

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric Company To Revise Its Electric Marginal Costs, Revenue Allocation, and Rate Design, including Real Time Pricing, to Revise its Customer Energy Statements, and to Seek Recovery of Incremental Expenditures. (U39M)

Application 10-03-014
(Filed March 22, 2010)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO THE
JOINT APPLICATION FOR REHEARING OF DECISION NO. 11-05-047
OF PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN
CALIFORNIA EDISON COMPANY AND KERN COUNTY TAXPAYERS
ASSOCIATION**

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CALIFORNIA EDISON COMPANY AND KERN COUNTY TAXPAYERS
ASSOCIATION**

Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure (Rules), the Division of Ratepayer Advocates (DRA) hereby submits this response to the joint application for rehearing of Decision (D.) 11-05-047 (Joint Application) of Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and Kern County Taxpayers Association (KernTax) (collectively “Joint Applicants” with or without SDG&E).¹ Joint Applicants’ challenge to the Commission's D.11-05-047 is only directed to its finding that PG&E's proposed customer charge is both unlawful and contrary to public policy.

I. Background

According to the Commission’s D.11-05-067 at p. 5, PG&E has sought “the most dramatic changes in its residential rate design in the last decade.” At least since 1975, the statutory policy in the State of California has been that there should be limits on “baseline

¹ As acknowledged in the original Joint Application, p.1, n.1, SDG&E was not yet a party to the proceeding, but on the same day that the Joint Application was filed, SDG&E was first filing its motion to intervene. Under Rule 16.2 of the Commission’s Rules, it does not appear that SDG&E has the right to be one of the parties to the Joint Application. Therefore, DRA filed its opposition to SDG&E’s motion.

rates” (previously known as “lifeline rates”) to reflect a baseline quantity of natural gas and electricity. The Historical and Statutory Notes to Cal. Pub. Util. Code § 739 reveal that Sections 1, 2 and 4 of Stats. 1975, c.1010 provided for lower rates for a basic minimum quantity of gas and electricity for residential heating and lighting as “basic human rights” and in order to promote conservation. In 1982, the Sher Baseline Bill (AB 2443), which was codified as Chapter 1541 Statutes 1982, encouraged conservation and simplified the lifeline program by inverting block structures into three tiers of electric rates with the first block or tier being the lowest rate between 75% and 85% of the system average rate. *See Pacific Gas & Electric Co.*, D.82-12-113, 10 CPUC 2d 512, 513-514.

As the Commission explained in D.11-05-047 at pp. 5- 6, on February 1, 2001, Assembly Bill (AB) 1 from the First Extraordinary Session (Ch. 4, First Extraordinary Session 2001) (AB1X) implemented measures to address rapidly rising energy costs resulting from the 2000-2001 energy crisis. One of these measures in AB1X was its mandate that rates for all residential electricity usage up to 130% of baseline quantities be capped at levels in effect on February 1, 2001.

As the Commission further explained in D.11-05-047 at p. 6,

In D.01-05-064, the Commission adopted a five-tier rate design for PG&E² based on an increasing rate per kWh within each successive tier, or ‘block’ of use. Given the restrictions required by AB 1X, all future residential rate increases were allocated to rates in Tiers 3 through 5, above the Tier 1 baseline and Tier 2 (130 percent of baseline) threshold.

To protect low-income households against these escalating costs, the Commission froze rates for the California Alternate Rates for Energy (CARE) program³ at July 2001 levels, after

² In D.01-05-064 and D.01-09-059, the Commission adopted the same residential tier structure for PG&E, SCE, and SDG&E: Tier 1: For kWh use up to 100 percent of baseline; Tier 2: For kWh use from 100 percent to 130 percent of baseline; Tier 3: For kWh use from 130 percent to 200 percent of baseline; Tier 4: For kWh use from 200 percent to 300 percent of baseline; Tier 5: For kWh use over 300 percent of baseline. The first two tiers are used to measure usage up to 130 percent of baseline.[This is footnote 3 in D.11-05-064]

³ The CARE program provides assistance to low-income electric and gas customers with annual household incomes no greater than 200 percent of the federal poverty guideline levels. (*See* Cal. Pub. Util. Code § 739.1(a)(4)(b)(1)). [This is footnote 4 in the D.11-05-064]. Hereinafter, unless otherwise indicated, all statutory references to sections are to sections of the California Public Utilities Code.

increasing the CARE discount from 15 to 20 percent. Non-CARE Tier 1 and 2 rates were also frozen in early 2001 and with one minor exception, these rates have remained constant through 2009.

Like the progressive income tax, all residential customers benefit from the level of rates for the first two tiers of rates. However, the customers using the most electricity have paid higher rates for electricity, because AB 1X had frozen the rates for the first two tiers (i.e., up to 130% of baseline). Therefore, almost all increases in residential rates were in PG&E's Tier 3 through Tier 5 rates between 2001 and 2010.⁴

The utilities and consumer groups ultimately worked out a compromise bill, Senate Bill (SB) 695 (Chapter 337, Statutes of 2009) on October 11, 2009, in order to allow gradual, limited increases in the Tier 1 and Tier 2 rates, such that the revenue from these rate increases could be used to decrease the rates in the upper tiers.⁵ As part of this compromise, residential rates for non-CARE customers in Tier 1 and Tier 2 (collectively up to 130% of baseline quantities) could increase annually, but only by a percentage tied to annual percentage changes in the Consumer Price Index plus 1%, but by no less than 3% and not more than 5%. This compromise was codified by SB 695, which added § 739.9(a) to the California Public Utilities Code to begin allowing limited, annual Tier 1 and Tier 2 rate increases for non-CARE customers (from 3 to 5 percent). As part of SB 695, Tier 1 and Tier 2 annual increases were also provided for CARE customers, but were tied to annual increases by the Legislature under the CalWORKS program (currently 0%), but the increases could not exceed (3%). This has been codified as § 739.1(b)(2).

As a further limitation on increases as part of the compromise in SB 695, in no event could the rates charged for residential customers for electricity usage up to the

⁴ One exception is that increases to Tier 1 and Tier 2 rates were allowed to recover California Solar Initiative costs.

⁵ In the compromise, the consumer groups agreed to changes from the frozen rates for Tier 1 and Tier 2 customers, and in return Tier 1 and Tier 2 customers were supposed to receive only a gradual and limited increase in rates. See Exh. # 23: DRA/Khoury, at 6-5 & 6-9; Exh. # 13: TURN/Florio, at 3 and Attachment A; Exh. # 11: TURN/Marcus at 79-80.

baseline quantities (i.e., Tier 1) exceed 90% of the system average rate prior to January 1, 2019. This was codified for non-CARE customers in § 739.9(b) and is also reflected for CARE customers in § 739.1(b)(4) which allows CARE rates to be up to 80% of non-CARE rates for Tiers 1, 2, and 3. This second limitation on rates was supposed to be a further protection for customers by putting an ultimate limit on rates for baseline quantities (i.e., Tier 1 rates).

As stated in D.11-05-047 at p. 18, one of PG&E's rate design proposals in the instant case is that "PG&E proposes to institute a residential fixed customer charge applicable for both CARE and non-CARE customers. PG&E currently applies fixed customer charges only in non-residential customer classes, but recovers its costs associated with servicing residential customer accounts through volumetric rates based upon usage. ... PG&E proposes to implement the customer charges in mid-2011 in addition to any authorized annual SB 695 increases to Tier 1 and Tier 2 rates."

Various consumer groups, including DRA, oppose PG&E's customer charge proposal, because it is contrary to Pub. Util. Code § 739.1(b)(2) for CARE rates and § 739.9(a) for non-CARE rates. The introduction of a fixed customer charge, combined with allowed maximum percentage increases in Tier 1 and Tier 2 volumetric rates, would circumvent the legal limits specified by these statutory requirements in SB 695.⁶ As discussed in more detail below, the Joint Applicants, in essence, have used the additional consumer protection for Tier 1 rates in § 739.9(b) to undermine the primary consumer protections for Tier 1 and Tier 2 customers (i.e., the limitation on rate increases) provided in §§ 739.1(b)(2) and 739.9(a). For the same reason that the Commission rejected this approach in D.11-05-047 on the basis that it is contrary to SB 695, it should reject the Joint Application, as well.

In the meantime, PG&E's highest-tiered rates have decreased significantly as a result of D.10-05-051, which consolidated Tiers 4 and 5 into a single Tier 4 and also allocated the proposed revenue requirement decreases to Tier 4 rates. As the

⁶ D.11-05-047 at p. 19.

Commission observed in D.11-05-047 at p. 8, PG&E has realized some progress toward narrowing the disparity between upper- and lower-tiered rates, noting that in the summer of 2010, PG&E's upper-tiered residential rates were reduced from their highest level of 49 cents per kWh to 40 cents per kWh. Based upon the record and residential rate design changes in this case, even with the Commission's rejection of PG&E's proposed fixed customer charge, PG&E's Tier 4 rates would further decrease to 32.5 cents per kWh.⁷

II. The Standard for Review

The Joint Applicants refer to the Alternate Proposed Decision of President Peevey (APD) and attach comments as part of their Appendix to their Joint Application.⁸ They further urge in their Joint Application, p. 2, that even if the Commission ultimately were to decide not to grant rehearing on its authority to implement the customer charge under Senate Bill (SB) 695, the Commission should find that sound public policy nevertheless supports the implementation of a residential customer charge. In addition, Joint Applicants devote six pages to relitigating the Commission's findings on policy arguments in D.11-05-047.⁹

The Joint Applicants ignore the fact that the Commission voted unanimously in favor of D.11-05-047. The Joint Applicants also ignore the reasons why President Peevey decided to withdraw his APD even though his reasons are directly stated in the attached comments in the Appendix to the Joint Application. President Peevey withdrew his APD based upon the Commission's General Counsel's legal conclusion that implementing such fixed charges in conjunction with increases in usage-based rates in Tiers 1 and 2 would exceed the limits permitted under state law - Public Utilities Code §§ 739.1 (b)(2) and 739.9(a). President Peevey also attributed his decision to withdraw his APD to the letter from Joe Como, Acting Director and Chief Counsel of DRA, which had responded to PG&E's May 23, 2011 letter to the Commissioners. The letter from Joe

⁷ D.11-05-047 at p. 8 and at Appendix Table A attached to the D.11-05-047.

⁸ Joint Application, p.2.

⁹ Joint Application, pp.15-20.

Como, DRA's Acting Director, relied upon Public Utilities Code §§ 739.1(b)(2) and 739.9(a), and upon *Assembly v. Public Utilities Com.*, (1995) 12 Cal.4th 87, in which the California Supreme Court had annulled the Commission's decision, because it was contrary to a provision of the California Public Utilities Code. The California Supreme Court declared: "Thus, as a matter of policy, the Commission's proposed disposition might well reflect a wise use of such funds. The issue before us, however, is the *legality*, rather than the wisdom, of the Commission's decision." *Id.* at 98-99. (Emphasis added).

Joint Applicants' efforts to argue against the policy reasons given in D.11-05-047 or to request that the Commission give an advisory opinion upon policy issues, even if it were to reject the Joint Application, are totally inappropriate matters to raise in their application for rehearing. As the Commission stated in D.10-04-053, at p. 6; 2010 Cal. PUC LEXIS 146 at *11:

Re-litigation of a rejected policy argument is not a proper subject matter for an application for rehearing. "The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." (Commission Rules of Practice and Procedure, rule 16.1(c).) Further, applicants for rehearing must set forth specifically "the ground or grounds on which the applicant considers the decision or order to be unlawful." (Pub. Util. Code § 1732.)

PG&E and SCE should fully understand the impropriety of relitigating policy issues in their joint application for rehearing, because the Commission has made this point clear in cases involving other applications filed by these utilities, which were challenged by other parties at the rehearing stage. *See, e.g.*, D.11-05-049, at p. 33, n.26; 2011 Cal. PUC LEXIS 303 at *58, n. 26; *see also* D. 09-07-052, at p. 20 ; 2009 Cal. PUC LEXIS 358 at *35. Therefore, the only issue properly before the Commission is whether its decision commits legal error. The legal issue is the appropriate interpretation of SB 695, and, in particular, the interpretation of §§ 739.9(a) and 739.9(b).¹⁰

¹⁰ § 739.9(a) provides, in part: "The commission may, subject to the limitation in subdivision (b), increase the rates charged residential customers for electricity usage up to 130 percent of the baseline quantities, as defined in section 739, by the annual percentage change in the Consumer Price Index from the prior year

In its D.11-05-047, at p.25, citing the California Supreme Court case, *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977, the Commission stated that “to construe a statute, ‘we must ascertain the intent of the Legislature. ... If the language is clear and unambiguous there is no need for construction nor is it necessary to resort to indicia of the intent of the Legislature.’ If the language is ambiguous or allows more than one reasonable interpretation, courts look to other extrinsic sources, including the ostensible objects to be achieved and the legislative history.”

III. Joint Applicants’ Repetition of Their Previously Rejected Arguments Does Not Establish Legal Errors

A. Joint Applicants’ Argument, that the Language in Sections 739.1(b)(2) and 739.9(a) Unambiguously Supports Their Interpretation, Is Baseless

1. The Commission Correctly Found that the Language Is Ambiguous

Joint Applicants argue that “rates charged residential customers for electricity usage” as used in §§ 739.1(b)(2) and 739.9(a), can only mean one thing: usage-based or volumetric rates. They also allege that a fixed customer charge, as used in a clause in § 739.9(b), indicates that that the legislative intent was that fixed customer charges were not limited in §§ 739.1(b)(2) and 739.9(a), because these fixed customer charges are not mentioned in these sections. Joint Applicants further refer to § 739(d)(3), to show that the Legislature was aware of customer charges and distinguished such fixed charges from volumetric charges.¹¹

The Joint Applicants’ basis for concluding that there is no ambiguity in the term “rates” is by erroneously contrasting the language in § 739.9(b) with the language in § 739.9(a). The language in § 739.9(b) states: “The rates charged residential customers for

plus 1 percent, but not less than 3 percent and not more than 5 percent per year....”

§ 739.9(b) provides, in part: “The rates charged residential customers for electricity usage up to baseline quantities, including any customer charge revenues, shall not exceed 90 percent of the system average rate prior to January 1, 2019.”

¹¹ Joint Application, pp. 3-4.

electricity usage up to the baseline quantities, including any customer charge revenues, shall not exceed 90% of the system average rate prior to January 1, 2019.”¹² The language in § 739.9(a) permits the Commission to increase the “rates charged residential customers for electricity usage” annually by only 3% to 5%. Therefore, because the two words “customer charge” are not included in § 739.9(a), Joint Applicants claim that it would be mere surplusage if those two words did not allow PG&E to charge a fixed monthly customer charge, such as \$3.00 on top of the volumetric rates.

In contrast, the Commission in D.11-05-047 at p.25, found ambiguity in the term “rates,” and rejected Joint Applicant’s narrow interpretation of § 739.9(a), because it is at odds with long-established Commission usage of the term “baseline rates” as including fixed customer charges, such as in the case with SCE. Therefore, the Commission disagreed with Joint Applicants that there is no ambiguity in the statutory use of the term “rates.”¹³

DRA agrees with the Commission that this language is ambiguous. The ordinary use of the words “rates charged for electricity usage” can be commonly understood to mean rates that residential customers must pay if they want to use any electricity. If the Legislature intended that the limits upon rate increases, which are set forth in §§ 739.1(b)(2) and 739.9(a), only applied to volumetric rates, the Legislature could have stated that, because it clearly knew how to use the term “volumetric” rates as shown by § 739(d)(3).

The Joint Applicants’ reliance upon Commission decisions about different statutory provisions in a different context, which utilize different wording (e.g., such as “usage-based rates”) is misplaced.¹⁴ The Commission’s interpretation of the language adopted in § 739.9(a) involves different language in a statute which has a totally different objective. Accordingly, the Commission has not erred in its determination as to what the purpose of SB 695 was in the present case. *See Cacho v. Boudreau* (2007) 40 Cal.4th 341,

¹² Joint Application, p. 4.

¹³ D 11-05-047 at p. 25.

¹⁴ Joint Application, pp. 14-15.

354-355. Nor can Joint Applicants rely upon D.09-12-048 as precedent, because the utilities had not raised the issue of whether the limitation in rate increases in § 739.9(a) applied to fixed charges.¹⁵ Therefore, the Commission never addressed or considered the issue in D.09-12-048 and the case has no precedential value. *See Dana Point Safe Harbor Collective v. The Superior Court of Orange County* (2010) 51 Cal.4th 1, 5; *see also Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 (Cases are not authoritative precedents for propositions they did not address or consider.)

In addition, it must be noted that there is ambiguity and an unreasonable result from Joint Applicants' reliance upon on the phrase "rates charged residential customers for electricity usage" and their contention that this could only mean volumetric rates. This is a problem for Joint Applicants, because that exact phrase is included in both § 739.9(a) and § 739.9(b). Indeed, throughout the Joint Application, Joint Applicants' argument centers upon the alleged distinction between these two sections, because § 739.9(b) includes a reference to revenues from fixed customer charges, which they insist is the key reason why §739.9(a) only imposed limitations on volumetric rates. However, if the limitation on "rates charged residential customers for electricity usage" should be interpreted to mean that it is only a limitation on the volumetric rates charged customers, as Joint Applicants maintain for § 739.9(a), then the exact phrase when used in § 739.9(b) should be interpreted to have the same meaning therein. Moreover, this would result in a contradiction, because it would result in stating that the limitation in rate increases in § 739.9(b) on volumetric rates for baseline customers, includes any fixed customer charge revenues.

This is an unreasonable interpretation and undermines the Joint Applicants' position that §739.9(a) only imposed limitations on volumetric rates. As the Commission correctly stated in D.11-05-047, at pp.30-31, the word "including" is a word of enlargement, not of limitation.¹⁶ If the Legislature had intended to exclude customer

¹⁵ Joint Application, p.14.

¹⁶ *See Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717.

charges from the phrase “rates charged to residential customers for electricity usage,” it would have been a more logical to use the phrase “in addition to,” instead of the term “including.” Even Joint Applicants concede that “in addition to” would have been a clearer way to make their point.¹⁷ Therefore, they cannot escape from the ambiguity that arises from their interpretation.

2. Joint Applicants’ Erroneous Interpretation Is Based upon Taking Words Out of Context

Joint Applicants’ statutory interpretation has taken words out of context in order to claim that rates “for electricity usage” mean volumetric rates. They rely upon only parts of the phrase in § 739.9(a), instead of the whole phrase “the rates charged residential customers for electricity usage up to 130 percent of the baseline quantities...” This would include all rates that a customer within the specified usage tier would pay, whether volumetric or fixed. The reference to “usage up to 130 percent of the baseline quantities” was, therefore, merely defining the Tier 1 and Tier 2 quantities, whose rates had been previously frozen under AB 1X.

The Commission recognized in D.11-05-047, at p. 24, that SCE had a fixed customer charge, and noted that there are no statutory restrictions categorically prohibiting fixed customer charges. The Commission, however, declared:

The key legal question here, however, is whether the imposition of a fixed customer charge is included within the Sec. 739.1(b)(2) and 739.9(a) annual rate limitations applicable to electric usage up to 130 percent of baseline. Based on our analysis of the statutory provisions as discussed below, we do interpret Sec. 739.1(b)(2) and 739.9(a) as including fixed customer charges within the limitations on allowable percentage increases in “rates for usage.” Thus, we are prohibited by law from approving PG&E’s customer charge to the extent the total bill impacts exceed these statutory limitations on baseline rate increases.¹⁸

¹⁷ Joint Application, p. 10.

¹⁸ D.11-05-047, at p. 24.

In D.11-05-047 at p.32, the Commission found that PG&E had already reached the statutory limits of increases in §§ 739.1(b)(2) and 739.9(a). Its additional imposition of a customer charge would exceed those limits.

Joint Applicants misleadingly refer to the previous language in AB 1X, Cal. Water Code § 80110,¹⁹ which had frozen Tier 1 and Tier 2 residential customer rates until such time as the California Department of Water Resources (DWR) had recovered all of the costs of power it had procured for the electrical corporations' retail end use customers. In this regard, Joint Applicants allege that “charges ... for existing baseline quantities or usage” must mean that baseline quantity charges were different than the phrase “charges ... for usage.” Otherwise, according to Joint Applicants, there would be no reason for using the word “usage” because it would be mere surplusage to the phrase “baseline quantities.” Joint Applicants have taken this previous language out of context to create an argument that is not reflective of the previous statute.

The full context of the pertinent part of Cal. Water Code § 80110(e), prior to SB 695, was as follows:

In no case shall the commission *increase the electricity charges* in effect on the date that the act that adds this section becomes effective for residential customers *for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities*, until such time as the department has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division. (Emphasis added)

The Commission had consistently interpreted the language in Cal. Water Code § 80110(e), as referring to the total charges for Tier 1 and Tier 2 rates. As the Commission stated in D.04-02-057 at 93:

We have consistently interpreted this AB 1X restriction to provide protection for *total charges for residential usage up*

¹⁹ The exact language at issue in Cal. Water Code § 80110, when AB 1X was first enacted, later was relettered as Cal. Water Code § 80110 (e) prior to SB 695.

to 130% of baseline, for utilities subject to the provisions of Water Code 80110. (Emphasis added).²⁰

Consequently, there was no surplusage, because the Legislature had stated that in no case shall the Commission increase the electricity charges in effect on that date for residential customers for existing baseline quantities (i.e., Tier 1 customers) or “usage by those customers up to 130% of existing baseline quantities” (i.e., Tier 2 customers). In any event, it is too late now to argue that the Commission’s decisions freezing total rates for Tier 1 and Tier 2 for nearly nine years had misinterpreted AB1X. Pursuant to Cal. Pub. Util. Code § 1709, once the Commission's decisions became final, they are no longer subject to collateral attack. In addition, there is a presumption that the Legislature was aware of the Commission's construction of the statute given the long duration of the Commission's decisions, particularly when the legislative history makes clear that the Legislature was very informed of the Commission's interpretation of AB1X in this regard.²¹

It is unreasonable to interpret this section as merely imposing limits on the volumetric rates. This is because it would have little meaning if a fixed customer charge could be imposed without regard to such limits, and thereby undermine the intended overall rate stability.

²⁰ The Commission previously stated in D.02-04-026 at 14:

We find this statement to be unequivocal: the Legislature, for the life of the legislation, does not want residential customers to pay more money than they were paying on February 1, 2001 for the baseline quantity of electricity they were receiving on that date. Likewise, residential customers should not pay more than they were paying on February 1, 2001 for their usage of electricity of up to 130% of the baseline quantity they were receiving on that date. (Emphasis added).

²¹ See *Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1017-1018. Indeed, as discussed below, the legislative history of SB 695 establishes that the Legislature was fully aware of the AB1X rate freeze.

3. Joint Applicants' Reliance upon Principles of Statutory Construction Cannot Circumvent the Legislative Intent

Joint Applicants exaggerate the effect of the two words, “customer charges,” that are included in § 739(b), but are not included in §§ 739.1(b)(2) and 739(a). This principle, commonly called “*expressio unius est exclusio alterius*,” is a subjective guideline. It is not a strict rule of statutory construction, which would compel the Commission to accept a particular interpretation.²²

As the California Supreme Court further explained in *Silverbrand v. County of Los Angeles*, 46 Cal.4th at 126, this interpretive principle, that the expression of some words necessarily signifies the exclusion of other things, applies only when the Legislature has intentionally changed a term by design. Factually, there should be some evidence that the Legislature intended that the inclusion of language in one section but its failure to include the language in another section was deliberate. “Furthermore, the principal is always subordinate to legislative intent.” *Id.* However, Joint Applicants cannot point to anything to indicate that the Legislature’s inclusion of “customer charges” in § 739(b), but exclusion of “customer charges” in §§ 739.1(b)(2) and 739(a), meant that the Legislature intended to exclude customer charges from the limitations on rate increases in §§ 739.1(b)(2) and 739(a).²³

Joint Applicants’ argue that the two words (i.e., “customer charges”), would otherwise be considered mere surplusage. However, this pales in comparison to making the entire subdivision of § 739.9(a), which consists of more than 100 words, or the entire subdivision of § 739.1(b)(2), which consists of more than 70 words mere surplusage. This would result from authorizing PG&E to circumvent these restrictions on rate increases by simply increasing rates in a fixed monthly customer charge to its residential Tier 1 or Tier 2 CARE and non-CARE customers.

²² See D.10-07-050 at 19, citing *Estate of Banerjee* (1978) 21 Cal.3d 527, 539.

²³ Rather than showing any evidence for this inference, the Joint Application, p. 5 admits that there is no discussion or evidence as to why the Legislature included this example in one section and not the others.

In D.11-05-047 at p.28, the Commission cited *California Mfrs. Assn. v. Public Utilities Com* (1979) 24 Cal. 3d 836, 844 for the proposition that statutory construction based upon alleged surplusage of words within a statute, which defies common sense or leads to mischief or absurdity, is to be avoided. Joint Applicants criticize the Commission's D.11-05-047, by first pointing out that the actual quote in *California Mfrs. Assn. v. Public Utilities Com*,. 24 Cal. 3d at 844 is "Interpretative constructions which render some words surplusage, defy common sense or lead to mischief or absurdity, are to be avoided."²⁴ Secondly, Joint Applicants attempt to distinguish *California Mfrs. Assn* on the basis that the interpretation in that case would have rendered the entire statute superfluous.²⁵ However, the Joint Applicants never address the point that their interpretation makes superfluous the entire subdivisions of § 739.9(a) and the entire subdivision of § 739.1(b)(2) mere surplusage, by stating that these limits only apply to volumetric rates and the utilities could completely avoid the limits by increasing or creating fixed customer charges.

Moreover, the California Supreme Court has made it crystal clear in *In Re J.W.*(2002) 29 Cal.4th 200, 209, that the two principles of statutory construction relied upon by the Joint Applicants (i.e., *expressio unius est exclusio alterius* and the rule against interpretations which would render certain words surplusage) are merely guides, and should not be applied if they would "defeat legislative intent or produce an absurd result." Indeed, "courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended." *Id.* at 210. Therefore, contrary to the position of Joint Applicants, courts consider the legislative history to determine legislative intent. *Id.*; *see also California Mfrs. Assn. v. Public Utilities Com*,. 24 Cal. 3d at 844("both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose.")

²⁴ Joint Application, p.10.

²⁵ Joint Application, p.11.

B. The Legislative History Supports the Commission’s Findings Concerning Legislative Intent

1. Joint Applicants Have Erred by Distorting the Legislative History

Joint Applicants assert that the Commission erred by finding support in the legislative history for concluding that the Legislature intended in enacting §§ 739.1 (b)(2) and 739.9(a) to place limits upon entire rate increases for Tier 1 and Tier 2 customers.

As the Commission correctly stated in D.11-05-047, at pp. 25-26:

In reference to the legislative history of SB 695, the Legislature has stated that “by restricting rate increases to an annual narrow range and controlling the increase within relatively small parameters, SB 695 is intended to minimize spikes in electricity rates and provide relative stability and predictability.”²⁶ Consistent with this express intent, the limitations in “rate” increases must be interpreted consistent with providing “relative stability and predictability” in customers’ rates. Ignoring the effects of a fixed customer charge in assessing permissible statutory rate increases would conflict with this stated intent of SB 695. Otherwise, merely imposing limits on volumetric tiers would have little meaning if a fixed customer charge could be imposed without regard to such limits, and thereby undermine the intended overall rate stability. No customer using only baseline quantities could avoid the customer charge. Thus, it is logical to infer that the Legislature intended that all rate elements relevant to baseline usage be included for purposes of “restricting rate increases.” Thus, by examining the legislative intent, we resolve the ambiguity in favor of interpreting customer charges as being included within the intended use of the term “rates” in Sec. 739.1(b)(2) and 739.9(a).

Joint Applicants state, for the first time, that the Commission has misinterpreted the legislative history, because nothing in the legislative history, quoted above, mentions fixed customer charges.²⁷ However, the silence in the legislative history hardly supports Joint Applicants’ view that the legislative intent was to allow utilities to eviscerate the

²⁶ Assem. Com. On Appropriations Analysis of SB 695 (2009-10 Reg. Sess.) August 19, 2009, at 2-4; *see also* Sen. Floor Analysis of SB 695, Sept. 3, 2009. [This footnote was numbered 16 in D.11-05-047].

²⁷ Joint Application, p. 5.

gradual and limited increases referenced in §§739.1(b)(2) and 739.9(a) by being unlimited in how much that they could allocate to fixed customer charges. Moreover, Joint Applicants do not and cannot deny that the legislative history, quoted above, was addressing the increases in the total rates for usage up to 130 percent of baseline quantities, which had been frozen under AB 1X.

Indeed, in their quote from the legislative history, Joint Applicants highlight the wrong sentences, discussing the background, but they do not highlight the sentence about what SB 695 is intended to do: “ ‘**It is uncertain when the DWR will retire the ABX1 bond debt or fully recover its costs. At that time, however, the lower-tiered rates are expected to skyrocket to provide less of a spread between the 130% of baseline and the higher tiers.** By restricting rate increases to an annual narrow range and controlling the increase within relatively small parameters, SB 695 is intended to minimize spikes in electricity rates and provide relative stability and predictability.’ (Assembly Com. On Appropriations Analysis of S.B. 695 (2009-10 Reg. Sess.) Aug. 19, 2009, pp. 2-4).” (Emphasis added by Joint Applicants).²⁸ The key sentence in this legislative history is the last sentence discussing how SB 695 is intended to minimize spikes in electricity rates by restricting rate increases to an annual narrow range and within relatively small parameters, which is obviously referring to the formulas listed in detail in §§739.1(b)(2) and 739.9(a).

2. The Legislative History Confirms that Joint Applicants Have Taken the Term “Rates Charged Residential Customers” Out of Context

A simple review of the legislative history establishes that the legislative intent was to use the entire phrase “the rates charged residential customers for electricity usage up to 130 percent of the baseline quantities” as a definitional term of art for Tier 1 and Tier 2 quantities, whose rates had been previously frozen under AB 1X. Thus, it was not intended to mean only volumetric rates or usage-based rates. This phrase was referring to the entire *retail rates* for the Tier 1 and Tier 2 customers, which had been frozen and

²⁸ Joint Application, p. 6.

were in a limited and gradual way being allowed to increase under the compromise reached between the consumer groups and the utilities.

This is clear when reviewing the purpose of SB 695 according to its author, Senator Kehoe. “According to the author, the purpose of this bill is to lift some of the emergency measures imposed during the energy crisis- including capping residential retail rates. ... Maintaining current policies could lead to dramatic rate changes if the rate stabilization measures imposed during a crisis were suddenly released without the incremental changes proposed in this bill.” Assembly Com. On Appropriations Analysis of S.B. 695 (2009-10 Reg. Sess.) Aug. 19, 2009, p. 3.

The legislative history is also clear as to the legislative intent to use the whole phrase, discussed above, as a term of art whether referring to AB1X or SB 695. Thus, it states that “[t]his bill eliminates the current rate freeze on *electricity usage for residential customers of up to 130% of the baseline rate* ... and provides several other rate stabilization measures.” *Id.*, p. 2. Among those rate stabilization measures are that the bill: “5) Restricts rate increases for CARE program participants for *electricity usage of up to 130% of baseline quantities* by the annual percentage increase in benefits under the CALWORK program, not to exceed 3% per year ... [and] 7) Restricts rate increases charged to residential customers for *electricity usage of up to 130% of baseline quantities*, by annual percentage change in the Consumer Price Index plus 1%, but not less than 3% and not more than 5% per year.” *Id.* at p. 2 (Emphasis added). These nearly identical phrases were therefore used by the Legislature, whether referring to the rate freeze under AB1X or the method by which SB 695 intended to eliminate the rate freeze.

The whole point of this compromise in the legislation was to prevent rates from skyrocketing. In return for the consumer groups’ agreement to remove the frozen rates enjoyed by Tier 1 and Tier 2 customers (as a result of AB 1X), the agreement reached was for the gradual and limited increase provided in the above-mentioned sections added by SB 695.

Joint Applicants never discussed the Senate Floor Analysis of SB 695, Sept. 3, 2009,²⁹ which is also relied upon by Commission in its D.11-05-047, at p. 26. The Senate Floor Analysis of SB 695 confirms that SB 695 adopted a compromise between the electric utilities and the representatives of residential consumer groups. In this regard, the Senate Floor analysis of SB 695 stated:

Existing law ... prohibits the CPUC from increasing the electricity charges in effect on February 1, 2001, for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of then existing baseline quantities, until the department has recovered the costs of electricity it procured for electrical corporation retail end-use customers. ...

This bill deletes the prohibition that the CPUC not increase the electricity charges in effect on February 1, 2001, for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of then existing baseline quantities. The bill authorizes the CPUC to increase the rates charged residential customers for electricity usage up to 130 percent of the baseline quantities by the annual percentage change in the Consumer Price Index from the prior year plus one percent, but not less than three percent, and not more than five percent per year. This authorization will be subject to the limitation that rates charged residential customers for electricity usage up to the baseline quantities, including any customer charge revenues, not exceed 90 percent of the system average rate, as defined. The bill authorizes the CPUC to increase the rates for participants in the CARE program, subject to certain limitations.³⁰

The legislative history, therefore, supports the Commission's interpretation that the "electricity usage of up to 130% of baseline quantities" was a definitional term, and increases in the rates or charges from the previously frozen Tiers 1 and 2 were limited to 3% to 5% annual increases.

²⁹ Sen. Floor Analysis of SB 695, Sept. 3, 2009, 2009 Legis. Bill Hist. CA S.B. 695.

³⁰ Sen. Floor Analysis of SB 695, Sept. 3, 2009, 2009 Legis. Bill Hist. CA S.B. 695, pp. 2, 4-5.

3. Joint Applicants' Argument that the Legislative History Referred to Examples of Rising Costs Is Irrelevant to the Consumer Protection Provisions for Tier 1 and Tier 2 Customers

Joint Applicants maintain that the only items referenced in the legislative history as potential spikes were volumetric items “such as rising fuel prices and legislative mandated and PUC-created programs.”³¹ This argument is totally irrelevant to the indisputable point in the legislative history that “by restricting rate increases to an annual narrow range and controlling the increase within relatively small parameters, SB 695 is intended to minimize spikes in electricity rates and provide relative stability and predictability.” As the Commission recognized in its D.11-05-047, at p. 26, “merely imposing limits on volumetric tiers would have little meaning if a fixed customer charge could be imposed without regard to such limits, and thereby undermine the intended overall rate stability.” So, without a limit on a fixed customer charge, it would potentially allow the electric utilities to shift the recovery of significant costs to the fixed customer charge for residential customers in Tiers 1 and 2. Thus, under the Joint Applicants’ theory, the more the utilities’ costs are recovered through a fixed customer charge, the more it would free up the so-called limit on the utilities’ volumetric rates. This would be totally inconsistent with any notion of a gradual limit in the increase of Tier 1 and Tier 2 rates. That is precisely why the legislative history supports the Commission’s view that the restricted and gradual rate increase must apply to the total retail rate, and not some subpart thereof.

At some point, of course, the electric utilities’ total revenues would be limited (including customer charge revenues) by operation of § 739.9(b). Joint Applicants rely heavily upon this limit to suggest that the Commission committed legal error in D.11-05-047 by ignoring this limit in its analysis.³² However, the primary protection for Tier 1 and Tier 2 customers is provided in §§739.1(b)(2) and 739.9(a), and the protection under § 739.9(b) is an additional limit on baseline rates (i.e., Tier 1) that sets the final

³¹ Joint Application at p. 6.

³² Joint Application, at p. 12.

limit allowable for baseline rates. Thus, §§ 739.9(a) and 739.9(b) properly read together, means that for non-CARE residential customers whose usage of electricity was up to 130% of baseline quantities (i.e., Tier 1 and Tier 2), the Commission may increase their previously frozen rates annually by 3% to 5% but even this increase is “subject to the limitation in subdivision (b),” such that in no event may the rates charged for the baseline quantities (i.e., Tier 1) exceed 90% of the system average rate for bundled service prior to January 1, 2019. Therefore, the Joint Applicants’ interpretation would deprive the Tier 1 and Tier 2 customers of their primary protection in § 739.9(a), effectively converge the protection into only being the additional protection in § 739.9(b), which is limited to rates charged for residential customers for electricity usage up to baseline quantities (Tier 1). Under Joint Applicants’ unreasonable interpretation, there also is no limit to how much they could charge to Tier 2 customers (i.e., customers who use between 101% and up to 130% of baseline quantities), because they could make up in fixed customer charges for anything limited by the complicated formula specified for determining the amount of the increase between 3% and 5% increase in § 739.9(a). Thus, the Joint Applicants’ unreasonable interpretation would effectively read the primary protection for Tier 1 and Tier 2 customers in §§ 739.1(b)(2) and 739.9(a) right out of SB 695.

C. The Joint Application’s Reference to Policy Arguments Is Inappropriate

D.11-05-047 referred to various policies, and DRA disputes much of the claims made in the policy section of the Joint Application. However, as stated above, it is improper to re-litigate policy issues in the application for rehearing.

This is particularly true, because the Commission concluded that it was restricted under the law to follow the compromise under SB 695. As the Commission correctly stated:

Based on our analysis of the statutory provisions ... , we do interpret Sec. 739.1(b)(2) and 739.9(a) as *including* fixed customer charges within the limitations on allowable percentage increases in “rates for usage.” Thus, we are

prohibited by law from approving PG&E's customer charge to the extent the total bill impacts exceed these statutory limitations on baseline rate increases.³³

In *Assembly v. Public Utilities Com.*, 12 Cal.4th at 98-99, the California Supreme Court annulled a decision by the Commission's because it was contrary to the law, regardless of the wisdom of the policy. For these reasons, DRA agrees with the Commission's legal conclusion, and will not engage in the policy debate with the Joint Applicants. The policy was already decided by the Legislature when it approved the compromise between the consumer groups and the utilities. The utilities need to live up to their part of the bargain and adhere to the law rather than try to circumvent it.

IV. CONCLUSION

For the above-mentioned reasons, DRA respectfully submits that the Commission should deny the Joint Application for Rehearing.

Respectfully submitted

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³³ D.11-05-047 at p. 24 (Emphasis added).