regarding this complex subject and ask difficult questions.”⁷⁸ In sum, local governments receive extensive information.

⁷⁵ CalCCA understands that Solana Beach intends to file a separate response to the Petition in which Solana Beach will provide more specific information.

⁷⁶ See http://www.ci.solana-beach.ca.us/index.asp?SEC=74D2DC6A-F6D0-41BF-BEFD-C23ECF269862&Type=B_BASIC

⁷⁷ See EES Consulting, Inc., *City of Solana Beach Peer Review of Community Choice Aggregation Study*, dated April 6, 2017. Available at: http://solana-beach.hdso.net/docs/CCA/CCA_Study.pdf. See also LACCE third party review. Available at: http://www.lacce.org/materials/1004282_ARCLACCEBizPlanReviewMemo-Final.pdf

⁷⁸ Comments and Report from the American Coalition for Sustainable Communities related to Item 7E; December 12, 2017 Santa Monica City Council meeting. Available at: http://santamoniacityca.iqm2.com/Citizens/Detail_Meeting.aspx?ID=1129

2. The Joint Utilities Continue To Avail Themselves Of Numerous Opportunities To Communicate With Local Governments About CCA Programs.

Throughout their Petition, the Joint Utilities claim that they have effectively been muzzled in their ability to communicate with local government representatives.⁷⁹ According to the Joint Utilities, they have been self-censoring their communications for fear of being accused of violating the Code of Conduct.⁸⁰ One of SCE’s declarations goes into greater detail, stating that “SCE has limited its communications with local governments regarding CCA formation or adoption even when local government officials have asked SCE for additional information.”⁸¹ SCE accentuates this point by claiming that a local government “also invited SCE to present at a meeting at which the prospective CCA planned to present, but SCE declined this invitation to avoid being accused of a Code of Conduct violation.”⁸² The Joint Utilities’ statements attempt to convey the impression that they have effectively been silent and have not communicated information to local governments about CCA programs – much less information on which the local government may weigh a decision as to whether or not to form a CCA program.⁸³

A simple review of public records reveals the inaccuracy of the Joint Utilities’ statements. SCE’s representatives executed their declarations between January 24-26, 2018,

⁷⁹ See, e.g., Petition, at 19.

⁸⁰ See, e.g., Petition, at 19 (“As a result of the risk of being accused of violating the Code, the Joint Utilities have self-censored their communication to localities regarding CCA programs based on their legitimate concern that these communications might be deemed a violation of the Code of Conduct.”).

⁸¹ Petition, Exhibit C, at C-6, Paragraph 8 (Thompson Declaration). See also Petition at 19 (“SCE has not answered certain CCA-related questions from local government officials due to the risk that an answer could be alleged to violate the Code’s lobbying restrictions.”)

⁸² *Id.*

⁸³ The Joint Utilities’ statements range from unreserved to qualified. See, e.g., Thompson Declaration; Paragraph 6 (“the Code of Conduct adopted by D.12-12-036 has curtailed SCE's ability to provide local governments with information regarding the costs and benefits of CCA programs....”); see also Petition, Exhibit C, at C-3; Paragraph 10 (Cushnie Declaration) (“my team and I have generally not affirmatively approached local governments to discuss these concerns....”).

which included claims that the Joint Utilities have not substantively communicated with local government representatives regarding CCA issues. However, as recently as January 23, the San Dimas City Council included an item on its agenda for the purpose of receiving a presentation from one of SCE's primary CCA experts: Ranbir Sekhon. The San Dimas City Council was actively considering whether or not to form and implement a CCA program through the LACCE program. The staff report accompanying the agenda item stated that Mr. Sekhon would be addressing the following questions:

- How Edison views LACCE;
- Are there issues the city should be aware of with this program;
- How does the program affect Edison; and
- How would the program affect Edison customers.⁸⁴

CalCCA urges the Commission to view the SCE CCA Presentation. In many ways, the SCE CCA Presentation speaks for itself, and wholly contradicts and refutes the Joint Utilities' representations that they have been "self-censored" and limited in their ability to communicate with local governments. At the council meeting, Mr. Sekhon provided numerous comments and opinions about CCA programs. The mere fact that Mr. Sekhon accepted an invitation to speak at the meeting about CCA programs contradicts the Joint Utilities' declarations. Moreover, far from being "self-censored," as the Joint Utilities' claim, communication by SCE's representatives about CCA programs were enthusiastically provided, with SCE's representatives stating that they were "happy to answer any questions [the San Dimas City Council] has about Community Choice Aggregation programs."⁸⁵ While Mr. Sekhon noted that he was governed by

⁸⁴ See San Dimas Agenda Item Staff Report Summary for the January 23, 2018 Meeting "Community Choice Presentation – questions and answers Ranbir Sekhon of Southern California Edison." See *supra* fn. 3. The SCE CCA Presentation may be viewed at the following website (at the 41:51 mark and continues through the 1:24 mark). Available at: <https://cityofsandimas.viebit.com/player.php?hash=irmMchhCfqL1> (Item 5A).

⁸⁵ SCE CCA Presentation.

the Code of Conduct and qualified that he was not speaking about “individual” CCA programs, Mr. Sekhon made clear that he was free to provide “general comments about CCA formation and the *issues and concerns* [SCE has] with *CCA formation*.”⁸⁶

Mr. Sekhon’s comments were substantive, far-ranging, and influential. For example, at various points in the presentation, Mr. Sekhon provided guidance on what the San Dimas City Council should be reviewing with respect to reports on CCA programs, including the “inverse correlation” between market prices and the PCIA—the clear takeaway from Mr. Sekhon’s comments was that this “inverse correlation” would effectively eliminate any savings the CCA program could expect. Mr. Sekhon also warned the San Dimas City Council about the impending CCA bond decision and the “uncertainty” as to whether the current \$100,000 bond amount will be significantly increased to “1 to 2 to 3 million dollars.” Before taking questions from the council, Mr. Sekhon commented on the then-pending resource adequacy resolution (E-4907), which, according to Mr. Sekhon, would expose CCA programs to “additional costs” that should be considered by decision-makers.⁸⁷ The comments make abundantly clear that SCE has in no way been self-censored. Again, CalCCA strongly urges the Commission to review for itself the SCE CCA Presentation.

Based in part on Mr. Sekhon’s comments, the San Dimas City Council voted to not move forward with CCA formation or implementation. Specifically, the San Dimas City Council, by a 5-0 vote, elected “to go with option “C” and monitor the development, success, and issues of the

⁸⁶ *Id.*

⁸⁷ *Id.*

LACCE implementation and program over a period of time to see how things work out and decide on the merits of joining the LACCE Program.”⁸⁸

There are numerous other examples of SCE’s communications with local government representatives, including key local government representatives like city managers.⁸⁹ Notwithstanding the statement in Christopher Thompson’s declaration that, in a specific instance, “SCE declined to answer [a] city manager’s questions,”⁹⁰ it is clear that SCE has spoken extensively and substantively with city managers. For example, SCE gave a presentation on October 5, 2017 to the California Contract Cities Association (“Contract Cities”) City Manager’s Meeting.⁹¹ In that presentation, SCE made various statements about CCA programs, including SCE’s views regarding likely Commission action to correct current “flaws” with the Power Charge Indifference Adjustment and the CCA bond methodology.⁹²

3. The Joint Utilities’ Inherent Market Power Militates Against Relaxed Lobbying Requirements.

The Joint Utilities assert their belief that providing expert information from the neighboring electric utility to local governments would be “helpful.”⁹³ CalCCA offers no opinion on the genuineness of the Joint Utilities’ motivation. CalCCA observes, however, that

⁸⁸ January 23, 2018 Minutes at 4.

⁸⁹ See e.g., Sempra’s presentation at the September 29, 2017 City of San Diego Environment Committee Meeting (starts at the 1:57 mark and continues through the 2:08 mark). Available at: http://granicus.sandiego.gov/ViewPublisher.php?view_id=51 (Item 6).

⁹⁰ See Petition, Exhibit C, at C-6 to C-7, Paragraph 8 (Thompson Declaration).

⁹¹ Further information on the Contract Cities may be found at: <https://www.contractcities.org/>. SCE is a platinum associate member of Contract Cities.

⁹² SCE’s presentation at the Contract Cities’ meeting is the same one that SCE presented to the San Dimas City Council. See *supra* fn. 86.

⁹³ See Petition, Exhibit C, at C-1, Paragraph 3 (Cushnie Declaration) (“I believe that my expertise on these topics and the expertise of other subject matter experts on my team at SCE on these and other topics could be helpful to localities in SCE’s service area considering the costs and benefits of, and procurement and other obligations associated with, forming a Community Choice Aggregator (“CCA”), or considering the feasibility of implementing a CCA program.”).

PG&E previously touted itself as a “trusted energy advisor” when providing what it presumably considered “helpful” information to cities considering participation in SJVPA’s CCA program.⁹⁴ While PG&E may have considered such communications helpful, SJVPA did not share that view. In fact, PG&E’s communications with local government representatives to discourage the formation of SJVPA was the primary driver of the SJVPA Settlement which helped establish the CCA Code of Conduct.

Irrespective of whether or not the Joint Utilities’ communication would be helpful, such communication, to the extent it is “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program,” should not be allowed without the proper controls of an independent marketing division set forth in the Code of Conduct. The inherent market power of the Joint Utilities demands nothing less.

E. The Code of Conduct Properly Regulates the Joint Utilities’ Commercial Speech.

1. The Commission Has Broad Authority to Regulate Commercial Speech.

The Commission has broad regulatory authority to regulate both the Joint Utilities’ economic activity and their associated commercial speech. Commercial speech does not receive the same level of protection as “other constitutionally safeguarded forms of expression.”⁹⁵ The Commission can regulate the Joint Utilities’ commercial speech as long as the regulation satisfies the test articulated in *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n*.⁹⁶

⁹⁴ See generally D.08-06-016.

⁹⁵ *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 952 (2002), as modified (May 22, 2002) (citation omitted).

⁹⁶ 447 U.S. 557 (1980); see also D.98-12-089, 1998 Cal. PUC LEXIS 917 (rejecting First Amendment challenge to affiliate marketing rules under *Central Hudson* test).

Under *Central Hudson*, misleading speech or speech regarding unlawful activity receives no protection at all.⁹⁷ Assuming the speech itself is lawful, the Commission may regulate the Joint Utilities’ commercial speech where: (a) the Commission has a substantial interest; (b) the regulation directly advances that interest; and (c) the regulation is no more extensive than necessary to serve that interest.⁹⁸ The Supreme Court has explained that the final prong of this standard does not require the Commission to use the “least restrictive means” of achieving the government’s goal. Rather, the Commission must only achieve a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,’ a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interests served.’”⁹⁹ As the Commission found when adopting the Code of Conduct—the Code amply satisfies that test.¹⁰⁰

2. The Lobbying Restrictions Regulate Commercial Speech.

The Joint Utilities’ Petition proceeds from an incorrect premise—that since the Joint Utilities’ lobbying activities do more than “propose a commercial transaction,” those activities necessarily fall outside of the Commission’s authority to regulate commercial speech.¹⁰¹ But whether a communication does no more than “propose a commercial transaction” is a *description* of commercial speech, not the *test* used to identify it.¹⁰² The Joint Utilities’ assertion belies the

⁹⁷ *Central Hudson*, 447 U.S. at 564.

⁹⁸ *Id.*

⁹⁹ *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted); see also D.98-12-089 (citing and applying *Fox*).

¹⁰⁰ See *supra*, at Section III.A.

¹⁰¹ Petition at 26, fn. 68.

¹⁰² See e.g., *Adventure Commcn’s, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 440 (4th Cir. 1999) (“In the abstract, the definition of commercial speech appears to be fairly straightforward, if somewhat circular: it is speech that ‘propose[s] a commercial transaction.’ In practice, however, application of [the definition is not always a simple matter.]”); see also *Bolger v. Youngs Drug Prods.*

“difficulty of drawing bright lines” identifying commercial speech.¹⁰³ When considering whether speech is commercial or non-commercial under the First Amendment, the California Supreme Court has instructed courts to consider three elements: the speaker, the intended audience, and the content of the message.¹⁰⁴ Evaluating the Joint Utilities’ speech in context, the lobbying restrictions target commercial speech.¹⁰⁵

“In typical commercial speech cases, the speaker is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged.”¹⁰⁶ The Joint Utilities are unquestionably commercial speakers involved in the distribution and sale of electricity.

The second factor, the intended audience, is also satisfied: for commercial speech, “the intended audience is likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers.”¹⁰⁷ Here, the intended audience of the Joint Utilities’ lobbying is local

Corp., 463 U.S. 60, 67 (1983); *Kasky* 27 Cal. 4th at 956 (“Although in one case the [Supreme] court said that this description was ‘the test for identifying commercial speech,’ in other decisions the court has indicated that the category of commercial speech is not limited to this core segment.” (citations omitted)).

¹⁰³ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

¹⁰⁴ *Kasky*, 27 Cal. 4th at 960. The court in *Kasky* limited its test to laws directed at avoiding commercial deception. *Id.* Application of that test is appropriate here because the Code of Conduct is directed at avoiding the kind of commercial deception that led to the passage of SB 790. Regardless, California courts have applied the *Kasky* test—which was distilled from Supreme Court jurisprudence—outside of pure commercial deception claims. *E.g.*, *Law School Admission Council, Inc. v. State*, 222 Cal. App. 4th 1265, 1289-90 (2014).

¹⁰⁵ As previously noted, the definition of “lobbying” under the Code of Conduct includes the requirement that the communication must have as its purpose “convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.” If the Joint Utilities do not have this as their purpose, their communication is not considered lobbying.

¹⁰⁶ *Kasky*, 27 Cal. 4th at 960.

¹⁰⁷ *Id.*

governments. In addition to being potential customers of the Joint Utilities, local governments are also the gateway through which a CCA provides retail service to all other customers.¹⁰⁸ Accordingly, “lobbying,” as used under the Code of Conduct, has a uniquely commercial element to it because it involves communication “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.”

In the Joint Utilities’ communications to governmental officials, the governmental entity is a customer of the Joint Utilities, or a prospective customer of a CCA or a prospective competitor. As a result, the “lobbying” communications are motivated by the Joint Utilities’ interest in disparaging its CCA competitor’s rates and services and by the Joint Utilities’ interest in retaining the governmental entity as a customer. Not only are local governments customers or prospective customers, they are also people likely to repeat the Joint Utilities’ message or otherwise influence actual or potential customers (i.e., the local governments’ constituency). When applying this factor, the California Supreme Court has found that even communications ostensibly directed to the public generally can be targeted to potential customers when the communications “were also intended to reach and influence actual and potential purchasers.”¹⁰⁹ Even if the Commission finds—as the Joint Utilities would have it—that their lobbying communications are solely “directed to governments in their capacity as policymakers for their residents and businesses,”¹¹⁰ those communications are still intended to reach and influence Joint Utilities’ customers—the residents and businesses local governments represent.

¹⁰⁸ D.08-06-016, mimeo at 6. *See also* D.12-12-036, Attachment 1, mimeo at A1-7 to A1-8, Rule of Conduct.

¹⁰⁹ *Kasky*, 27 Cal. 4th at 963.

¹¹⁰ Petition at 27, fn. 78.

Finally, the content of the Joint Utilities lobbying communications are commercial, and the setting of the communications—ostensibly in public meetings in front of government bodies—does not change their commercial nature. Commercial communications are broader than “only statements about the price, qualities, or availability of individual items offered for sale.”¹¹¹ Commercial statements also include “statements about the manner in which the products are manufactured, distributed, or sold,” and “statements about the education, experience, and qualifications of the persons providing or endorsing the services.”¹¹² Such statements are commercial even when they are intertwined with statements that “relate[] to a matter of significant public interest or controversy.”¹¹³ Here, the Joint Utilities’ lobbying statements about “the risk of cost-shifting to a utility’s remaining bundled service customers,” “how to maintain the reliability of the statewide grid,” and “the relationship between the CCA and the utility”¹¹⁴ are statements about Joint Utilities own products and services, which is quintessentially commercial content, even if they touch upon important topics such as cost-shifting, grid reliability, and the relationship of a CCA to the utility.¹¹⁵

The Joint Utilities are commercial entities in the business of selling electricity. Their communications with local governments (which are both customers of the Joint Utilities and

¹¹¹ *Kasky*, 27 Cal. 4th at 961.

¹¹² *Id.*

¹¹³ *Id.* at 964; *see also Bolger*, 463 U.S. at 67-68 (“The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.”); *see also Fox*, 492 U.S. at 474 (finding commercial speech despite expression discussing “how to be financially responsible and how to run an efficient home”).

¹¹⁴ Petition, at 29.

¹¹⁵ Joint Utilities need not specifically identify their product by name for their speech to be a discussion of their product. *Kasky*, 27 Cal. 4th at 957 (“[A] company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names.” (quoting *Bolger*, 463 U.S. at 66, fn. 13)).

representatives of potential customers) on the subject of who local governments and their ratepayers should buy electricity from, is commercial speech.

3. The Lobbying Restrictions Satisfy *Central Hudson*.

Because the speech at issue is commercial in nature, the Commission can properly regulate that speech provided it has a substantial interest in doing so and the regulations advance that interest with a proper fit. Again, as the Commission concluded in D.12-12-036, they do.¹¹⁶

a. The Commission Has a Substantial Interest.

In *Central Hudson*, the Supreme Court found that the State of New York’s regulation of advertisements encouraging the use of electricity were supported by the State’s substantial interests in both energy conservation and ensuring that electricity rates were fair and efficient.¹¹⁷ Likewise, in D.98-12-089, the Commission found a substantial interest in both “promoting competition by preventing cross-subsidization,” and in “promoting customer choice.”¹¹⁸

With respect to CCA programs, the Commission’s interests are equally substantial: “California has a substantial governmental interest in ensuring that conduct by electrical corporations does not threaten the consideration, development, and implementation of community choice aggregation programs.”¹¹⁹ The Code of Conduct also serves the substantial

¹¹⁶ Joint Utilities effectively concede this point by not challenging the Code of Conduct as applied to *marketing* communications, which are clearly commercial speech. If the Commission concludes—as it should—that the lobbying restrictions also target commercial speech, those restrictions are permissible for the same reasons as the marketing restrictions.

¹¹⁷ *Central Hudson*, 447 U.S. at 568-69.

¹¹⁸ D.98-12-089, 1998 Cal. PUC Lexis 917 at *21-23. These interests supported the Commission’s rules “regulating the relationship between a utility and its affiliates, and how the utility communicates with its customers about its affiliates.” *Id.* at *20.

¹¹⁹ SB 790, Section 2(g).

interests of preventing cross-subsidization, ensuring customer choice, and ensuring ratepayers remain “free from forced speech.”¹²⁰

b. The Code of Conduct Directly Advances the Substantial Interests.

The Code of Conduct in general, and the lobbying rules in particular, directly advance the state’s goal of permitting and facilitating the development of CCA programs.¹²¹ As detailed in Section III.A.2 above, prior to the Commission implementing the Code of Conduct, there are countless examples of ways in which PG&E attempted to thwart the development of community choice through lobbying and marketing activities.¹²² Further, because the Joint Utilities’ inherent market power and influence is broad, it is appropriate for the Commission to have broad rules that limit the Joint Utilities wielding such market power (which was granted by the State) to discourage CCA growth. Accordingly, limitations on “lobbying” that operate to neutralize or mitigate the Joint Utilities’ inherent market power directly advances the express interest of the California legislature to ensure that Joint Utilities do not hinder the formation of CCAs through their commercial speech.

c. The Code of Conduct Is Proportional to the Commission’s Interests.

When developing the Code of Conduct, the Commission received extensive public comment (including from the Joint Utilities) on the scope, content, and application of the Code of Conduct’s lobbying and other restrictions. Based on such public comment, the Commission approved rules that were narrowly-tailored to provide CCAs with the opportunity to compete on a fair and equal basis with the Joint Utilities while at the same time preserving the Joint Utilities’

¹²⁰ Cal. Pub. Util. Code § 707(a)(5).

¹²¹ See Assembly Bill No. 117 (2002).

¹²² See *supra*, at 8-10.

free speech rights. For instance, while some parties wanted to restrict the Joint Utilities from providing factual information upon request to local government officials, the Commission decided to allow the Joint Utilities to have such communications because it determined that “a prohibition against a utility providing factual information in response to questions is not in the interests of California consumers.”¹²³

As detailed above in Section III.C.2, the lobbying definition in the Code of Conduct is also narrowly written to only include communications made “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.”¹²⁴ There are also major exceptions to the lobbying definition which allow the Joint Utilities to communicate with local government officials on factual matters involving utility programs, tariffs, and the CCA formation rules and processes.¹²⁵

The Code of Conduct is narrowly tailored so as to comport with the requirements of SB 790. And because the Code of Conduct permissibly regulates the Joint Utilities’ commercial speech, the Commission need not consider whether the Code’s lobbying restrictions are content based, or whether the speech concerns a public issue.¹²⁶

¹²³ D.12-12-036, mimeo at 37 (Finding of Fact No. 6).

¹²⁴ *See supra*, at 20.

¹²⁵ *See supra*, at 21-22.

¹²⁶ *Bolger*, 463 U.S. at 65-68; *see also Kasky*, 27 Cal. 4th at 964 (rejecting the argument that “speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy”); Similarly, because the Code of Conduct regulates commercial speech, the Joint Utilities’ invocation of *Citizens United*, which applied strict scrutiny to regulations banning *political speech*, is inapposite. *See* Petition, at 24; *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318 (2010) (“The Government may regulate corporate *political speech* through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” (emphasis added)); *see also, e.g., Connecticut Bar Ass’n v. United States*, 620 F.3d 81, 92 (2d Cir. 2010) (distinguishing between tests under *Citizens United* and *Central Hudson*).

F. Requiring Ratepayers to Subsidize the Joint Utilities’ Lobbying Would Violate Ratepayers’ First Amendment Rights.

Despite the Joint Utilities’ efforts to cloud the issue, the Code of Conduct does not prevent them from lobbying and does not prevent them from speaking on any issue—whether characterized as a “public issue” or otherwise. Instead, the Code of Conduct prevents them from using *ratepayer money to do so*. Not only is the Code of Conduct’s prohibition on the Joint Utilities’ use of ratepayer funds a constitutional exercise of the Commission’s regulatory authority, granting the Joint Utilities’ request and forcing ratepayers to subsidize lobbying expenditures would violate ratepayers’ First Amendment rights. Indeed, the Code of Conduct’s existing method of protecting ratepayers from subsidizing Joint Utilities’ advocacy *itself* constitutes a compelling interest sufficient to withstand strict scrutiny.¹²⁷

It is a “bedrock principle that, except perhaps in the *rarest of circumstances*, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.”¹²⁸ The California Supreme Court recognized this principle—and its application to utilities’ rate-setting—as early as 1965.¹²⁹ Section 707 and the Code of Conduct animate these

¹²⁷ As discussed, the Code of Conduct is not subject to strict scrutiny because it regulates Joint Utilities’ commercial speech. However, even if the Code were subject to strict scrutiny, avoiding a compelled subsidy of Joint Utilities’ advocacy would constitute a compelling interest. *Walker v. Beard*, 789 F.3d 1125, 1136 (9th Cir. 2015) (“Compliance with the Constitution can be a compelling state interest.”).

¹²⁸ *Harris*, 134 S.Ct. at 2644 (emphasis added); see also *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 321 (2012) (citing cases) (public employee union could not impose special assessment on members who had opted out of political spending, where the assessment was dedicated to political spending); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977) (union could collect fees for collective bargaining activities but not ideological or political activities, as “the Constitution requires ... that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and are not coerced into doing so.”).

¹²⁹ *Pacific Tel. & Tel. Co. v. Pub. Util. Comm’n*, 62 Cal. 2d 634, 670 (1965) (“the cost of legislative advocacy should not be passed on to the ratepayers”).

well-established and uncontroversial principles in the context of the Joint Utilities’ efforts to stymie CCA formation.¹³⁰

The Code of Conduct’s requirements that the Joint Utilities lobby against CCAs only through an independent marketing organization effectuate ratepayers’ rights to be free from compelled speech. Under the First Amendment, “compulsory subsidies for private speech are subject to exacting First Amendment scrutiny,” and Joint Utilities could force ratepayers to subsidize their lobbying activities only if: (1) there is a “comprehensive regulatory scheme involving a ‘mandated association’ among those who are required to pay the subsidy”; and (2) the “fees [are] levied only insofar as they are a ‘necessary incident’ of the ‘larger regulatory purpose which justified the required association.’”¹³¹ Even assuming the first criteria is satisfied, the larger regulatory purpose behind the Joint Utilities’ relationship with ratepayers is the provision of safe, reliable, and affordable electric service. As Section 707 makes clear, the Joint Utilities’ advocacy against CCAs is *not* a “necessary incident” to that purpose. Because the Joint Utilities lobbying expenditures are not a “necessary incident” of providing safe and affordable electricity to Californians, the Joint Utilities may not compel ratepayers to subsidize that activity.¹³²

The Joint Utilities offer two arguments to avoid this conclusion, neither of which withstands scrutiny. First, the Joint Utilities assert a lack of state action, arguing that “[f]or

¹³⁰ See Cal. Pub. Util. Code § 707 (a)(5) (“The code of conduct, associated rules, and enforcement procedures, shall do all of the following: . . . Provide for any other matter that the commission determines to be necessary or advisable to **protect a ratepayer’s right to be free from forced speech** or to implement that portion of the federal Public Utility Regulatory Policies Act of 1978 that establishes the federal standard that no electric utility may recover from any person other than the shareholders or other owners of the utility, any direct or indirect expenditure by the electric utility for promotional or political advertising (16 U.S.C. Sec. 2623(b)(5))(emphasis added)).

¹³¹ *Knox*, 567 U.S. at 310.

¹³² The fact that Joint Utilities’ speech is commercial does not diminish ratepayers’ rights to be free from a compelled subsidy. *United States v. United Food*, 533 U.S. 405, 409-10 (2001).

purposes of constitutional analysis, government-regulated utilities like the Joint Utilities are generally treated as private actors, not government actors.”¹³³ This argument confuses the applicable legal standard. The Supreme Court has held that “compelled funding of the speech of *other private speakers or groups* presents the same dangers as [government] compelled speech.”¹³⁴ Whether or not the Joint Utilities are private actors does not determine whether ratepayers may be compelled to subsidize their speech.

The Joint Utilities appear to be asserting that since they are not “generally” state actors *vis a vis* private citizens, the Commission has no interest in protecting ratepayers against the Joint Utilities’ anti-CCA lobbying. If that were the case, the California Supreme Court would have never protected ratepayers from subsidizing the Joint Utilities’ political advocacy in the first instance, because Joint Utilities are not state actors.¹³⁵ Moreover, because the Joint Utilities assess Commission-approved electric rates that must be paid by their customers, they *are* state actors.¹³⁶ In any event, the Joint Utilities’ only cited authority for this proposition did not consider whether a ratepayer’s compelled subsidy of a utility’s lobbying offends the First Amendment—the plaintiffs in that case were not even customers of the defendant utilities.¹³⁷

Second, the Joint Utilities argue that if their speech “were assumed to be state action, expenditures of money for speech that is ‘germane’ to a utility’s mission would not infringe on a

¹³³ Petition at 28-29 and fn. 85 (citing *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 746 (9th Cir. 2003)).

¹³⁴ *Harris*, 134 S. Ct. at 2639 (emphasis added) (citation omitted).

¹³⁵ See *Pacific Tel. & Tel. Co. v. Pub.Util Comm’n.*, 62 Cal. 2d 634, 670 (1965).

¹³⁶ See e.g., *Sable Commc’ns of Cal., Inc. v. Pac. Tel & Tel. Co.*, 890 F.2d 184, 188-89 (9th Cir. 1989); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (union shop, though private actor, satisfied state-action requirement for First Amendment claim where it was authorized by statute (citing *Railway Emp. Dept. v. Hanson*, 351 U.S. 225 (1956))).

¹³⁷ *Single Moms*, 331 F.3d at 746.

customer’s right to be free from forced speech.”¹³⁸ There are several flaws with this argument. Primarily, the argument ignores the definition of lobbying in the Code of Conduct. The Code of Conduct does not generally prohibit “[c]ommunicating with local governments or the press on CCA-related issues,”¹³⁹ it prohibits the narrow category of communications “for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program.” *That* activity—which is the only activity the lobbying restrictions in the Code of Conduct reaches—is not germane to the Joint Utilities’ mission of providing safe, reliable and affordable electric service. As discussed above, the lobbying activities the Code of Conduct targets do nothing but harm consumer choice and enable the utilities to leverage market power and engage in cross-subsidization.¹⁴⁰ The argument also confuses expenditures being “germane” to Joint Utilities’ *own purposes* with the expenditures being germane to the *larger purpose* of ratepayers’ mandated association with the Joint Utilities.¹⁴¹ If measured by the former standard, *any* expenditure would be “germane,” but the only expenditures that the Joint Utilities may force ratepayers to pay for are those germane to the State’s purposes.¹⁴²

Finally, even if the Commission could require ratepayers to subsidize the Joint Utilities’ advocacy under the First Amendment—which CalCCA disputes for the reasons above—that does not mean the Commission could require such a subsidy under California law. Whether or

¹³⁸ Petition at 29.

¹³⁹ *Id.*

¹⁴⁰ *See supra* Section III.A.

¹⁴¹ *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (“Here the compelled association and integrated bar is justified *by the State’s interest* in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane *to those goals* out of the mandatory dues of all members.” (emphases added)).

¹⁴² *Cf. Knox*, 567 U.S. at 320-21 (rejecting attenuated arguments of “germaneness”).

not an activity is “germane” to Joint Utilities under the First Amendment, “the cost of legislative advocacy *should not be passed on to the ratepayers.*”¹⁴³

IV. CONCLUSION

For the reasons stated above, CalCCA respectfully requests that the Commission deny the Joint Utilities’ Petition.

Respectfully submitted,

By: /s/ _____
Patrick Ferguson
Vidhya Prabhakaran
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Email: patrickferguson@dwt.com
Email: vidhyaprabhakaran@dwt.com

Scott Blaising
Braun Blaising Smith Wynne, P.C.
915 L Street, Suite 1480
Sacramento, CA 95814
Tel. (916) 993-3165
Email: blaising@braunlegal.com

March 1, 2018

Attorneys for CalCCA

¹⁴³ *Pacific Tel. & Tel. Co. v. Pub. Util. Comm’n.*, 62 Cal. 2d 634, 670 (1965) (prohibiting including the cost of legislative advocacy in rates despite the fact that legislation “would affect the telephone service,” and “[e]ven conceding that such activity in a given instance may prove beneficial to ... ratepayers.”).