

Decision 04-04-020

April 1, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to
Determine Whether Baseline
Allowances for Residential Usage of Gas
and Electricity Should Be Revised.

Rulemaking 01-05-047
(Filed May 24, 2001)

ORDER DENYING REHEARING OF DECISION (D.) 04-02-057

I. BACKGROUND

Decision (D.) 04-02-057 (Baseline Decision) involves the Commission's determination of baseline allowances for residential usage of gas and electricity. AB1X (as codified at Water Code section 80110) bars the Commission from increasing "electricity charges" above 2001 levels for use up to 130 percent of existing baseline quantities. In D.04-02-057, the Commission exempted customers using less than 130% of baseline electricity quantities from increases in total rates.

The Commission's decision rested its interpretation of the phrase "electricity charges." The Commission reads the phrase to encompass both the commodity and non-commodity portion of rates. Thus customers will see no increase in rates on electricity use up to 130% of baseline. San Diego Gas & Electric Company ("SDG&E") contends that the phrase "electricity charges" applies only to the commodity portion of rates, and that the non-commodity portion of rates for use below 130% of baseline can rise even if the increase pushes total rates above 2001 levels.

The procedural history is set forth in detail in D.04-02-057. To briefly recap, on May 24, 2001, the Commission instituted Rulemaking (R.) 01-05-047 to evaluate whether the utilities' baseline programs should be revised. The rulemaking has proceeded in two phases. In D.02-04-026 issued in Phase 1, the Commission required that jurisdictional utilities update baseline quantities to reflect current usage of gas and electricity, increase baseline quantities to the maximum percentage levels allowed by law for customers not already receiving those maximum allowances, and simplify and improve the process by which customers may obtain the standard limited additional baseline allowance for medical reasons. The utilities are authorized to accrue program costs and related revenue losses in their baseline balancing accounts (BBAs), the disposition of which the Commission deferred to Phase 2.

SDG&E timely filed an application for rehearing of D.04-02-057. SDG&E alleges that error lies because: (1) the Commission's interpretation is contrary to Water Code section 80110's plain language; (2) the Commission improperly considered legislative history in interpreting Water Code section 80110, and (3) the Commission's interpretation of Water Code section 80110 contravenes the legislative purpose behind the statute's enactment. SDG&E further asserts as error: (4) the Commission's asserted reliance on "dicta," and (5) the Commission's alleged denial of due process. ORA and TURN filed a joint response opposing SDG&E's claims on rehearing. The Commission received no other responses.

At issue is whether Water Code section 80110's prohibition on increases in "electricity charges" for customers using less than 130% of baseline amounts of electricity freezes total rates, or just the commodity portion of rates. In D.04-03-057 the Commission adopted the former view. SDG&E argued then, and argues again now, on rehearing, for the latter position.

II. DISCUSSION

A. **The Plain Language of Water Code Section 80110 Does Not Require Adoption of SDG&E’s Interpretation of the Phrase “Electricity Charges;” the Meaning of the Phrase “Electricity Charges” is Ambiguous and the Commission May Properly Refer to Legislative History in Interpreting the Phrase.**

The portion of Water Code section 80110 at issue reads:

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.¹

SDG&E’s first and second specifications of error relate to the Commission’s allegedly improper consideration of legislative intent in interpreting Water Code section 80110.² SDG&E contends that the phrase “electricity charges” in the foregoing excerpt is susceptible of only one meaning: commodity costs. In D.04-02-067, of course, the Commission found otherwise, concluding that the phrase “electricity charges” referred to total rates.

The California Supreme Court has set forth general rules governing statutory construction:

Where a statute is theoretically capable of more than one construction we choose that which most comports with the intent of the Legislature. [Citation] Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citation]

¹ This portion of Water Code section 80110 is referred to as the “AB1X exemption.”

² “(1) The Commission’s interpretation of AB1X and Water Code section 80110 as capping non-commodity rates in addition to ‘electricity charges,’ i.e., the cost of the electricity commodity, for usage of up to 130% of baseline, is contrary to express and unambiguous statutory language. (2) The Commission impermissibly resorts to legislative history to contradict the express and unambiguous statutory language to support its AB1X interpretation.” Rhg. App. at 2-3.

Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. [Citation] In the present instance 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. [Citation]

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

The state Court of Appeal recently faced competing interpretations of AB1X, as DWR and PG&E were at odds over interpretation of certain of the bills provisions. The court noted in resolving the DWR/PG&E dispute that:

The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. . . . 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. . . . 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.

Pacific Gas & Electric Co. v. Department of Water Resources, 112 Cal. App. 4th 477, 495 (2003) (internal citations omitted in original).

This Commission has adopted the three-step approach to statutory construction articulated in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1239 (1992). See D.97-11-020, 1997 Cal. PUC LEXIS 1033, at *7. In *Halbert's*, the court established a sequence for applying the tools of statutory construction. "There is order in the most fundamental rules of statutory interpretation if we want to find it. The key is applying those rules in proper sequence." *Halbert's, supra*, 6 Cal. App. 4th at 1238. First, one looks to the plain language of the statute. If the language is unambiguous, then the language controls and the inquiry is over. Otherwise, one proceeds to the legislative history. "The final step--and one which we believe should only be taken when the first two steps have failed to reveal clear meaning--is to apply reason, practicality, and common sense to the language at hand." *Halbert's, supra*, 6 Cal. App. 4th at 1239.

The cases upon which SDG&E relies in support of its first and second specifications of error are generally³ consistent with the foregoing. They simply restate the rule that where there is no ambiguity, legislative history may not be considered in interpreting a statute, and, conversely, to borrow SDG&E's own articulation of the rule, "when a statute is capable of more than one reasonable construction [] it [is] appropriate to explore legislative history."⁴ The threshold question, then, is whether Water Code section 80110 clearly and unambiguously is susceptible to only one interpretation.

SDG&E is incorrect in its claim that the statute's meaning is plain on the statute's face. The phrase "electricity charges" is not defined in the Water Code, the Public Utilities Code, in any other statute, or in any pre-AB1X decisional authority. Indeed, the phrase does not appear anywhere else in the Water Code, and appears in only one instance anywhere in the Public Utilities Code.⁵ While SDG&E claims "electricity charges" self-evidently means what SDG&E says it means, numerous other parties have contended that it in fact means something else. The Commission ultimately adopted one of the competing views – the view that the phrase "electricity charges" refers to total, rather than commodity, rates.

SDG&E claims that the express language of AB1X refers to "power,"⁶ and that therefore the phrase "electricity charges" must refer to the commodity portion of

³ SDG&E cites *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345, 350 (7th Cir., 1991), for the proposition that "recourse to legislative history to clarify the meaning of statutory language, is, at best, a shaky endeavor." The California Supreme Court has not taken such a disparaging view of the use of legislative history, and *Halbert* places legislative history second in its tripartite hierarchy.

⁴ Rhg. App. at 6.

⁵ The phrase appears in a discussion of legislative purpose in Public Utilities Code section 399(e)(6). Turn/ORAs argue in their joint comments ("Jt. Comm.") that Public Utilities Code section 399(e)(6) uses the expression to mean total rates. Jt. Comm. at 4.

⁶ "The statutory text is expressly linked only to 'power' costs, the costs of the commodity itself that DWR has incurred." Rhg. App. at 4. "A review of the express language of AB1X reveals that the statutory purpose of AB1X is to protect usage of up to 130% of baseline from increases in the cost of power, i.e., the commodity cost, that DWR purchased for utility customers in response to the 2000-2001 energy crisis." *Id.* at 3-4, citing Water Code section 80000.

rates.⁷ The word “power” appears only once in the pertinent part of Water Code section 80110. That appearance comes in the context of the termination of the AB1X exemption: the legislature has tied the end of the AB1X exemption to DWR collecting the costs of purchasing power under its (DWR’s) AB1X authority. The legislature’s decision to end the AB1X exemption upon DWR’s collection of its power purchase costs does not lead ineluctably to the conclusion that the AB1X exemption reaches only the commodity portion of rates.

The “AB 1890 rate freeze” illustrates how the legislature can establish a freeze on “total” rates while tying the end of the freeze to collection of costs that comprise only a fraction of total rates. In AB 1890,⁸ the legislature tied the end of a “retail rate” (i.e., “total rate”) freeze to either: (1) recovery of certain “uneconomic,” (i.e., generation) costs or (2) to a date certain, whichever came first. See PU Code Section 368. It is entirely plausible that in AB1X the legislature would again freeze total rates while linking the end of the AB1X exemption to collection of a particular set of costs – DWR power purchase costs. Thus, while the word “power” appears in Water Code section 80110, the word is not used as a modifier of the phrase “electricity charges,” and so does not conclusively establish the meaning of that phrase.

SDG&E refers also to a mention of “power” in Water Code section 80000. Again, the mention of “power” does not compel the conclusion that the legislature meant to freeze only commodity, as opposed to total, rates. In Water Code section 80000, the legislature states that “The furnishing of reliable reasonably priced electric service is essential for the safety, health, and well-being of the people of California,” before expressing concern with *both* “rapid and substantial increases in wholesale energy costs and retail energy rates, with statewide impact . . .” This suggests that the legislature’s

⁷ “Specifically, Water Code section 80110 expressly links ‘electricity charges’ with DWR’s ‘costs of power’ procured for its retail customers.” Rhg. App. at 7.

⁸ Stats. 1996, ch. 854.

concern was not just with energy costs (i.e., power costs), but *also* with “retail energy rates” (i.e., total rates).

SDG&E makes much of the fact that Water Code section 80110 does not use the word “total” to modify “electricity charges.” But neither does it use the word “commodity”. Arriving at SDG&E’s interpretation requires implying a meaning that is not expressly set forth in the statute. As pointed out in the Baseline Decision, if the legislature meant to single out commodity rates (or the commodity portion of rates) for the AB1X exemption, it could and would have expressly done so.⁹ SDG&E remarks that “[t]hat observation cuts both ways,”¹⁰ but SDG&E’s comment merely highlights the ambiguity of the statute’s phraseology.

To summarize, neither Water Code section 80000 nor Water Code section 80110 clearly establishes the meaning of the phrase “electricity charges.” The phrase is readily susceptible to more than one meaning, and so the Commission may properly consider “both the legislative history of the statute and the wider historical circumstances of its enactment,” *California Manufacturers Ass’n, supra*, 24 Cal. 3d at 844, in interpreting the statutory phraseology.

⁹ “When the Legislature was considering AB1X, it was clearly aware of the fact that electric rates have several components. AB1X itself added statutory sections that reference “component rates” (Water Code § 80114) and the “generation related component of the retail rate” (§ 360.5). AB 1890 mandated the separation of electric rates into individual rate components (§ 368(b)). AB 265 and AB1X 43 imposed restrictions (§ 332.1(b) and (f)) on “the energy component of electric bills” for SDG&E.” D.04-02-057, mimeo at 94-95. See also Public Utilities Code section 454.1 for an example of legislation that expressly distinguishes between the commodity and the non-commodity portions of rates.

¹⁰ Rhg. App. at 8.

B. SDG&E Misconstrues the Purpose of the AB1X exemption.

1. The Legislative History Supports the Commission's Interpretation of the AB1X exemption; SDG&E's Failure to Identify Any Ambiguity in the Legislative History Renders the Legislative History Dispositive.

The Commission takes a multistep approach to statutory interpretation. “If the language is ambiguous or susceptible to more than one reasonable interpretation, the next step is to refer to the legislative history. [Citation] If legislative history fails to provide clear meaning, the final step is to apply reason, practicality, common sense, and extrinsic aids.” D.97-11-020, 1997 Cal. PUC LEXIS 1033, at *7.

In this case, the legislative history of AB1X contradicts SDG&E's interpretation of the statute. We articulated our understanding of the legislative history in D.04-02-057.¹¹ On rehearing, SDG&E has not challenged our interpretation of the legislative history.

TURN and ORA again call attention to the fact that an early draft of AB1X contained language limiting the AB1X exemption to “the electric procurement portion of electricity charges.”¹² A January 31, 2001 Senate amendment struck the “electric procurement portion” language, and that language never reappeared in the bill. In D.04-02-057 we accorded “no weight” to “the phrase [electric procurement portion of . . .].”¹³ On rehearing, we find it persuasive that while one incarnation of the bill contained language that beyond dispute modifies the phrase “electricity charges” to apply only to a portion of rates, the version of the bill that became law did not. There can be no question

¹¹ *Id.* at 93-94.

¹² See Jt. Comm. at 5. For the pertinent text of the draft bill, see Document 1 accompanying Motion of PG&E Requesting Official Notice of Documents in this docket, p. 12 of Senate draft dated January 30, 2001, adding quoted language.

¹³ D.04-02-057, mimeo at 94.

that SDG&E seeks to read back into AB1X language similar to what the legislature struck.¹⁴

In summary, in its rehearing application, SDG&E does not offer an alternative view to our interpretation of the legislative history. SDG&E seeks instead to exclude the legislative history from consideration altogether in favor of either a plain text analysis (inappropriate for the reasons discussed previously) or in favor of exclusive reliance on the alleged “historical circumstances,” *California Manufacturers Ass’n, supra*, of AB1X’s enactment.

SDG&E’s reliance on “historical circumstances” is misplaced. SDG&E’s failure to address the merits of the legislative history leaves untouched an analysis of the legislative history supporting this commission’s interpretation of Water Code section 80110. Pursuant to *Halbert’s*, the inquiry into the statute’s meaning is at an end. Nonetheless, we will address the remainder of SDG&E’s statutory interpretation arguments.

2. SDG&E’s Recitation of the Historical Circumstances Surrounding AB1X’s Enactment.

Assuming, for the sake of argument, that the legislative history is not dispositive, the Commission must turn to SDG&E’s contention that the historical circumstances surrounding the passage of AB1X compel adoption of SDG&E’s interpretation of Water Code section 80110. In summary, SDG&E contends that skyrocketing commodity costs alone gave rise to AB1X, and so “it is clear that the purpose of the AB1X 130% of baseline prohibition is to shelter residential customers at

¹⁴ As we explained in D. 04-02-057, SDG&E argued that “removal of these words from the bill signifies that the Legislature intended the bill’s protection to apply “to the entire commodity charge and not just to the procurement portion of the commodity charge.” SDG&E also notes that AB 1X provides protection for “electricity charges” rather than “total rates.” In response, TURN states that there is no separate “procurement portion” of SDG&E’s commodity charge and no justification or evidence supporting SDG&E’s artificial distinction.” D.04-02-057, mimeo at 88-89. We agree with TURN that there is no separately stated “procurement portion” of SDG&E’s commodity charge.

this usage level from commodity rate increases for what could be as long as 19 more years, until 2022, when the DWR bond charge is due to terminate.”¹⁵

As discussed earlier, the language of Water Code section 80000 expresses concern about both “increases in wholesale energy costs and retail energy rates, with statewide impact.” Even if the legislature was solely concerned with spiking commodity prices, it is entirely conceivable that the legislature addressed the problem posed by wholesale energy costs by freezing certain customers’ retail energy rates. The legislature need not necessarily have tailored its solution to the problem of rising electricity bills as perfectly or as narrowly as it theoretically could have. The legislature could reasonably have responded to a commodity price spike by capping total rates rather than by becoming embroiled in the finer points of utility rate design.

3. The Commission’s Interpretation of Water Code § 80110 Need Not Lead to Unreasonably Harsh Results.

SDG&E complains that:

Under D.04-02-057’s interpretation that AB1X caps both non-commodity and commodity rates for usage of up to 130% of baseline, if AB1X were in effect for the full term of the bonds that the DWR issued to pay the costs of the 2000-2001 energy crisis, SDG&E would be prevented from passing on even normal inflationary increases in distribution and transmission rates for approximately 70% of residential usage until 2022. This result clearly is unreasonable.¹⁶

It cannot be said as a matter of law that it is unreasonable for the legislature to shelter the smallest residential users from future rate increases. This is true even if, as SDG&E suggests, “[normal inflationary increases in distribution and transmission rates for approximately 70% of residential usage remain] within the residential class,”¹⁷ thereby increasing rates for the above-baseline use at a rate in excess of inflation.

¹⁵ Rhg. App. at 9 (emphasis in original).

¹⁶ Rhg. App. at 11.

Moreover, as ORA and TURN note, if commodity prices decline, it may become possible to increase other sub-components of rates without requiring off-setting reductions to comply with the AB 1X exemption.¹⁸

SDG&E further speculates that “in a subsequent proceeding, the Commission [may] decide to allocate all or a portion of [normal inflationary increases in distribution and transmission rates for approximately 70% of residential usage] to SDG&E’s large commercial and industrial customer class.” The Commission’s interpretation of Water Code section 80110 does not require that the Commission engage in an interclass cost shift of the type that SDG&E describes, and so SDG&E’s speculations have no impact on the Commission’s interpretation of Water Code section 80110.

The record in this proceeding is closed. The Commission will not reopen the record for the “Total Rate Impacts Under Various AB 1X Shortfall Recovery Scenarios” table that SDG&E has submitted in attachment 2 of its rehearing request. The Commission must review of the lawfulness of its decision based on the record; the Commission therefore cannot consider the extra-record document that SDG&E has submitted.

C. The Commission Properly Referred to Relevant Commission Precedent

SDG&E objects to the Commission’s asserted reliance on selected Commission decisions.

D.04-02-057 states, mimeo at 93, “We have consistently interpreted this AB 1X restriction to provide protection for total charges for residential usage up to 130% of baseline for utilities subject to the provisions of Water Code section 80110,” citing to

¹⁷ Rhg. App. at 12.

¹⁸ “In the next few years as DWR contracts expire, DWR costs would decline and commodity rates would also decline. When commodity rates or other rates decline, an off setting [sic] increase to other rate components would be allowed.” Jt. Comm. at 8.

D. 02-04-026, mimeo at 14 (Phase 1 Baseline Decision) and D.02-10-063 as modified by D.02-12-082, mimeo at 18 (DWR bond decision).¹⁹

SDG&E objects to the reference to the Phase 1 Baseline Decision on the grounds that it “suffers from the same legal infirmities as does D. 04-02-057 in interpreting AB1X as imposing a cap on total rates for usage of up to 130% of baseline.” This is an improper collateral attack²⁰ on a final prior decision for which the time to seek review has run,²¹ and the Commission need not entertain this argument.

SDG&E objects to the reference to the DWR bond charge decision on the grounds that “[T]he DWR bond decision was not confronted with the issue of non-commodity rate caps.”²² SDG&E similarly objects to references to D.01-03-082 (Edison and PG&E’s three cents surcharge decision) and D.01-05-064 (Edison and PG&E’s rate design proceedings) “because those cases related either to DWR costs or to commodity costs.”²³

There is no legal error in the citations to these prior Commission decisions. SDG&E claims that “any expansive reading of AB1X in [the DWR bond decision] that arguably addresses non-commodity rate increases is mere dicta and entitled to no weight.” SDG&E’s narrow reading of our prior decisions interpreting Water Code section 80110 is unwarranted. TURN and ORA list exemplary quotes from our prior decisions that demonstrate the Commission’s consistent view that the AB1X exemption applies to total rates:

- “Residential customers whose usage is below 130% of baseline are now statutorily exempt from rate increases not in effect as of January 5, 2001.” (D.01-03-082, Conclusion of Law #16)

¹⁹ Rhg. App. at 13.

²⁰ See Public Utilities Code section 1709.

²¹ Public Utilities Code section 1756. DWR also improperly launches a collateral attack on D.02-10-063, See Rhg. Ap. at 21. D.02-10-063 is also a final decision no longer subject to review

²² Rhg. App. at 12-13

²³ *Id.*

- “The majority of residential usage has been statutorily exempted from any rate increases that this Commission might impose.” (D.01-05-064, pp. 27-28)
- “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.” (D.02-04-026, p.12-13)
- “What the Legislature has determined is that residential customers, to the extent that they do not use above 130% of baseline, should not experience a rate increase.” (D.03-02-036, p. 6)²⁴

To the extent that SDG&E reads prior decisions to cap rates only where there is a change in commodity costs, the Commission clarifies now that SDG&E is taking an unduly narrow view of the AB1X exemption. That the referenced language may be *dicta* – a dubious contention, given the need in our prior decisions to interpret the phrase “electricity charges” in its entirety – does not render it any less helpful in the task of understanding of the AB1X exemption.

In the DWR bond decision, when the Commission imposed DWR bond charges on residential customers using less than 130% of baseline quantities, the Commission stated:

[W]e recognize that the modifications we are ordering today will require other charges to be reduced in equal or greater amounts to maintain rates for SDG&E residential customer usage up to 130% of baseline at today's levels. However, Ordering Paragraph 4 of D.02-10-063 already requires the utilities to impose offsetting decreases in charges for electricity energy costs as part of their compliance advice letter filings that impose a per kWh charge on non-exempt bundled consumption to insure that overall rates are not raised at this time.²⁵

²⁴ Jt. Comm. at 2.

²⁵ D.02-12-082, 2002 Cal. PUC LEXIS 930, at *4.

As the Commission made clear in the Phase 1 decision, any increase in a rate subcomponent must be offset by a decrease in another subcomponent (or subcomponents), such that total rates remain unchanged. For the Commission to refer back to its prior decisions relating to interpretation of Water Code section 80110, and in particular to the Phase 1 decision in this docket addressing the very issue now on rehearing, is not legal error.

The Baseline Decision is consistent with our prior decisions interpreting the phrase “electricity charges.” By contrast, it is impossible to square SDG&E’s proposed interpretation of this phrase with the DWR Bond Charge decision, which effectively renders SDG&E’s argument an improper collateral attack on that decision. If the rate exemption is only applicable to “commodity” charges, then the DWR bond charge decision was incorrectly decided, since in that decision the Commission allowed the commodity portion of rates to rise, albeit while requiring offsetting decreases such that the total rate remained unchanged. In the DWR bond charge decision the Commission reasoned that so long as the total rate remained unchanged, individual components could fluctuate. Under SDG&E’s interpretation of Water Code section 80110 as barring increases in “commodity” costs, the total rate *could* change, while the commodity component of rates would have to remain fixed at 2001 levels, exactly the opposite of what the Commission allowed in the DWR bond charge decision.

D. There Are No Prior Commission Decisions or Resolutions Endorsing SDG&E’s Interpretation of Water Code Section 80110.

SDG&E claims that “Commission precedent that dealt precisely with the issue here presented, *i.e.*, whether commodity rate decreases are required to offset non-commodity rate increases, clearly rejects the interpretation that AB1X imposes a “total rate” cap on baseline usage.”²⁶ SDG&E points to no resolutions, decisions, or orders in support of this claim.

²⁶ Rhg. App. at 15.

Examination of the “precedent” that SDG&E cites reveals no decisions or resolutions approving the advice letters listed in Attachment 1 to SDG&E’s rehearing application. The advice letters were apparently approved by staff action. The decisions which the advice letters purportedly implement dealt only with subcomponents of rates, and did not deal with the question of whether total rates could increase notwithstanding Water Code section 80110. As the DWR bond charge decision teaches, rate subcomponents may vary, so long as total rates do not exceed 2001 levels.

It does not appear that anyone drew staff’s, or the Commissioners’, attention to the problem posed by the listed advice letters, or by the settlement, notwithstanding that they implement rate increases for residential customers using up to 130% of baseline levels. Having now become aware of this problem, the Commission has moved to rectify it by ordering that SDG&E file tariffs that conform to the Commission’s stated interpretation of Water Code section 80110.

SDG&E expresses its concern “with the Commission’s last minute vacillation on this issue.” The Commission has not “vacillated” in its interpretation of Water Code section 80110. As the bullet list in section III(C), above, demonstrates, in every decision addressing the interpretation of Water Code section 80110, the Commission has asserted that total rates should not increase for residential use of up to 130% of baseline, even if subcomponents of rates increase.

E. SDG&E’s Due Process Claims Are Meritless.

SDG&E argues that “reversing previously approved non-commodity rate increases was outside the scope of this proceeding.”²⁷ Therefore, according to SDG&E, a requirement that SDG&E alter its tariffs to comply with the Commission’s interpretation of AB1X without a further hearing violates Public Utilities Code section 1708.

SDG&E does not cite to a single case in support of this argument.

²⁷ Rhg. App. at 18.

Before turning to SDG&E's Public Utilities Code section 1708 argument, it is necessary to address SDG&E's description of the Commission's action as "reversing" approved rate increases. First, the Commission is leaving SDG&E's tariffs unaffected up to the date of the baseline decision; the relief ordered therein is prospective only. Second, the decision is not altering any particular subcomponent increase that the Commission may have approved in a decision; rather the Commission is requiring that total rates be brought into conformity with the Commission's interpretation of Water Code section 80110, without passing on the particular rate subcomponent changes that SDG&E may have to implement to achieve that conformity.

Public Utilities Code section 1708 states as follows:

The commission may at any time, upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

As a threshold matter, D.04-02-057 does not appear to implicate Public Utilities Code section 1708. SDG&E points to no decision or order made by the Commission approving the advice letters listed in Attachment 1 to its rehearing request. As SDG&E itself states in its application for rehearing, "*the Energy Division granted all of SDG&E's proposals.*"²⁸ Absent rescission, alteration, or amendment of a "prior order or decision," Public Utilities Code section 1708 does not come into play.

Addressing SDG&E's arguments nonetheless, SDG&E had ample notice and opportunity to be heard on the fundamental issue governing whether SDG&E's tariffs were lawful – namely, how to interpret Water Code section 80110. As for the secondary issue of how to apply the interpretation of Water Code section 80110 to SDG&E's tariffs, SDG&E had notice that the issue was in play upon issuance of the Proposed Decision in this docket, and an opportunity to be heard during the comment

²⁸ *Id.* At 16 (emphasis added).

period on the Proposed Decision, pursuant to Public Utilities Code section 311(d). SDG&E argues that it should have had an opportunity to “provide[] analyses demonstrating the economic consequences, including rate impacts and undercollections, that its customers could potentially experience if the AB1X interpretation and corresponding roll back of the previous non-commodity rate increases were implemented.”²⁹ But this argument ignores the fact that the question of the legality of SDG&E’s tariffs turns on a purely legal question – the meaning of the phrase “electricity charges.” And economic impact is irrelevant both to the interpretation of that phrase, and to the question of whether SDG&E’s tariffs conform to the Commission’s reading of that phrase.

SDG&E asserts that “the Commission’s own regulations require that parties be given some indication that the Commission intends to reverse previous rate authorizations.”³⁰ SDG&E has failed to specify the “regulation” to which it refers, and so has failed to adequately specify the grounds upon which it considers the Commission’s action unlawful. Moreover, as already noted, SDG&E did have notice that the Commission might require tariff alterations when the Proposed Decision issued.

///

///

///

²⁹ Rhg. App. at 19.

³⁰ Rhg. App. at 19.

III. CONCLUSION

For the reasons set forth above, good cause does not exist for granting SDG&E's Application for Rehearing.

Therefore, **IT IS ORDERED** that:

SDG&E's Application for Rehearing of Decision 04-02-057 is denied.

This order is effective today.

Dated April 1, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners