BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Petition of the Alliance for Retail Energy Markets [et al.] to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5	Petition 06-12-___

P0612002

PETITION OF ALLIANCE FOR RETAIL ENERGY MARKETS, 3 PHASES ENERGY SERVICES, AOL UTILITY CORP., APS ENERGY SERVICES COMPANY, INC., ARDEN REALTY, BUILDING OWNERS AND MANAGERS ASSOCIATION OF CALIFORNIA, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE UNIVERSITIES, CALPINE POWERAMERICA-CA, LLC, COMMERCE ENERGY INC., COMMERCIAL ENERGY OF CALIFORNIA, CONSTELLATION ENERGY COMMODITIES GROUP, INC., CONSTELLATION GENERATION GROUP, LLC, CONSTELLATION NEWENERGY, INC., CORAL POWER, L.L.C., DIRECT ACCESS CUSTOMER COALITION, DUNN-EDWARDS CORPORATION, ENERGY AMERICA, LLC, FEDERATED DEPARTMENT STORES, INC., FOOD & BEVERAGE ASSOCIATION OF SAN DIEGO, FRANCHISE INVESTMENT CORPORATION, GUARDIAN INDUSTRIES CORP., KINDER MORGAN ENERGY PARTNERS, L.P., LOS ANGELES COUNTY SANITATION DISTRICT, MACY'S WEST, PILOT POWER GROUP, INC., RED MOUNTAIN RETAIL GROUP, INC., REGENTS OF THE UNIVERSITY OF CALIFORNIA, SCHOOL PROJECT FOR UTILITY RATE REDUCTION, SEMPRA ENERGY SOLUTIONS LLC, SILICON VALLEY LEADERSHIP GROUP, STRATEGIC ENERGY, SWEETWATER UNION HIGH SCHOOL DISTRICT, WAL-MART STORES, INC. AND THE WESTERN POWER TRADING FORUM TO ADOPT, AMEND, OR REPEAL A REGULATION PURSUANT TO PUB. UTIL. CODE § 1708.5

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and on behalf of Petitioners named above and the Supportive Entities named below

December 6, 2006

List of Supportive Entities

The following entities join with the parties named in this Petition in calling upon the Commission to institute a rulemaking and investigation into how the direct access market can be reopened in California. The fundamental right of choice has now been denied to all but a few existing direct access customers for over five years and other California commercial and industrial end-users, schools, healthcare and other community organizations need to have the ability to choose their electricity provider restored as expeditiously as possible.

1. 7-Eleven, Inc.
2. Action Electronics
3. Alameda County Office of Education
4. Albertsons
5. Allied Office Plaza, LLC
6. Alta Office Services
7. Appletree Montessori
8. AVI Commercial Insurance Marketing
9. AZ Manufacturing
10. Bakersfield Mall LLC
11. Bay Shore Mill Partners
12. Blair Reprographics
13. BOC Gases
14. Boeing Company
15. Bon Bon Candy
16. Bonded Cleaners and Laundry
17. The Book Corral
18. Boss Paint & Body, Inc.
19. Boston Properties Limited Partnership
20. BPS Reprographics
21. Bristol Farms
22. Brownies Digital Imaging
23. BST Investments
24. Budget Uniform
25. Burger King
26. C.V. Center, Inc.
27. Cable Maintenance Group, Inc.
28. California Portland Cement Company
29. Caltronics Circuits, Inc.
30. Cargill, Incorporated
31. Carlsbad Floral Mart, LLC
32. Carlsbad-USD&T, Inc
33. Centennial Management Corp.
34. Chabot – Las Positas Community College District
35. Chavers Gasket Corp.
36. Community College League of California
37. Consolidated Reprographics
38. Container Supply Co., Inc.
39. Dairy Queen
40. Daley Foods of Cudahy (McDonald's)
41. Daley Olsen Corp. (McDonald's)
42. Deep Valley Enterprises Inc.
43. Discovery Isle Child Development Center, Inc.
44. Dob-Sab, Inc.
45. Dyco Metal Specialists
46. Eastridge Shopping Center LLC
47. Eureka Union School District
48. Finishline Tires & Automotive
49. Foothill-DeAnza Community College District
50. Ford Graphics
51. Forest City Commercial Management, Inc.
52. Fowler Unified School District
53. Fresh Squeeze
54. Gavino Management
55. Garp Properties LLC
56. GC Aero Inc.
57. GGP – Alameda Mall Associates
58. Glenborough Realty
59. Grant Joint Union High School District
60. HG Foods LLC
61. Huntington Beach Chrysler Jeep
62. Impressive Printing and Graphics
63. Industrial Environmental Association

64. Irvine Valley College
65. J&K Manufacturing, Inc.
66. Jeronimo Cleaners
67. Keith's Restaurant
68. Kilroy Realty
69. KimDun Inc.
70. KNJ, Inc.
71. Kroger Co. (dba Ralphs Grocery Company)
72. La Jolla Country Club
73. Long Beach Community College District
74. Lost Arrow/Patagonia, Inc.
75. Lyons Magnus, Inc.
76. Macerich Company
77. Major Markets
78. Manteca Unified School District
79. Marine Air
80. Marriott International
81. Metropolitan Education District
82. Metropolitan Utilities
83. Modular Manufacturing Holdings, Inc.
84. Montessori on the Lake
85. Moxie Java
86. NAQC Systems
87. National Gypsum Company
88. Net Runner Global, Inc.
89. Oakley
90. OCB Reprographics
91. Palomar Community College District
92. Pase Aluminum, Inc.
93. PPG Aerospace/PRL DeSoto International
94. Peninsula Digital Imaging
95. Precise Plastic
96. Prenova, Inc.
97. Qualcomm Incorporated
98. R. Daley Corp. (McDonald's)
99. Redwood City School District
100. Reliable Reprographics
101. Resource Asset Management
102. Ron Milk Corp.
103. Ross School District
104. Round Table Pizza
105. S&W Merchandising
106. Salon Heavener
107. San Diego Regional Chamber of Commerce Energy Committee
108. San Diego International Floral Trade Center
109. San Jose Blue
110. San Jose Unified School District
111. San Mateo County Community College District
112. San Ramon Valley Unified School District
113. Santa Clara Unified School District
114. Santa Cruz City Schools
115. Santa Cruz County Superintendent of Schools
116. Santa Rosa Junior College
117. Saratoga Restaurant Systems, Inc.
118. Scotts Temecula Operations, LLC
119. Shaw Industries Inc.
120. Shaw Diversified Services
121. Sierra College
122. Sierra Pacific Industries
123. Simon Properties
124. Sizzler
125. Sohrabi Enterprises, Inc.
126. Specialty Mfg., Inc.
127. Spectrum Printing Systems
128. Sprout's Market
129. Stockton Blue
130. Stockton Unified School District
131. Sunflower Montessori
132. Symbolic Displays, Inc.
133. Systech Displays
134. Taipan Restaurant, Inc.
135. TMX Engineering
136. TNE Toro Company
137. Tracy Mall Partners, L.P.
138. Transwestern
139. Turtle Rock Preschool
140. URM Group
141. USAA Real Estate Company
142. Vallejo City Unified School District
143. Victor Valley College
144. Wells Fargo Bank, N.A.
145. Wendy's International, Inc.
146. Williams-Sonoma, Inc.
147. XZX Electronics Inc.

TABLE OF CONTENTS

I. INTRODUCTION 3

II. BACKGROUND 6

III. THERE ARE GOOD REASONS TO LIFT THE SUSPENSION OF DIRECT ACCESS AND NO LONGER RESTRICT CUSTOMER CHOICE AS THE REASONS THAT LED TO ITS SUSPENSION HAVE ALL BEEN ADDRESSED. 9

IV. A WELL-DESIGNED RETAIL ELECTRICITY MARKET WILL STIMULATE THE WHOLESALE MARKET, CLARIFY THE UTILITIES' PROCUREMENT AND DEFAULT SERVICE OBLIGATIONS AND PROVIDE MUCH-NEEDED CERTAINTY TO THE STATE'S ENERGY POLICIES. 14

- A. Prevailing Economic Thought Continues to Support Competitive Retail Markets in Electricity...14
- B. Competitive Markets Lead to Efficient Allocation of Resources, with Economic and Environmental Benefits for California Consumers.......................15

V. VARIOUS LEGAL THEORIES SUPPORT THE PRINCIPLE THAT DIRECT ACCESS SHOULD BE REOPENED 16

- A. The Legislature Did Not Intend for the Suspension of Direct Access to Continue Indefinitely. 16
- B. The Commission Has Already Determined That the Statute Requires Interpretation and That the Primary Rationale for the Suspension of Direct Access Was to Eliminate Cost Shifting. Having Addressed Cost Shifting, the Commission May Now Consider Whether Direct Access May be Reinstituted. 17
- C. Principles of Statutory Interpretation would Justify the Commission Acting to Lift the DA Suspension..20

VI. ISSUES REQUIRING INVESTIGATION 27

VII. CONCLUSION – THE RIGHT OF CHOICE IS FUNDAMENTAL.............................28

ATTACHMENT A - COMPLIANCE WITH RULE 6.3

ATTACHMENT B - VERIFICATION

ATTACHMENT C - LIST OF DOCKETS THAT HAVE RECEIVED SERVICE OF THIS PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Petition of the Alliance for Retail Energy Markets [et al.] to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5	Petition 06-12-___

PETITION OF ALLIANCE FOR RETAIL ENERGY MARKETS, 3 PHASES ENERGY SERVICES, AOL UTILITY CORP., APS ENERGY SERVICES COMPANY, INC., ARDEN REALTY, BUILDING OWNERS AND MANAGERS ASSOCIATION OF CALIFORNIA, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE UNIVERSITIES, CALPINE POWERAMERICA-CA, LLC, COMMERCE ENERGY INC., COMMERCIAL ENERGY OF CALIFORNIA, CONSTELLATION ENERGY COMMODITIES GROUP, INC., CONSTELLATION GENERATION GROUP, LLC, CONSTELLATION NEWENERGY, INC., CORAL POWER, L.L.C., DIRECT ACCESS CUSTOMER COALITION, DUNN-EDWARDS CORPORATION, ENERGY AMERICA, LLC, FEDERATED DEPARTMENT STORES, INC., FOOD & BEVERAGE ASSOCIATION OF SAN DIEGO, FRANCHISE INVESTMENT CORPORATION, GUARDIAN INDUSTRIES CORP., KINDER MORGAN ENERGY PARTNERS, L.P., LOS ANGELES COUNTY SANITATION DISTRICT, MACY'S WEST, PILOT POWER GROUP, INC., RED MOUNTAIN RETAIL GROUP, INC., REGENTS OF THE UNIVERSITY OF CALIFORNIA, SCHOOL PROJECT FOR UTILITY RATE REDUCTION, SEMPRA ENERGY SOLUTIONS LLC, SILICON VALLEY LEADERSHIP GROUP, STRATEGIC ENERGY, SWEETWATER UNION HIGH SCHOOL DISTRICT, WAL-MART STORES, INC. AND THE WESTERN POWER TRADING FORUM TO ADOPT, AMEND, OR REPEAL A REGULATION PURSUANT TO PUB. UTIL. CODE § 1708.5

The parties named above ("Petitioners") respectfully submit this petition ("Petition") [1] requesting that the Commission immediately commence a rulemaking, or open an investigation in order to adopt a regulation and establish rules with respect to how and when the Direct Access ("DA") retail market should be reopened in California.[2] The investigation should be conducted such it may be concluded by July of 2007, so that the DA market can be reopened no later than

[1] This Petition is filed pursuant to Section 1708.5 of the Public Utilities Code and in accordance with Rule 6.3 of the Commission's Rules of Practice and Procedure. Attachment A hereto provides a detailed explanation of the steps taken by Petitioners in order to comply with the requirements of Rule 6.3.

[2] Each of the Petitioners supports the reopening of the DA market. However, each of the Petitioners also reserves its respective rights to address specific issues as they arise in the course of the requested rulemaking or investigation.

January 1, 2008. In addition to the thirty-eight Petitioners named above, we provide following the title page of this filing a list of one hundred forty-seven Supportive Entities that endorse the goals of this Petition and join in the call for California electricity consumers to once again benefit from competitive choice in selecting an electricity supplier. The one hundred eighty-five Petitioners and the Supportive Entities include public and private entities such as schools, universities and trade associations, small commercial, large commercial and industrial customers, including both existing bundled service and direct access service end-users. This petition represents a broad-based call for the Commission to investigate the restoration of the right of consumers to have a competitive choice of electricity providers in the State of California.

I. INTRODUCTION

The right of electric customers to acquire DA service was suspended over five years ago by the Commission as a *temporary* measure to help California weather the electricity crisis in 2000-2001.[3] Due to many other actions that the Commission and the Legislature took, the crisis is now well behind us, and the purposes for which DA was suspended have either been served, addressed through other means, or no longer pertain. The continued imposition of the suspension of DA as a permanent regulatory condition is unnecessary, counter-productive and overly restrictive for California consumers. Moreover, in the November 2005 special election, Californians sent a clear signal from the polls in support of competitive energy markets and against further constraints on customers exercising choice.[4] Accordingly, it is the Petitioners' and the Supportive Entities' belief that the time has come for the Commission to commence a rulemaking immediately and to complete an investigation in time to allow for the reopening of the retail electricity market no later than January 1, 2008. We note also that restoring direct access is supported fully by the Schwarzenegger administration. In his signature message accompanying SB 423,[5] Governor Schwarzenegger wrote:

[3] AB 1X added Water Code §80110, which authorized suspension of the "right of retail end use customers … to acquire service from other providers until [DWR] no longer supplies power hereunder," effective as of a date to be determined by the CPUC.

[4] In the November, 2005, special statewide election, Proposition 80 which would have eliminated the right for direct access to be reopened, lost by the largest margin of any proposition on the ballot, with 65.6% of the electorate voting in opposition.

[5] SB 423(2006) permits the donation of electricity supply to nonprofit charitable organizations.

> Restoring direct access in order to increase competition and lower prices to retail electricity customers is a cornerstone of my Energy Action Plan. I have supported several legislative attempts to address this issue during my tenure. Senate Bill 423 restores direct access – only if the energy service provider gives the electricity away. While I commend the legislature for recognizing the merits of direct access and acting upon them, this narrow exemption exemplifies the challenges of implementing meaningful energy policy reform in California. I strongly encourage the Legislature to pass legislation that reinstates direct access and increases consumer choice in California.

While there has been considerable debate in the Legislature over the past several years regarding the restoration of DA, it appears as though the debate hinges on several issues of fact which the Commission is preeminently qualified to resolve. These matters include: (1) addressing alleged and potential cost shifting concerns; (2) defining customer eligibility to participate in competitive retail markets; and (3) clarifying the utilities' procurement role as it relates to providing bundled default service. Rather than continuing to debate these topics in many varied forums, a Commission proceeding and investigation can serve as the forum for a full airing of the issues among all stakeholders and, if so determined, action to lift the current suspension.

The Commission's investigation and rulemaking on reopening the retail electricity market will necessarily encompass many issues, some of which are discussed briefly in Section VI below. These issues include: (1) whether the Commission has the requisite statutory authority to determine when to reopen the direct access market; (2) the type of retail market structure to be adopted; (3) the treatment of customers that do not elect retail choice; (4) the adoption of rules regarding customers switching between competitive service and default service; (5) assuring recovery of bond costs; and (6) making sure that public purpose program charges continue to be collected from all customers. Undoubtedly this list will expand as the Commission moves forward with its order instituting the rulemaking and investigation:

Petitioners believe that the Commission can, on its own initiative at any time, lift the current suspension and re-establish a DA market without the need for new legislation. However, even if the Commission determines that additional legislative action is required to lift the suspension now, the issues raised in this petition still need to be addressed. Addressing the issues in a Commission forum would inform future debate at the Legislature. Commission action now to commence an investigation would supply a factual basis for the debate and would provide the Legislature with the Commission's considered judgment on the issues, based on a

hearing of all stakeholders in an orderly proceeding. Accordingly, Petitioners seek an order from the Commission to commence a rulemaking and institute an investigation on restoring the availability of direct access service so that customers can once again exercise their right to retail choice of electricity suppliers no later than January 1, 2008.

The Commission already has the authority to implement the DA market. In its exercise of that authority, the Commission must interpret the applicable statutes and determine whether, and when, it has the authority to reopen the DA market. In the absence of action by the Commission or the Legislature, conventional wisdom presumes that the suspension of DA will end with the expiration of the California Department of Water Resources ("DWR") contracts. At that time, the entire market will be reopened and all utility customers will be free to choose a provider, without restriction. As was the case prior to September 20, 2001, and may be the case prospectively if no action is taken, all customers, from the largest industrial to the smallest residential user would once again have the right of retail choice. It may be that a full reopening of the DA market without further Commission or legislative action is precisely what should happen. But the Commission should also consider whether alternative retail market structures may be preferable.

For example, there has in recent years been a good deal of discussion and official support for reopening the market under a "core/noncore" market structure. This market structure would be analogous to the model that has existed quite successfully in California's natural gas market for over 15 years and would be a more modest alternative to a complete market reopening. Petitioners believe any adopted market model should facilitate the interests of any and all customers who wish to participate in the retail market and not exclude those customers who most desire retail choice. The exercise of the right of choice should not accrue solely to the largest of customers, as choice is a fundamental right that should not be casually restricted.

Other market structures may also be worthy of consideration. For example, DA could be re-opened in the areas in which the cost responsibility surcharge ("CRS") undercollection has been fully recovered or in proportion to the expiring DWR contracts and load growth in a given utility service territory. Petitioners do not advocate any particular market structure at this time. Indeed, it is highly likely that individual Petitioners may disagree with each other on an optimal market structure.

The point is that it is timely for the Commission to commence a rulemaking and institute an investigation to guide the discussion proactively and provide a meaningful forum for the public to debate this topic. In California, customer choice has now been suspended for new locations and new customers for over five years, and we are long past both the wholesale market crises that gave rise to such a draconian measure and the need for its continuation. It is therefore appropriate for this Commission promptly to commence a rulemaking, open an investigation and adopt a regulation specifying how the direct access retail market should be reopened in California in 2008. We discuss below the implications and issues that should be considered in connection with such an endeavor.

II. BACKGROUND

A primary goal of electric industry restructuring was to enable retail customers to access the competitive wholesale market and to eliminate any threat of market power abuse by any party or market participant that could inhibit retail competition. The Commission's initial investigation and rulemaking into electric industry restructuring[6] led to the issuance of the landmark Preferred Policy Decision,[7] which set forth a view of a more competitive electricity industry that was expected to allow retail customer choice, promote wholesale competition, and reduce electricity prices. It is important to recall the Commission's rationale for enabling DA, as expressed in the Preferred Policy Decision:

> From the beginning, our policy preference has inclined strongly in the direction of competition and market mechanisms. As we move from the realm of theoretical discussion toward deployment, our task is to ensure that the competition is genuine and market mechanisms are open to competitive entrants and transparent to those who must depend upon their function. [8]

In this clear and unambiguous statement, the Commission decreed its strong preference for genuine competition and a transparent market that is open and attractive to new entrants.

The Commission subsequently issued a series of decisions designed to facilitate the introduction of competition into California's electricity industry. Pursuant to Assembly Bill

[6] R.94-04-031, I.94-04-032.

[7] *Preferred Policy Decision*, D.95-12-063, as modified by D.96-01-009.

[8] *Preferred Policy Decision*, [*mimeo*] at p. 5.

("AB") 1890,[9] the Commission opened the retail electricity market to competition in 1998, with all customers of the state's major investor-owned utilities ("IOUs") eligible for DA service. Generally speaking, from the beginning in 1998, the competitive retail market operated smoothly and DA was largely considered to be a success. However, the electricity crises of 2000-2001 precipitated major changes not only in the DA market but also in the entire California energy market.

On January 17, 2001, Governor Davis proclaimed that a "state of emergency" existed within California as the result of unanticipated shortages in generation resources and the resulting sustained dramatic increases in wholesale electricity prices that were putting the financial health of the IOUs in jeopardy. The Governor's Proclamation and the subsequent passage of AB 1X directed the DWR to procure power on behalf of the customers of the state's IOUs. AB 1X also directed the Commission to suspend the right of consumers to acquire direct access service, effective as of a date to be determined by the Commission.[10]

Pursuant to AB 1X, the Commission suspended DA effective September 20, 2001.[11] Since that time, customer eligibility for DA service is limited to customers who are currently on DA service or otherwise had arrangements in place at the time the suspension went into effect. To keep bundled customers "indifferent" to the migration of load to DA during the summer of 2001 (i.e., before the suspension went into effect) and to ensure that DA customers pay their portion of DWR power supply procurement costs, the Commission also established the DA Cost Responsibility Surcharge[12].

DA customers, as a group, comprise an impressive cross-section of the California business economy. Current DA customers include manufacturers, agricultural customers, retail malls and stores, restaurants and fast-food chains, hotels, hospitals, and schools and universities, as well as tens of thousands of residential customers and small businesses. Based on the Commission's own statistics, DA represents approximately 27.3% of large industrial (greater than 500kW) statewide load; 13.2% of large commercial (20-500kW) statewide load; and

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[9] Chapter 854, Statutes of 1996.

[10] Water Code § 80110.

[11] D.01-09-060, (Sept. 20, 2001).

[12] D.02-11-022, (Nov. 7, 2002); *see also,* D.01-09-060.

10.43% of total load of the state's IOUs.[13] Should direct access be reopened, these levels could be expected to increase as existing and additional customers elect to exercise their right of competitive choice.[14]

In fact, at the height of the market, DA service represented approximately 42.8% of large industrial statewide load; 17.4% of large commercial statewide load; and 15.9% of total load of the state's IOUs.[15] However, the suspension of new DA has led to reduced activity by retail suppliers in the state and a concurrent decrease in the total amount of load that is DA. Moreover, the continued suspension of new DA service has had a deleterious affect on customers who were already on direct access. A review of the Commission's DA statistics reveals that since its peak in February, 2003, when DA represented 15.9% of statewide load, it has declined steadily to its current level of approximately 10.43%.[16] Effectively, the suspension has created two worlds; one in which a minority of customers have retail choice, while the remainder do not.

This affects competition in a multitude of industries, as over one-quarter of current industrial customers enjoy the benefits of DA service while those same benefits are not available to other customers in the same and other market segments. The message sent to customers moving to the state is that they cannot have choice because they happened to move into California after September 20, 2001. This is the wrong message to send to businesses looking to invest in the state by building new facilities or expanding existing facilities in California. Moreover, many of these customers are familiar with retail choice and exercise their right to it when it is available to them in other states. This may make it more attractive to locate or expand out of the state or not to relocate to California. For customers who value retail choice, this puts the California economy at a distinct disadvantage with other large states that offer retail choice.

By means of comparison, it should be noted that the State of New York has permitted retail choice since 2000, and that 76.2% of its large commercial and industrial customers, 48% of small/medium commercial and industrial customers and even 10.3% of its residential customers

[13] *See*, Supplemental Direct Access Implementation Activities Report, Statewide Summary, October 15, 2006, at http://www.cpuc.ca.gov/static/energy/electric/electric+markets/direct+access/00thru05.htm

[14] Also, existing DA customers who have opened new facilities in California during the last five years could add such facilities to existing DA contracts. Such additions have been forbidden under the suspension rules.

[15] *See*, Supplemental Direct Access Implementation Activities Report, Statewide Summary, March 15, 2003.

[16] Id.

have exercised the right of choice.[17] Statistics like these demonstrate both that there is a strong desire among consumers for the right of choice and that retail choice can in fact be a popular program in a major industrialized state such as California, provided the market rules are fair and well designed to promote a competitive market.

Finally, it is critical to ask why customer choice should continue to be restricted for the majority of electricity consumers. Our state's consumers and businesses enjoy choice with regard to a number of other commodities and formerly monopoly services such as natural gas, telecommunications and now cable television service, with the recent passage and signing of Assembly Bill 2987.[18] We casually accept that it is our right to choose our wireless provider, natural gas provider, internet service provider and gasoline marketer. Yet we continue to deny choice for the majority of electricity consumers based on a rationale whose purpose has been served and whose time has passed. It is time to restore freedom of choice to California's electricity consumers, and the Commission can and should lead the way in sponsoring the public debate, discussion and eventual implementation of such a change.

III. THERE ARE GOOD REASONS TO LIFT THE SUSPENSION OF DIRECT ACCESS AND NO LONGER RESTRICT CUSTOMER CHOICE AS THE REASONS THAT LED TO ITS SUSPENSION HAVE ALL BEEN ADDRESSED.

The Legislature's directive to suspend the right to acquire direct access is set forth in Water Code § 80110, which, like other Water Code provisions enacted by AB 1X, generally concerns DWR's procurement of power on behalf of bundled IOU customers and the recovery of associated costs. AB 1X's major provisions authorized DWR to enter into contracts for power for resale to the IOUs' customers and directed the Commission to assess customer cost responsibility surcharges to enable DWR to recover its costs. The Act also authorized the issuance of state bonds to finance the costs of DWR's previous power purchases and related obligations, with authorization for the Commission to assess customer surcharges to recover bond-related costs.[19]

[17] New York Power Shopping, August 2006. Source, New York Public Service Commission. All percentages reflect MWh on a statewide basis.

[18] Nunez (Chapter 700, Statutes of 2006).

[19] *See*, D.02-10-063, at p. 2: "Sections 80110 and 80134 of the Water Code entitle DWR to recover the revenues needed to repay bond-related costs and require that this Commission impose charges on electric customers to effectuate cost recovery.

Other than the generic directive that these provisions "shall be construed in a manner so as to effectuate the purposes and objectives thereof,"[20] the Legislature's reasons for directing the Commission to suspend DA are not stated in AB 1X. When the Commission suspended DA pursuant to AB 1X, however, it cited three purposes that would be served by the suspension:

- DWR would be assured a stable customer base from which to recover its bond-related costs, thereby facilitating issuance of the DWR bonds at investment grade;
- DWR would be assured a stable customer base from which to recover its ongoing procurement costs; and
- Preventing additional customers from switching to direct access service would prevent DWR costs being shifted to the IOUs' remaining bundled customers.[21]

In a later analysis of AB 428, which would have established a core/non-core market structure, the Senate Energy Committee confirmed that these were the intended purposes of suspending direct access:

> To ensure the predictable revenue stream necessary for long-term contracts, the issuance of ratepayer-backed revenue bonds, and prevent cost-shifting from direct access to bundled service customers, the CPUC was directed to suspend direct access to prevent additional migration of IOU customers.[22]

In the intervening five years, all of the aforementioned conditions cited for the suspension have been addressed by the Commission. In particular:

- the DWR bonds were successfully issued at investment grade and the Commission has established a non-bypassable cost responsibility surcharge to recover bond-related costs from all customers;[23] and
- the Commission has established IOU charges to recover ongoing DWR contract costs from bundled customers, and the CRS mechanism to ensure that DA customers pay their "fair share" of such costs.[24]

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[20] Water Code § 80003(b).

[21] D.01-09-060, pp. 4, 5-6 and 8.

[22] Senate Energy Committee Analysis of AB 428, July 8, 2003.

[23] D.02-10-063, 221 P.U.R.4th 409, 2002 Cal. PUC LEXIS 678 (Oct. 24, 2002).

[24] D.02-11-022, *supra*, n. 5.

Therefore, the re-opening and restoration of the direct access market will neither affect the revenue stream necessary to service the bonds nor result in any stranding or shifting of bond-related charges.

In a successful workshop process that developed the methodology for the cost responsibility surcharge associated with DWR contract costs, a methodology adopted in D.06-07-030, it became clear that the CRS mechanism will not result in cost-shifting from DA to bundled customers. In fact, it was confirmed in the decision that the CRS undercollection in SDG&E's and PG&E's service territories has been paid off[25] and both utilities have an overcollection of CRS that has been or will be returned to customers. Further, at expected accrual and collection rates, SCE's undercollection balance is expected to reach zero before the end of 2008[26] and the CRS on a going forward basis is expected to be considerably less than the 2.7 cent cap. Therefore, the DWR revenue stream is secure; protections are in place to ensure that DWR costs are not being shifted to bundled customers from the migration of additional load to DA; and those costs will be FULLY recovered from current DA customers even though the DWR contracts may continue for several more years.

Furthermore, it is important to note that the allegedly high-priced DWR contracts no longer look so expensive. At the time the contracts were executed and DA was suspended, there was a concern that customers might migrate to direct access to avoid the cost of the DWR contracts. The CRS was imposed to assure that DA customers would pay any above-market portion of those contracts (though it should be remembered that DA customers do not receive DWR power). The increase in natural gas costs nationwide and the resultant increase in publicly-quoted power prices mean that today the DWR contracts represent a reliable source of economical power for bundled service customers.

It is also notable that DWR's procurement authority has expired and the IOUs have resumed their procurement responsibilities. DWR's contracting authority under AB 1X terminated almost four years ago, on January 2, 2003, with the IOUs resuming responsibility for procuring power for their retail customers pursuant to AB 57 the day before. In a procurement-related decision, the Commission explained the purpose of these measures as follows:

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[25] D.06-07-030, at pp. 5-6, 23.

[26] D.06-07-030, at p. 23.

> Without question, the procurement statutes were designed to ***extricate DWR from the business of procuring energy*** for the retail customers of the electric utilities. That is evidenced in part by the termination of DWR's authority to do so as of January 1, 2003, pursuant to ABX1-1 and Water Code §80260. The Legislature therefore enacted a framework for the Commission to oversee the administration, operation and dispatch of the DWR contracts, pursuant to §454.5, ***so that the utilities could resume procuring electricity*** for their retail customers.[27] [Emphasis added]

Therefore, the original legislative and Commission concern that customer migration to DA would interfere with DWR's contracting is now moot as DWR now engages in no contracting efforts to supply new power to Californians.[28] The Commission has also acted to ensure that DA customers and the electric service providers ("ESPs") that serve them are subject to the same overall state policy goals that affect IOUs. For example:

- The Commission has established Resource Adequacy Requirements for all LSEs to ensure existing generation is retained and stimulate investment in new generation resources.[29]
- The Commission has recently approved a new cost allocation methodology in the Long-Term Procurement Proceeding.[30]
- In response to the Legislature's acceleration of the renewable portfolio standard for all retail sellers to 20% by 2010, the Commission has instituted proceedings and directed that the RPS requirements apply to ESPs.[31]
- In response to the recently-passed greenhouse gas ("GHG") legislation, the Commission is in the process of establishing a GHG emissions reduction requirement on all load-serving entities, including ESPs.
- Further, the approval of the implementation of Automated Meter Interface ("AMI") technology by the Commission present the perfect opportunity for direct access, as IOUs cannot custom-design rates for individual customers. If the Commission wants to

[27] *See,* D.03-06-074, *mimeo*, p. 9.

[28] Water Code §80260. "On and after January 1, 2003, the department shall not contract under this division for the purchase of electrical power. This section does not affect the authority of the department to administer contracts entered into prior to that date or the department's authority to sell electricity."

[29] *See*, D.05-10-042, at pp. 11-12.

[30] *See*, D.06-07-029.

[31] *See*, D.05-11-025.

promote demand response and energy efficiency, then it should be advancing "price transparency" to customers through the AMI program, coupled with the restoration of retail choice.

Therefore, concerns that reopening DA could result in un-allocable stranded costs or could delay the implementation of important public policy initiatives have been shown to be addressed.

In view of all these important developments, the Commission has reiterated its commitment to customer choice and acknowledged that the time may be ripe for considering how to increase it. In D.06-07-029, issued in the long-term procurement proceeding (R.06-02-013), the Commission stated that:

> With this decision today, the Commission seeks to signal that it is committed to the fundamental principles that have guided electricity market restructuring in California and elsewhere: competition and customer choice. In particular, we intend to pursue policies to develop and maintain a viable and workably competitive wholesale generation sector in order to assure least cost procurement for bundled utility customers. **At an appropriate juncture, in another proceeding, we intend to explore how we may increase customer choice, by reinstituting DA or via other suitable means**.[32]

Continuing the suspension of DA into the foreseeable future, without a clear road map, helps to create a sense of regulatory uncertainty that may be seen by some as one of the causes frustrating speedy resolution of other market design issues. Reopening the retail market to competition in 2008 will be just one additional signal that California has put the crisis of 2000-2001 behind it and may very well be the act that increases confidence in the state's direction for its energy markets, resulting in a reassured climate for new investment in the state. In summary, there is no valid reason to continue the suspension of direct access. Therefore, it is appropriate and timely for the Commission to begin an investigation into the reopening of the market so that all pertinent issues can be analyzed and discussed with interested market participants and policies developed for reopening of the retail market as of January 1, 2008.

[32] D.06-07-029, at p. 2. [Emphasis added]

IV. A WELL-DESIGNED RETAIL ELECTRICITY MARKET WILL STIMULATE THE WHOLESALE MARKET, CLARIFY THE UTILITIES' PROCUREMENT AND DEFAULT SERVICE OBLIGATIONS AND PROVIDE MUCH-NEEDED CERTAINTY TO THE STATE'S ENERGY POLICIES.

Competitive markets are a fundamental aspect of successful economies. They make sense for several reasons: (1) a competitive market will provide an array of services that more closely match the great variety of consumer preferences; (2) healthy competition leads to efficient price-setting and clear price signals to consumers; (3) market competition can provide incentives to improve efficiency, which in turn can reduce the need for generation demand, and lead to reduced environmental impacts, and lower costs to consumers. It is also generally accepted that competitive providers offer a much broader array of products and services than private or government monopolies, and competitive pressures help to serve to make alternative providers more innovative. Competition causes these suppliers to be more responsive to consumer needs and demands, monitor costs more closely, and compete on the basis of price or face going out-of-business. It also spurs innovation as a means for an entity to distinguish itself with respect to its competitors. Experience shows that a broad array of buyers and sellers are needed for a market to be competitive and efficient. In order for competition to provide the lowest costs for consumers, spur innovation, and help California companies better compete in the global economy, the benefits of retail choice must be restored to a greater segment of the California marketplace.

A. Prevailing Economic Thought Continues to Support Competitive Retail Markets in Electricity.

A noted group of economists, including Economics Nobel Prize laureate Vernon L. Smith, recently published an "Open Letter to Policymakers" that strongly advocates continued efforts to support and implement both wholesale and retail competition.[33] Their letter noted that consumers receive the greatest benefits from well-functioning competitive markets; that competitive markets shift the risk of bad business decisions away from consumers and to the

[33] Signatories to the June 26, 2006, letter included Paul L. Joskow (*Massachusetts Institute of Technology*); Alfred E. Kahn *(Cornell University)*; William W. Hogan *(Harvard University)*; Peter Cramton *(University of Maryland)*; Howard J. Axelrod *(Energy Strategies, Inc.)*; Nobel Laureate Vernon L. Smith *(International Foundation for Research in Experimental Economics);* David W. DeRamus *(Bates White, LLC)*; and Gary L. Hunt *(Global Energy Decisions)*.

shareholders of competitive suppliers; and that savings for consumers will continue to grow with competitive markets. The economists concluded their letter by stating:

> In sum, despite the recent increases in electricity prices, policymakers should stay the course and continue to support restructuring and the evolution of competitive wholesale and retail markets for power. Competition is the very foundation of our nation's economy. Competitive electricity markets are relatively new and will continue to evolve. We urge policymakers to focus on making necessary improvements in market design and resist the temptation to reject competition for a return to heavy-handed regulation. We are persuaded that competition in electricity markets will stand the test of time and continue to provide visible customer benefits.

The Petitioners echo these remarks and also urge the Commission to "support restructuring and the evolution of competitive wholesale and retail markets for power."

B. Competitive Markets Lead to Efficient Allocation of Resources, with Economic and Environmental Benefits for California Consumers.

An active competitive market for power and services will, in the nature of such markets, lead suppliers to find the most efficient and cost-effective ways to supply their customers. Within the guidelines set by appropriate Commission policies, such competition will result in meeting consumers' need for power with a mix of resources, efficiency measures, and pricing mechanisms that will bring economic and environmental benefits for all the state's residents, even those who do not opt for direct access. Single-supplier regulation can not create or appropriately price the range of incentives that a competitive market provides to improve efficiency. Efficient competition can reduce demand for input fuel, which in turn reduces environmental impacts, and lowers costs to consumers.

Allowing customers to choose a different provider can offer benefits even if there are no immediately discernible price savings. Non-quantifiable benefits may be difficult to define precisely in advance but are nonetheless real. As noted by the Commission's Division of Strategic Planning:

> Allowing customers to choose a different provider, even if there are no discernible price savings, may offer benefits such as increased flexibility, new and different service options, greater control over usage, and other benefits. Additionally, the possibility of customers switching may incent the utility to better address the concerns of their customers more than they would under a structure where choice is not available. Allowing choice also provides a potential benchmark to measure the efficiency of utility-provided services. It is not

possible to quantify these savings, but they are potentially of some value to customers.[34]

V. VARIOUS LEGAL THEORIES SUPPORT THE PRINCIPLE THAT DIRECT ACCESS SHOULD BE REOPENED

Petitioners do not offer herein a legal brief on the subject of the ability of the Commission to re-open the DA market. Rather, we anticipate that briefing on this and related legal topics may be called for as part of the rulemaking and investigation to be opened in response to this Petition. Petitioners observe, however, that there are several legal and factual arguments that support the principle that the Commission may re-open the DA market. Specifically, we note that:

- The Legislature did not intend for the suspension of direct access to continue indefinitely;
- The primary rationale for the suspension of direct access -- to eliminate cost shifting – has been fully addressed.
- Principles of statutory interpretation would justify the Commission acting to lift the DA suspension.

A. The Legislature Did Not Intend for the Suspension of Direct Access to Continue Indefinitely.

AB 1X gave authority and latitude to the Commission to determine the duration of the suspension with the proviso that the suspension ends when "the department [DWR] no longer supplies power hereunder."[35] By this language, the Legislature intended to tie the suspension of direct access to DWR's responsibility to procure power for the IOUs' bundled customers. As noted above, in the absence of action by the Commission or the Legislature, it is commonly presumed that the suspension of DA will end with the expiration of the DWR contracts. However, Petitioners challenge that conventional wisdom and urge the Commission to publicly acknowledge that it has the authority to lift the suspension on its own initiative and act to do so through the vehicle of the investigation and rulemaking called for herein.

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[34] "A Core/Noncore Market Structure for Electricity in California" Staff Report, Division of Strategic Planning, California Public Utilities Commission. March 15, 2004, at p 14.

[35] Water Code § 80110.

Since the grant of procurement authority to DWR was temporary, it can be inferred that the Legislature's intent was that the suspension of direct access would also be temporary. As previously discussed, DWR no longer has the legal authority to procure power supplies on behalf of utility bundled customers, all three utilities have been restored to creditworthy status and all are actively soliciting supplies on behalf of their respective customers. Therefore, DWR is no longer procuring power. Moreover, while DWR continues to be counter-party to the existing contracts, the management and implementation of those contracts has been delegated to the three utilities at the same time that they were reinstated to their role of procuring power supplies in January 2003. DWR was a convenient creditworthy entity to be used during the IOUs' collective financial crises. However, its role today has been reduced to being counterparty to contracts that are administered and paid for by the IOUs, who are actively engaged in procurement of all of their remaining power needs. In short, the pre-crisis status quo has been restored and the DA suspension is merely a historical anachronism that should be eliminated by this Commission.

The fact that AB 1X did not repeal the provisions of AB 1890 authorizing direct access, as well as the Legislature's authorization of community choice aggregation subsequent to the suspension of direct access, further indicates that the Legislature did not intend for and did not make the suspension of direct access permanent. Instead, Petitioners believe that the Legislature deferred to the good judgment and expertise of the Commission to determine whether and when to lift the suspension of DA. As discussed above, all of the causes and concerns that gave rise to the temporary suspension of retail competition have been addressed or no longer pertain. It is therefore appropriate and timely for the Commission to move forward with an examination of how the market can be re-opened and restored.

B. The Commission Has Already Determined That the Statute Requires Interpretation and That the Primary Rationale for the Suspension of Direct Access Was to Eliminate Cost Shifting. Having Addressed Cost Shifting, the Commission May Now Consider Whether Direct Access May be Reinstituted.

In D.03-05-034, the Commission adopted rules that permit direct access customers to return to bundled service and subsequently switch back to direct access service under what is referred to as the "switching exemption." The Utility Reform Network ("TURN"), Southern California Edison Company ("Edison") and Pacific Gas and Electric Company ("PG&E") filed applications for rehearing of D.03-05-034 that were in large part rejected by the Commission in

D.03-06-035.[36] However, the extensive discussion in the decision with respect to principles of statutory interpretation and the ability of the Commission to interpret the statute has significant relevance to the issue of whether the Commission may consider reinstituting direct access.

In their rehearing applications, TURN and Edison claimed that the Commission had no legal authority to permit the switching exemption and both argued that Water Code Section 80110 prohibited the switching exemption. In response the Commission noted, "Both TURN and Edison take a limiting and literal interpretation of this statute." The Commission then discussed principles of statutory interpretation that are highly relevant to the question of whether the Commission may consider re-opening direct access:

> A fundamental task in statutory interpretation is to determine the intent of the Legislature. (See City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 90.) "Courts must ascertain legislative intent so as to effectuate a law's purpose." (Neumarkel v. Allard (1985) 163 Cal.App.3d 457, 461, citing Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658.) This is to be accomplished first by turning to the language of the statute. (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798; see also, California Teachers Association v. San Diego Community College District (1981) 28 Cal.3d 692, 698; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230-231.) Unless it is demonstrated that the natural and customary import of a statute's language is repugnant to the general purview of the statute, effect must be given to the statute's plain meaning. (Tiernan v. Trustees of California State University and Colleges (1982) 33 Cal.3d 211, 218-219.) **However, the literal interpretation of the words of a statute should not prevail if it defies common sense, creates absurd results or results demonstrably at odds with the intention of the Legislature.** (People v. Pieters (1991) 52 Cal.3d 894, 898.)[37] [Emphasis added]

The Commission then examined and rejected the "limiting and literal" interpretations of the statute by stating that:

> "Adopting an overly limiting interpretation of the statute would mean that the Commission's authority ended with the determination of the date of suspension. However, the suspension was not self-executing and we were required as part of our regulatory duties to make further determinations."[38]

[36] D.03-06-035 did grant a limited rehearing on the issue of using the Cal-ISO hourly price as a proxy for the short-term commodity price of electricity.

[37] D.03-06-035, p. 4.

[38] *Id.*, p. 5.

The Commission reasoned that a "literal interpretation would not have made sense in light of the legislative intent"[39] because:

> "Although there is no clear statement from the Legislature when it passed Water Code Section 80110, **we believe that the Legislature enacted the statutory provision to prevent cost-shifting between direct access customers and bundled service customers** due to the significant increases in direct access load."[40] [Emphasis added]

The Commission noted it had determined that cost-shifting would be prevented through the equitable allocation of the direct access cost responsibility surcharge that was adopted and implemented in D.02-11-022, as modified and affirmed in D.02-12-027.[41] The Commission concluded it had acted lawfully and its actions were "a proper exercise of our discretion pursuant to Water Code Section 80110 and Public Utilities Code Section 366.2(d), as well as our broad regulatory authority under the California Constitution and the Public Utilities Code."[42] Critically, the Commission further concluded that "Water Code Section 80110 provides for the suspension on a date chosen by the Commission **and the implementation of this suspension has been left to the Commission**."[43]

The foregoing excerpts from D.03-06-035 demonstrate several principles of relevance to the Commission's opportunity to commence a rulemaking and open an investigation now into whether direct access should be reopened:

- First, principles of statutory interpretation direct that *the literal interpretation of the words of a statute should not prevail* if it defies common sense or creates absurd results.[44]
- Second, the Legislature enacted the statutory provision to prevent cost-shifting between direct access customers and bundled service customers.
- Third, the implementation of this suspension has been left to the Commission and it can lawfully act to interpret the statute as a proper exercise of its discretion pursuant

[39] *Id.*

[40] *Id.*, pp. 5-6.

[41] *Opinion Rejecting Earlier DA Suspension Date* [D.02-03-055], *supra*, pp. 7 and 16 (slip op.).

[42] *Id.*, p. 8.

[43] *Id.*, p. 9. [Emphasis added]

[44] See section V.C for further discussion of issues pertaining to statutory interpretation.

to Water Code Section 80110 and Public Utilities Code Section 366.2(d), as well as its broad regulatory authority under the California Constitution and the Public Utilities Code.

An overly "limiting and literal interpretation of this statute" would mean that direct access could not be reinstituted until the last DWR contract had expired. Another extreme interpretation would be that DA could not be re-opened until the DWR's bonds are fully paid off. Either of these conditions would both defy common sense and lead to the absurd result of precluding the resumption of direct access in the event DWR had even one remaining contract for one MW of power or one remaining bond payment before full redemption. That would be particularly unreasonable, given that the Commission will have already prevented cost shifting between bundled and direct access customers by establishing the DACRS at least a decade earlier.

Having already complied with the Legislature's goal that led to the suspension of direct access in the first place, it would be inconsistent for the Commission to determine that it had no further discretion to interpret the statute with respect to when direct access could be reopened. Having addressed cost shifting, the Commission should now consider whether direct access may be reinstituted.

C. Principles of Statutory Interpretation would Justify the Commission Acting to Lift the DA Suspension

Whether or not the Commission has the authority to reopen direct access hinges on the interpretation of the provision of AB 1X, codified in Water Code § 80110, directing the Commission to suspend direct access. Section 80110 provides in pertinent part:

> After the passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department no longer supplies power hereunder.

Specifically, the phrase "until [DWR] no longer supplies power hereunder" can be interpreted in more than one way. For instance, it could mean until such time as DWR *ceases contracting to supply power*. This interpretation is consistent with the Legislature's intent that direct access be suspended while DWR was responsible for supplying power to the utilities'

retail customers pursuant to AB 1X. Alternatively, Section 80110 could require the suspension of direct access to remain in effect "until the last DWR contract expires." The statute is thus ambiguous on its face, as the phrase "supplies power" is susceptible to more than one interpretation.

Since DWR's procurement authority under AB 1X terminated on January 2, 2003, and the utilities have resumed responsibility for procuring power for their retail customers, the condition precedent for lifting the suspension of direct access has occurred. Therefore, there is no statutory impediment to the Commission reopening direct access. Because the issue has never been litigated before the Commission or in the courts, there is no precedential authority that would preclude the Commission from reopening direct access, either on its own initiative or in response to a petition from an interested party. However, the legality of the Commission's order reopening direct access would be subject to review by the California Supreme Court.[45]

The California courts generally adhere to the so-called traditional rules of statutory construction.[46] The Court of Appeal summarized these rules in a decision involving, appropriately enough, competing interpretations of AB 1X:

> The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. To do so, a court first examines the actual language of the statute, giving the words their ordinary, commonsense meaning. The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it…"
>
> Where, however, the statutory language is ambiguous on its face or is shown to have a latent ambiguity such that it does not provide a definitive answer, we may resort to extrinsic sources to determine legislative intent. Under this circumstance, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' 'In such cases, a court may consider both the legislative history of the statute and the wider historical circumstances of its enactment to ascertain the legislative intent.'

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[45] Pub. Util. Code § 1768 provides that only the California Supreme Court has jurisdiction to review CPUC orders or decisions applying the provisions of AB 1X.

[46] *See*, *e.g.*, *Hughes v. Board of Architectural Examiners* (1998), 17 Cal.4th 763 at 775-776; *Long Beach Police Officers Ass'n v. City of Long Beach* (1988), 46 Cal. 3d 736, 741, 759 P.2d 504, 507, 250 Cal. Rptr. 869, 872; *Solberg v. Superior Court* (1977), 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470; *see also* Cal. Code Civ. Proc. § 1859 (West 1983) ("In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible. . . .").

> And a court may disregard the plain meaning of a statute and resort to its legislative history to aid in interpretation when applying the literal meaning of the statutory language 'would inevitably (1) **produce absurd consequences which the Legislature clearly did not intend** or (2) **frustrate the manifest purposes which appear from the provisions of the legislation when considered as a whole in light of its legislative history**. ...' But '[i]f the legislative history gives rise to conflicting inferences as to the legislation's purposes or intended consequences, then a departure from the clear language of the statute is unjustified. ...'
>
> Another consideration where, as here, one of the parties is an administrative agency charged with enforcing the statute, is that '[t]he standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.'[47]

As in the foregoing summary, the courts frequently state that their authority to investigate the Legislature's intent is subject to the condition precedent that the "plain meaning" of the statute not be clear and unambiguous on its face—the so-called "plain meaning rule."[48] Further, the Court has previously held "[w]here a statute is *theoretically* capable of more than one construction we choose that which most comports with the intent of the Legislature. Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible."[49] Given that Section 80110 is susceptible to more than one interpretation, the Court would almost certainly examine other provisions of AB 1X to ascertain if they shed any light on the intended meaning of the statute.

Direct access is not referenced in any other provision of AB 1X besides Section 80110. However, the Legislature obviously did not adopt Section 80110 in a vacuum. In enacting AB 1X, the Legislature declared that DWR was required to "*participate in markets* for the purchase and sale of power and energy" in order to address "an *immediate peril* to the health, safety, life and property of the inhabitants of the state" created by the power crisis.[50] More specifically, the Legislature declared that DWR was being authorized to "*enter into contracts* for the purchase of electric power" and to "sell power to retail end use customers and, with specified exceptions, to

[47] *Pacific Gas and Electric Co. v. Department of Water Resources* (2003), 112 Cal. App. 4th 477, 495-496; 5 Cal. Rptr. 3d 283. [Emphasis added and citations omitted]

[48] *See*, *e.g.*, *Lenna v. FTB*, 9 Cal.4th 253, 268 (1994); *Granberry v. Islay Investments*, 9 Cal. 4th 738, 744-746 (1995).

[49] *California Manufacturers Ass'n v. Public Utilities Commission,* 24 Cal. 3d 836, 844 (1979).

[50] Water Code § 80000(a) (emphasis added).

local publicly owned electric utilities" at cost.[51] Significantly, DWR's charge to undertake these "critical responsibilities" was not open-ended; rather, AB 1X expressly prohibited DWR from entering into new contracts after January 2, 2003.[52] Thus, the Legislature's directive concerning the suspension of direct access was adopted in the context of DWR *temporarily* assuming responsibility for procuring power for the utilities' customers. When viewed in this context, the phrase "shall be suspended until [DWR] no longer supplies power hereunder" in Section 80110 could reasonably be understood as directing the Commission to suspend direct access while DWR was responsible for entering into contracts to supply power for retail customers.

Second, the Court has held that "[i]nterpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided."[53] The Legislature intentionally did not impose any limits on the duration of contracts that DWR was authorized to execute pursuant to AB 1X. At the time this issue was debated, it was acknowledged that DWR could conceivably enter into contracts with terms of 20 or even 30 years. Thus, if one accepts that the Legislature intended to tie the duration of the suspension of direct access to the duration of the DWR contracts, then one must accept that the Legislature contemplated direct access being suspended for decades after the power crisis was over. Moreover, one must accept that the Legislature intended for the suspension of direct access to remain in effect if only a single DWR contract was still in effect for an insignificant amount of power. The Court is unlikely to accept these premises without clear evidence of Legislative intent.

Third, courts generally disfavor statutory interpretations that would have the effect of repealing an earlier statute by implication.[54] That would be the practical effect, however, of interpreting Section 80110 as requiring direct access to be suspended until the last DWR contact expires in 2015. If that had been the Legislature's intent, it could have simply repealed the provisions of AB 1890 authorizing direct access. It chose not do so, however. Instead, it directed the Commission to suspend the right to *acquire* direct access service, leaving the statutes authorizing direct access in place. This arguably reflects the intent that the suspension of

[51] AB 1X, Preamble, § 3 (emphasis added).

[52] Water Code § 80260.

[53] *California Manufacturers Ass'n*, *supra* n. 21.

[54] *See*, *e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 547, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988)

direct access be a temporary, rather than a semi-permanent, measure and that the Legislature gave discretion to the Commission as to the actual implementation of the suspension.

It is possible that the Court would stop its inquiry here and conclude that the Commission's interpretation of Section 80110 more closely comports with the Legislature's intent. It is more likely, however, that the Court would examine the legislative history of AB 1X and the historical circumstances in which the statute was adopted to ascertain the Legislature's intent concerning the duration of suspension of direct access. Given that AB 1X was enacted as urgency legislation in just over a month after being introduced, the statute's legislative history is surprisingly voluminous.[55] However, it contains only a handful of references to the suspension of direct access, including:

- An analysis of AB 1X prepared by the Assembly Committee on Energy and Cost Availability states that the bill would "[s]uspend direct access provisions until DWR no longer supplies power pursuant to [the bill's] provisions." In addition, it states that the bill "suspends a customer's ability to choose direct access until such point as DWR no longer supplies power pursuant to the provisions of this legislation."[56]

- An Enrolled Bill Report signed by then-Commission President Loretta Lynch states that AB 1X "suspends the ability of retail customers from selecting alternative providers of electricity until such time as **DWR ceases procuring power** for retail customers." [Emphasis added]

- A press release issued by the Governor's office states that AB 1X "suspends the ability of retail customers from selecting alternative providers of electricity until such time as **DWR ceases procuring power** for retail customers."[57] [Emphasis added]

The bill analyses prepared by the Assembly Committee merely paraphrases Section 80110 and thus do not provide any additional insight into the Legislature's intent. However, both the description of AB 1X signed by Commissioner Lynch and that appearing in the Governor's press release support the proposition that the Legislature intended for the duration of

[55] The probative value of legislative history materials is generally ranked in the following order: committee reports, statements made during floor debate, transcripts of committee mark-up sessions, mark-ups and amendments, transcripts of committee hearings, and post-enactment statements of intent. *See* Noah, Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules, 51 Hastings L.J. 255, 274-276 (2000).

[56] The Committee's analysis states further that "[t]he effective date of the suspension would be determined by the Commission. Customers currently receiving service from an alternative energy supplier would not be affected by these provisions since their direct access contract[s] cannot be impaired by a change of law."

[57] Note that this is the same language used by the Commission in its Enrolled Bill Report.

the suspension of direct access to be tied to the duration of DWR's responsibility to procure power for retail customers.

That conclusion is arguably supported by an Assembly Republican analysis. Although the analysis does not directly refer to the suspension of direct access, under the heading "Arguments in Support of the Bill" it states that AB 1X "seeks to 'stay the course' intended when AB 1890 was passed, to move California toward a deregulated energy market. The benefits of an effectively deregulated electricity market are many, and fall into the following principle areas: increased competition; lower prices for consumers/ratepayers; lower operating costs for businesses …"[58] This passage suggests that the proponents of suspending direct access addressed opposition to the measure from Republican lawmakers by providing assurances that the suspension would be temporary and relatively short in duration.

In fact, several Republican lawmakers voiced opposition to the suspension of direct access in floor speeches during the debate leading to adoption of AB 1X. In response, one of the architects of AB 1X, Senator Bowen, promised to carry a bill to "fix" direct access if AB 1X passed.[59] However, the surviving legislative history of AB 1X does not contain any *definitive* statement of the Legislature's intent concerning the duration of the suspension of direct access. Indeed, it does not even provide an explanation of the suspension's intended purpose from which to infer the Legislature's intent.

Any legal challenge to a Commission order reopening direct access would undoubtedly argue that such an action would be inconsistent with the Legislature's purported goals of ensuring a stable customer base for DWR and preventing cost shifting. However, as noted above, the DWR bonds were issued successfully, and the Commission has established a non-bypassable charge for recovery of DWR's bond-related costs from all customers. The Commission has established rates for recovery of DWR's ongoing contract costs from the utilities' bundled customers. And the Commission has established the CRS to ensure that direct access customers reimburse the utilities bundled customers for their "fair share" of ongoing DWR costs. Moreover, DWR is no longer authorized to enter into long-term contracts. Thus, reopening direct access now would not affect DWR's revenue stream, would not result in DWR costs being shifted to bundled customers, and would not impact DWR's contract obligations. In

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[58] Assembly Republican Bill Analysis of AB 1X, p. 2 (Jan. 30, 2001).

[59] Assembly Floor Debate, Jan. 31, 2001.

other words, the factors that justified the initial suspension of direct access have been addressed by the Commission, making the continued suspension redundant.

Further, subsequent to the issuance of AB1X, the Legislature passed AB 117,[60] which authorized the commencement of community choice aggregation in California. Through this process, governmental entities such as cities and counties are entitled to aggregate the load of all end users within their geographical boundaries and become their supplier of power, taking the place of the traditional utility supplier. The community choice aggregation process is fundamentally identical to direct access, with the only difference being that the governmental entity must serve all customers rather than being permitted to pick and choose among only certain classes or sizes of customer. Indeed, it is anticipated that the governmental entities that pursue community choice aggregation will likely contract with energy service providers to act as suppliers of powers to the customers of the governmental entities. ESPs are, of course, the same parties that sell power to direct access customers. The Court might well note that it makes little to no sense to assume that direct access must continue to be suspended when essentially the same process, with a slightly different cast of characters, would be legal. The fact that community choice aggregation was authorized subsequent to the suspension of direct access is a further indicator that the Legislature did not intend any sort of permanent or semi-permanent elimination of the right of customer choice.

In light of the foregoing, the Court could reasonably conclude that the Legislature intentionally left ratemaking and cost responsibility issues to the Commission's expertise, with the suspension of direct access intended to be a temporary, stopgap measure. That would tend to support the view that Section 80110 should be interpreted as requiring the Commission to suspend direct access for the two years that DWR would be responsible for supplying power to the utilities' customers, but not necessarily any longer than that. Given that DWR is no longer in the business of procuring power for retail customers, the condition precedent for reopening direct access specified in Section 80110 has arguably already occurred, and the Commission can direct the reopening of direct access.

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[60] AB 117 (Midgen), Stats. 2001, ch. 838.

VI. ISSUES REQUIRING INVESTIGATION

Petitioners have identified several key issues that will need to be addressed as part of the Commission's investigation and rulemaking on reopening the retail electricity market. These issues, outlined briefly below, should be set for consideration in the Commission's order instituting the rulemaking and investigation:

- **Statutory Authority of the Commission –** Does the Commission have the requisite statutory authority to determine when to reopen the direct access market?

- **Type of Retail Market Structure –** Should California again open retail competition to all customers or should there be a customer size level to determine eligibility for DA, such as in a core/noncore system?

- **Default Service for DA-Eligible Customers Who Do Not Elect Choice –** Should default service for DA-eligible customers be provided by the IOUs or by a third party supplier? Should the default provider shoulder any uncompensated risks/costs?

- **Switching Rules –** Are rules for customers switching between competitive and default service necessary?

- **Bond Costs –** What needs to be done to ensure ironclad recovery of DWR bond costs?

- **Public Purpose Program Charges –** What, if anything, needs to be done to assure that all public purpose program charges continue to be recovered from all customers?

This is not meant to be an exhaustive list. Rather, it offers a sampling of the types of issues that will need to be addressed by the Commission prior to implementing the re-opening of the competitive retail market. It is evident that this analysis will take time and will engage the interests of multiple market participants. The Commission thus should initiate this effort without delay.

VII. CONCLUSION – THE RIGHT OF CHOICE IS FUNDAMENTAL.

In 2001, when California's electricity market was in disarray, and its investor-owned utilities either entered or teetered on the precipice of bankruptcy, the State took the unprecedented step of entering into power purchase agreements on behalf of private companies regulated by the Commission. The right of choice was suspended over five years ago for electric customers as a *temporary* measure to help California weather the electricity crisis.

Fortunately, thanks to the policies of the Commission and the legislature, the crisis is now behind us and the rationale that justified the suspension of DA no longer exists. The intended purposes of suspending DA have been addressed through the various means described above. The Commission has already determined that the Legislature enacted the statutory provision to prevent cost-shifting between direct access customers and bundled service customers and the Commission has long since addressed that potential through imposition of the DA CRS. The DWR contracts are in fact "in the money" and do not represent a cost burden to bundled service customers. Further, the Commission has already determined in D.03-06-035 that the implementation of this suspension has been left to the Commission and that it can lawfully act to interpret the statute as a proper exercise of its discretion pursuant to Water Code Section 80110 and Public Utilities Code Section 366.2(d), as well as its broad regulatory authority under the California Constitution and the Public Utilities Code.

The continued suspension of DA as a permanent condition in the California electricity retail market is therefore unnecessary and counter productive. Moreover, the Commission has eliminated significant barriers to reopening the market through the approval of Resource Adequacy Requirements for all LSEs, the adoption of the cost allocation methodology to ensure that all parties that benefit from utility procurement activities bear a fair share of the associated costs and the imposition of both RPS and GHG obligations on all LSEs. Finally, last year Californians sent a clear signal from the polls in support of competitive energy markets in their rejection of further constraints on customers exercising choice. Accordingly, the time has come for the Commission to investigate reopening the retail electricity market to competition.

For the foregoing reasons, the Petitioners and the Supportive Entities request that the Commission promptly issue an order instituting a rulemaking and an investigation into reopening the retail market. The rulemaking should consider such possible approaches as a core/noncore market structure, as well as other possibilities that may be proposed by interested parties.

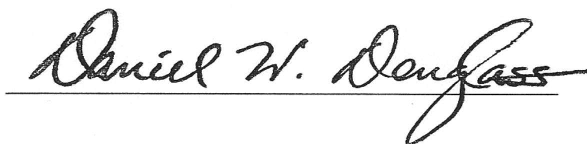
Petitioners do not intend to preclude the consideration of any particular approach, believing that all market participants may want to weigh in on such a significant step.

What is critical, however, is that the Commission should not defer this effort indefinitely and instead move ahead with putting substance behind its earlier pronouncements in the IEPR and the Energy Action Plan and D.06-07-029 that have called for the re-examination of customer choice. The Petitioners and the Supportive Entities thank the Commission for its attention to these comments and strongly urges it to move forward with commencing a rulemaking and opening an investigation to consider the many issues related to the reopening of the California direct access retail market. The investigation should be conducted such it may be concluded by July of 2007, so that the DA market can be reopened no later than January 1, 2008.

The Petitioners and the supportive entities thank the commission for its attention to this proposal.

Respectfully submitted,

On behalf of the Joint Petitioners and the Supportive Entities



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December 6, 2006

Attachment A

COMPLIANCE WITH RULE 6.3

Pursuant to the Rules of Practice and Procedure of the Commission ("Rules"), Rule 6.3(a) provides that, "any person may petition the Commission under Public Utilities Code Section 1708.5 to adopt, amend, or repeal a regulation. The proposed regulation must apply to an entire class of entities or activities over which the Commission has jurisdiction and must apply to future conduct." The relief sought herein complies with this requirement of the Rules, as it would apply to the entire class of current and prospectively eligible direct access customers, which is a subject over which the Commission has jurisdiction. Moreover, the Petitioners seek Commission action that would be applicable to future conduct and does not seek any retroactive relief.

Rule 6.3 (b) proves that "A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. In addition, a petition must state whether the issues raised in the petition have, to the petitioner's knowledge, ever been litigated before the Commission, and if so, when and how the Commission resolved the issues, including the name and case number of the proceeding (if known)." Sections I, III, IV, V, VI and VII herein state the justification for the requested relief. These sections explain why it is appropriate for the Commission to open a rulemaking and investigation into the reopening of the direct access market. This subject of the suspension of direct access was dealt with in consolidated Dockets A.98-07-003, A.98-07-006 and A.98-07-026, wherein the Commission issued its decision D.01-09-060, in which the Commission suspended the right for new customers to seek direct access service, as of September 20, 2001. Further actions by the Commission with respect to the implementation of direct access suspension have generally been dealt with in Docket R.02-01-011.

Rule 6.3(b) further requires that, "A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. The caption of a petition must contain the following wording: 'Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5.'" The factual assertions contained in this petition are verified (see Attachment B) and the petition is named in accordance with Rule 6.3(b).

Finally, Rule 6.3(c) requires that, "Petitions must be served upon the Executive Director, Chief Administrative Law Judge, Director of the appropriate industry division, and Public Advisor. Prior to filing, petitioners must consult with the Public Advisor to identify any additional persons upon whom to serve the petition. If a petition would result in the modification of a prior Commission order or decision, then the petition must also be served on all parties to the proceeding or proceedings in which the decision that would be modified was issued. The assigned Administrative Law Judge may direct the petitioner to serve the petition on additional persons." Petitioners have also complied with these requirements and have served this petition on the service lists in the dockets listed in Attachment C hereto. When an ALJ is assigned to this proceeding, Petitioners will comply with any further service directions that are provided.

Therefore, Petitioners have complied with all of the procedural requirements imposed by Rule 6.3.

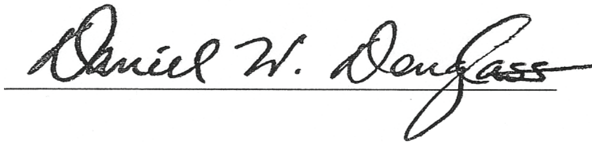
Attachment B

VERIFICATION
(Rule 1.11)

I am the attorney for the Petitioners named herein; said parties are absent from the County of Los Angeles, California, where I have my office, and I make this verification for said parties for that reason. The statements in the foregoing Petition are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and executed on December 6, 2006, at Woodland Hills, California.

Respectfully submitted,



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ALLIANCE FOR RETAIL ENERGY MARKETS

Attachment C

List of Dockets That Have Received Service of this Petition

R.02-01-011 - Order Instituting Rulemaking regarding the implementation of the suspension of direct access pursuant to Assembly Bill 1X and Decision 01-09-060.

R.04-04-003 - Order Instituting Rulemaking to promote policy and program coordination and integration in electric utility resource planning.

R.05-12-013 - Order Instituting Rulemaking to consider refinements to and further development of the Commission's resource adequacy requirements program.

R.06-02-012 - Order Instituting Rulemaking to develop additional methods to implement the California renewables portfolio standard program.

R.06-02-013 - Order Instituting Rulemaking to integrate procurement policies and consider long-term procurement plans.

R.06-05-027 - Order Instituting Rulemaking to continue implementation and administration of California renewables portfolio standard program.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document on all parties of record in the proceedings and dockets listed in Attachment C hereto, by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on December 6, 2006, at Woodland Hills, California.

Michelle Dangott

R.02-01-011

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