

Decision **DRAFT DECISION OF ALJ PULSIFER** (Mailed 5/17/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.

Rulemaking 02-01-011
(Filed January 9, 2002)

OPINION RESOLVING PETITION TO MODIFY DECISION 04-12-059 AND RELATED DECISIONS REGARDING MUNICIPAL DEPARTING LOAD ISSUES

I. Introduction

This order grants, in part, and denies, in part, the California Municipal Utilities Association (CMUA) Petition to Modify Decision (D.) 04-12-059 and related decisions, filed February 16, 2005, in Rulemaking (R.) 02-01-011 (Petition). CMUA concurrently filed a Petition to Modify D.04-11-015 in Application 04-07-032, and a Petition to Modify D.04-02-062 in Investigation (I.) 02-04-026. We resolve those Petitions in a separate companion order.

The CMUA Petition concerns certain issues relating to the applicability of the Municipal Departing Load (MDL)¹ “cost responsibility surcharge” (CRS) within the service territories of California’s three major electric utilities:

¹ As used herein, the term “Municipal Departing Load” refers to departing load served by a “publicly owned utility” as that term is defined in Pub. Util. Code § 9604(d).

Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E). D.04-12-059 resolved applications for rehearing of D.04-11-014, and D.03-08-076 resolved applications for rehearing of D.03-07-028.

The CRS was assessed on MDL customers to provide recovery of a fair share of costs as prescribed in D.03-07-028 and related decisions. The CRS incorporates costs incurred by the investor-owned utilities and by the California Department of Water Resources (DWR) pursuant to legislative directive, as set forth in Assembly Bill (AB) 1 from the First Extraordinary Session (AB 1X). (See Stats. 2002, Ch. 4) and Pub. Util. Code § 366.2(d).

In its opening comments in the MDL billing and collection phase of this proceeding, CMUA described what it considered to be certain ambiguities and conflicts that require clarification, and requested that the Commission issue a ruling or decision clarifying these issues. These issues were discussed at the January 31 billing and collection workshop, subsequent to which CMUA received direction from Administrative Law Judge (ALJ) Pulsifer to file a formal pleading so that all parties may have an opportunity to specifically address the issues raised by CMUA. Accordingly, CMUA filed its Petition for Modification.

CMUA claims in its Petition that there are certain ambiguities and conflicts within the Commission's decisions addressing MDL CRS applicability, and requests that the Commission issue a ruling or decision that "clarifies the scope" of CRS exemptions for categories of MDL, in the manner specified in the CMUA Petition.

Responses to the CMUA Petition were filed on March 17, 2005. Comments in support of the Petition were filed by the Merced Irrigation District (ID),

Modesto ID, South San Joaquin ID and the Northern California Power Agency. Comments in opposition to the Petition were filed by PG&E and SCE. Based on review of the parties' pleadings, we reach the following conclusions, as set forth below.

II. Applicability of CRS for MDL Served Through "Stand-Alone" Transactions

A. Parties' Positions

CMUA seeks modification of D.03-08-076 as it relates to the applicability of CRS to new MDL served through a "stand-alone" or "direct" transaction. As defined by Pub. Util. Code § 369, a "stand-alone" or "direct" transaction is one where the use of transmission and distribution facilities owned by the Investor-Owned Utility' (IOU) is not required. In D.03-08-076, the Commission made a correction to D.03-07-028, Conclusion of Law (COL) 12. In its original form, D.03-07-028, Conclusion of Law 12, stated:

"In accordance with Section 369, 'new load' for purposes of *CRS* recovery excludes load being met through a direct transaction that does not otherwise require the use of transmission and distribution facilities owned by the IOU."
(Emphasis added.)

In D.03-08-076, however, the Commission stated that "COL 12 contains a typographical error" and the "[r]eference to 'CRS recovery' in COL 12 on page 76 should be changed to 'CTC' recovery." Thus, D.03-08-076 revised COL 12 to read as follows:

"In accordance with Section 369, 'new load' for purposes of *CTC* recovery excludes load being met through a direct transaction that does not otherwise require the use of transmission and distribution facilities owned by the IOU."
(Emphasis added.)

CMUA believes that the Conclusion of Law 12, in its original form in D.03-07-028, excluding CRS in its entirety, was correct, and claims that the change made in D.03-08-076, excluding only CTC, was in error. CMUA seeks to modify COL 12 to reverse the correction that was made in D.03-08-076, and to revert to the original language in D.03-07-028.

CMUA argues that the Commission's original text for COL 12 in D.03-07-028 was consistent with the treatment of stand-alone situations in the other departing load context, Customer Generation Departing Load (CGDL). In D.03-04-030, with respect to CGDL, the Commission concludes as follows:

“[If] the load is being met through a direct transaction [that] does not otherwise require the use of transmission or distribution facilities owned by the utility, that load will not be considered as departing, and will not be obligated to pay a CRS in accordance with Pub. Util. Code § 369.”

In approving Customer Generation tariffs Resolution E-3831 (July 8, 2004), the Commission indicated that it was not just tail CTC from which stand-alone new load should be exempted, but stating:

PG&E in its [advice letter] states that the ordering paragraphs are silent on whether new or incremental load [in stand-alone customer generation situations] is exempt from all departing load charges or just CTC...PG&E's tariff language assumes the Commission's intent is to exempt from **all DL charges**, any new or incremental load served by an on-site or over-the-fence generator that can pass the 'physical test.' PG&E's interpretation is correct....”

In view of the above-described factors, CMUA argues that it would be irrational and unlawfully discriminatory for the Commission to treat CGDL differently than MDL. CMUA thus requests that the Commission modify

D.04-12-059 to renew its previous conclusion that new MDL in stand-alone situations is exempted from all elements of CRS.

B. Position of PG&E and SCE

PG&E and SCE oppose CMUA's requested modification, arguing that § 369 addresses responsibility for the CTC, not the DWR Bond or Power Charges. As such, they believe that the "stand-alone" language in § 369 provides an exemption only from the CTC, but not from the DWR Bond or Power Charges. PG&E and SCE argue that the "change" that CMUA refers to is merely a "typographical error" in D.03-07-028 that the Commission corrected on its own initiative in D.03-08-076.

C. Discussion

We find no basis to reverse the correction that was made in D.03-08-076, as advocated by CMUA, replacing the term "CRS" with the term "CTC" as referenced in D.03-07-028, COL 12. This correction made by the Commission in D.03-08-076 was done so independently of any request from a party, but was necessary to properly reflect the limited applicability of § 369 to CTC. The statutory language in § 369 is expressly limited to CTC, and there is no statutory provision identified by CMUA that warrants extending it to cover other elements of the CRS.

CMUA cites to PG&E's Preliminary Statement BB, which excludes new MDL in stand-alone situations from the definition of DL. However, PG&E's Preliminary Statement BB (which is titled "Competition Transition Charge Responsibility for All Customers and CTC Procedure for Departing Loads") was written before the energy crisis and before issuance of D.03-07-028 and

D.03-08-076. PG&E responds that the definition in its Preliminary Statement BB is therefore based on the § 369 definition of DL responsibility for the CTC.

In addition, CMUA argues that applying CRS to new MDL in stand-alone situations is inconsistent with the treatment in D.03-04-030 accorded to stand-alone CGDL which the Commission exempted from all CRS. We find no unlawful discrimination, however, in treating MDL differently from CGDL with respect to “stand-alone” transactions. The CRS is not applied based on the provider of the electricity (whether customer generation or publicly owned utility) and how the provider handles the transaction involved. Rather, it is applied based on whether the load which is departing had been included in the IOU’s forecasts and, thus, resulted in DWR incurring costs on behalf of this load. This is true for both MDL and CGDL. (See D.04-11-014, pp. 13, 36-37, 40 & 50 (MDL); D.03-04-030, p. 54 (CGDL).) The fact that we have permitted exceptions to the full CRS for certain CGDL customers is based on separate considerations that do not apply to MDL customers.

The fact that we have permitted exceptions to the full CRS for certain CGDL customers is based on separate considerations that do not apply to MDL customers. In D.03-08-076, we previously determined that because MDL has different characteristics from CGDL, there is no unlawful discrimination in treating MDL differently with respect to CRS exceptions. Specifically, in this regard, we stated:

“Unlike with CGDL, there were no other statutes, except for AB 117, involving MDL and the legislative mandates involving the Commission’s regulation over electric corporations or the provision of electricity service that required harmonizing. Thus, this is another reason why MDL is different from CGDL, and not similarly situated.

Accordingly, there is no unlawful discrimination. (See *Griffin v. Superior Court* (2002) 96 Cal.App.4th 757, 775.” (D.03-07-076 at page 31.)

In view of the distinctions between CG and MDL, as noted above, we conclude that there is no unlawful discrimination in treating these two load categories differently. Accordingly, in view of these considerations, we decline to adopt the modification, as requested by CMUA, to exempt new MDL in stand-alone transactions from all elements of CRS.

III. Applicability of the New MDL Exception in the Geographic Area Covered by Transferred Load

A. Parties' Positions

CMUA seeks confirmation from the Commission that the scope of the exemption provided to new MDL located within the geographic areas served by Publicly-Owned Utilities' (POUs) named in the PG&E Bypass Report is not limited by any volumetric energy cap, but is only limited by the geographic area covered in the Bypass Report forecast. CMUA seeks this confirmation in response to PG&E's position, expressed for the first time in its opening comments in the MDL billing and collection phase, claiming that the total combined amount of transferred and new MDL exemptions should be capped at the numerical level shown in the PG&E Bypass Report. CMUA argues that PG&E's new interpretation is contrary to D.04-11-014 and D.04-12-059, as well as PG&E's own earlier pleadings.

CMUA argues that in D.04-11-014 and D.04-12-059, the Commission provided two categories of exemptions related to the Bypass Report:

(1) transferred MDL exemptions, limited to the energy amounts shown in the Bypass Report and (2) new MDL exemptions, limited to new load within the

geographic areas served by the publicly owned utilities named in the Bypass Report. The decisions referred to the transferred MDL exemption as “**corresponding**” to the explicit energy adjustment contained in the Bypass Report:

“[I]n the case of PG&E, an explicit adjustment was made in its load forecast provided to DWR to recognize future bypass due to anticipated transfers of existing IOU load to irrigation districts and municipalities. We conclude that a corresponding CRS exclusion is warranted to recognize the effects of this MDL ‘transferred load’ component....”
(D.04-11-014 at p. 4.)

Based on this reference, CMUA infers that the transferred MDL exemption was capped at the energy levels in the Bypass Report and was made specifically applicable to just transferred MDL. In this regard, D.04-12-059, Ordering Paragraph (OP) 1.i stated: “[A] CRS exception [is created] **applicable to transferred load** within the PG&E service territory corresponding to the estimates set forth in PG&E’s August 2000 Bypass Report.” (Modifying D.04-11-014 at p. 58, OP 4.)

D.04-11-014 also provided for a separate category for exemptions for new MDL served by POUs named in the Bypass Report. CMUA interprets this exemption as being an **additional** category of exemptions specifically applicable to new MDL located in the geographic areas served by publicly owned utilities named in the Bypass Report citing the Commission’s statement: “We **further** conclude that any new load served by publicly-owned utilities within the annexed areas covered by the PG&E transferred load should **likewise** be excluded from paying the CRS.” (D.04-11-014 at pp. 4-5, emphasis added.) CMUA argues that this new MDL exemption was not capped by energy, but

rather was limited to the geographic areas served by public-owned utilities, and made specifically applicable to new MDL. In this regard, the Commission stated” “[w]e shall grant **a limited exception for new load** limited to that occurring within the annexed or condemned **geographic areas** covered by the transferred load identified in PG&E’s Bypass Report.” D.04-12-059 at p. 21.)

PG&E interprets the language of D.04-12-059 to provide that new MDL, in combination with associated transferred MDL, receive only an exemption from the DWR Power Charge capped at the level of transferred load set forth in PG&E’s Bypass Report.

PG&E argues that D.04-12-059, OP 1.i, capping the new MDL exemption at the level forecast in PG&E’s Bypass Report, is consistent with the Findings of Fact (FOF) and COL in D.04-11-014 that justified the limited new MDL exemption to an “implicit” level of new MDL in PG&E’s Bypass Report. (*See e.g.*, D.04-11-014, Findings of Fact 4, 6, 10-12, Conclusion of Law 3.) PG&E also notes the Commission’s discussion in D.04-12-059, justified the new MDL exemption based on the **implicit** inclusion of new MDL in the IOUs’ sales forecast. (*See* D.04-12-059, pp. 19-23.) To the extent that new MDL was implicitly included in PG&E’s bypass estimates, PG&E thus believes the combined level of transferred and new MDL exempted from the DWR Power Charge should be capped at those estimates.

In reply comments on billing and collection issues, various POUs cited D.04-12-059, OP 1.g (adding OP 17) to support their claim that new MDL served by those entities named in PG&E’s Bypass Report should receive an exemption from the DWR Power Charge without any specified energy cap. PG&E disagrees. PG&E notes that OP 1.g was adopted in response to Modesto and

Merced ID's "request for clarification of the **limited** exception from certain cost responsibility surcharges for new load." (D.04-12-059, p. 32 emphasis added.)

OP 1.g clarified that the exemption granted to new MDL served by POU's named in the Bypass Report applies, not only to new MDL in territory **annexed** by the POU (as D.04-11-014 originally stated), but also to new MDL in “geographic areas where an IOU still had an obligation to serve” (as stated in D.04-12-059, p. 33).

PG&E argues that the **limited** nature of the new MDL exemption is further demonstrated by footnote 16 of D.04-12-059, which states:

In its response to the rehearing applications filed by Modesto ID and Merced ID, PG&E contends that there is no justification to extend the CRS exception to the shared service territories where the irrigation districts are...competing with PG&E for new customers. We disagree. In D.04-11-014, we addressed similar arguments raised by PG&E and determined that new MDL of Merced ID did qualify for the CRS exception. Further, PG&E's arguments are simply a disagreement with our policy determination that the **CRS exception for transferred load in shared service territories would apply equally to new load.** [D.04-12-059, p. 33, n.16, citations omitted, emphasis added.]

Accordingly, since the CRS exception for transferred MDL is capped at the level set forth in PG&E's Bypass Report, and the transferred exception is to “apply equally to new load,” PG&E infers that the new MDL exception must (in combination with the transferred MDL exception) also be capped at the level set forth in PG&E's Bypass Report.

At the billing and collection workshop, the POU's argued that PG&E's interpretation of D.04-12-059 focused exclusively on OP 1.i, but failed to acknowledge OP 1.g. PG&E's claims, however, that its interpretation harmonizes the two ordering paragraphs.

PG&E argues that the POUs' claim of an **unlimited** new MDL exemption gives meaning to **only** OP 1.g, but ignores (and renders meaningless) OP 1.i, and fails to recognize the specific request for clarification that gave rise to OP 1.g. PG&E thus interprets OP 1.i as establishing a **limited** exemption from the DWR Power Charge for both new and transferred MDL served by POUs named in PG&E's Bypass Report. PG&E interprets OP 1.g as clarifying that new MDL in both annexed and shared service territories are eligible for this limited exemption.

PG&E acknowledges that, prior to D.04-12-059, it had interpreted D.04-11-014 to provide for only two kinds of exemptions: (1) an exemption for transferred MDL for those POUs named in PG&E's Bypass Report up to the amounts forecast in the Report (with leftover exemptions to be used by certain other POUs), and (2) an exemption for new MDL of POUs without transferred load serving at least 100 customers by July 10, 2003, the date issuance of D.03-07-028 up to an interim amount of 150 megawatt (MW) in the PG&E and SCE territories. On rehearing, however, PG&E claims the exemptions were changed by (1) allowing new MDL associated with the transferred MDL shown in PG&E's Bypass Report to qualify for the first exemption (again, up to the amounts forecast in the Report), and (2) reducing the level of the "greenfield only" exemption for 150 MW to 80 MW.

IV. Discussion

We conclude that new MDL within the geographic region covered by the transferred MDL shown in the PG&E Bypass Report is not entitled to an unlimited DWR-related exclusion. Accordingly, such new MDL, in combination with the related transferred MDL, shall receive an exception from the DWR

power charge that is capped by the level of transferred load identified in PG&E's Bypass Report. Thus, the DWR-related capped exclusions based on the Bypass Report shall apply jointly both to transferred MDL identified in the Bypass Report and related new MDL within the region. New MDL, however, in excess of this capped exclusion within the region reflected in the Bypass Report is not eligible for an additional unlimited exclusion from DWR-related cost responsibility.

The new MDL subject to this cap applies specifically to that load served by existing POU's within the geographic regions named in the PG&E Bypass Report. This category of new MDL is separate and distinct from new MDL that is subject to the 80 MW exception, as adopted in D. 04-12-059. The 80 MW exemption adopted in D.04-12-059 applies only to new MDL served by POU's that were formed and serving at least 100 customers as of July 10, 2003, that are not specifically named in the Bypass Report.

In concluding that new MDL served by existing POU's, as identified in the Bypass Report, is subject to a fixed cap, we are guided by the requirement that all customers bear their "fair share" of DWR-related costs and do not shift costs to bundled customers. In the case of transferred MDL, we previously concluded that no cost shifting results by excluding such load from paying DWR-related costs. This conclusion is supported by the fact that DWR did not include such load in the forecasts utilized for procuring power.

We previously determined that the record supported a discrete numerical cap on the power associated with transferred MDL eligible for exclusion from DWR-related cost responsibility. Thus, because DWR did not procure power on

behalf of such transferred MDL, we determined that transferred MDL, up to the capped limits, is not required to paying DWR costs.

A similar inquiry applies in the case of new MDL to be served within the same geographic regions within which the transferred MDL is served. The new MDL represents new customer growth within such regions that is in addition to the transferred MDL of existing customers, as identified in the PG&E Bypass Report. DWR forecasted and procured power to cover the growth of new load within the service territories of the three IOUs. The specific question before us here is whether the load forecasts utilized by DWR for procuring power included a provision for serving *all* new load *within the geographic regions covered by the transferred load*. If all such new load was included within the DWR forecast, then such load, including that portion served by POU's, rightly bears responsibility for paying a fair share of DWR-related costs.

Alternatively, if some, or all, of the new load within the regions covered by the transferred load was *not* included in the forecasts utilized by DWR for purposes of procuring contract power, then customers served as part of that load should *not* bear responsibility for paying such DWR-related costs, and there should be *no* cap on such exclusion. Thus, to determine the correct interpretation of D. 04-11-014 and D. 04-12-059 with respect to new MDL exclusions in the geographic regions that are in addition to any transferred MDL exclusions, we must consider how the forecasts utilized by DWR treated new load growth assumed to occur within such regions.

In its comments on the Draft Decision, PG&E explains how the forecast of new load was developed to produce the forecast that it provided to DWR in February 2001. First, PG&E produced a forecast of sales for *all* electric consumers

in PG&E's service territory, whether served by PG&E or not. This forecast included a provision for additional usage by existing customers as well as new load due to new customers moving into the service territory.

PG&E then reduced the sales forecast to reflect amounts net of the transferred load amounts in designated geographic regions as shown in its Bypass Report. The Bypass Report, however, did not include forecasted reductions in future load growth in those regions under an assumption that such load would be served by a POU. Thus, there was no subtraction of new load from the total forecast in the geographic regions covered by the transferred load.

No assumption was made in the forecast that, because existing load in certain geographic regions had been transferred from IOUs to POUs, subsequent new load in those regions would likewise be served by POUs. As PG&E explains, the vast majority of new load lost, to date, has *not* occurred in areas annexed to cities subject to a universal service obligation, but rather in nonexclusive "joint service" areas where irrigation districts have duplicate distribution lines by which to serve new loads on a selective basis. Thus, DWR incorporated forecasted new load in such regions into its power procurement requirements.

Accordingly, in order to prevent impermissible cost shifting, new load served in the geographic regions depicted in the Bypass Report must bear a "fair share" of DWR-related costs. In order to accomplish this result, new load served by a POU should not be permitted an unlimited exclusion from the DWR Power Charge. By permitting new MDL to be excluded, in combination with transferred MDL, up to the amounts set forth in the Bypass Report, some

exclusion is provided for new MDL, while preventing cost shifting for growth beyond forecasted exclusions.

This is a proper result because DWR procured power, in part, on behalf of such new load, whether the load ultimately is served by an IOU or a POU. Thus, the combined exclusions from DWR-related costs for any transferred load and new load occurring in the geographic regions covered by the Bypass Report must remain capped at the explicit numerical energy amounts set forth therein.

PG&E's argument seeking to reduce the transferred MDL exemption based on reconsideration of the net-versus-cumulative forecast approach, however, raises a separate issue beyond the scope of the new load issue dispute at issue in the CMUA Petition. Moreover, we have already decided the issue in D.04-12-059 of whether to apply the transferred load exemption on the basis proposed by PG&E. PG&E's attempt to relitigate this issue through comments in response to the issues raised in the CMUA Petition is beyond the scope of the Petition to Modify.

V. Does the Exception for the Power Charge Extend to the DWR Bond Charge?

A. Position of Parties

CMUA seeks modification of D.04-12-059 to exclude new MDL from any requirement to pay DWR Bond Charges. CMUA seeks this modification to resolve the "ambiguity" as to whether the CRS exemption for new MDL incorporates the DWR Bond Charge. CMUA cites to D.03-07-028 in which the Commission initially stated that new MDL shall not be subject to a CRS. CMUA then cites D.03-08-076 (on the rehearing of D.03-07-028) where the Commission limited the extent of the CRS exception for new MDL, noting that new MDL of

existing POU's remains responsible for "the tail CTC component of CRS" pursuant to § 369. CMUA finds it significant that in D.03-08-076, while referencing the tail CTC component, the Commission did not explicitly state that new MDL is responsible for the DWR Bond Charge. CMUA thus infers that the Commission's intent was that the CRS exception for new MDL includes both the DWR power charge, as well as the DWR bond charge.

CMUA argues that the Commission's statement in D.04-12-059 that "new MDL should be held responsible for the DWR Bond Charge, pursuant to Public Utilities Code Section 366.2(d)..."² is consistent with the Commission's action in D.03-07-028 and D.03-08-076. CMUA claims that there appears to be a conflict between D.04-12-059 and the Commission's prior decisions with respect to the MDL responsibility for the DWR Bond Charge.

PG&E and SCE oppose the modification sought by CMUA, and argue that there is no ambiguity or inconsistency in the Commission's decisions. PG&E and SCE believe that D.04-12-059 is clear that new MDL is responsible for paying the DWR Bond Charge, and that no further modification is warranted.

B. Discussion

We find no ambiguity in D.04-12-059 with respect to new MDL cost responsibility for paying the DWR Bond Charge. The language in D.04-12-059 is clear that new MDL remains responsible for the DWR Bond Charge. Moreover, we find no ambiguity or conflict between D.04-12-059 and other relevant Commission decisions. In fact, the Commission's purpose in making findings in D.04-12-059 regarding the applicability of the DWR Bond Charge was to promote clarity of Commission intent in prior decisions, not to obscure it.

D.04-12-059 was responsive to PG&E's Application for Rehearing, filed November 29, 2004, (see page 23) expressly seeking clarification that there is no MDL exemption for either the DWR Bond Charge or to Tail CTC.³ D.04-12-059 confirmed that new MDL, in fact, is responsible for both of these elements. Thus, we find no basis for granting the modification sought by CMUA on the issue of DWR Bond Charge responsibility based on any claim of ambiguity or conflict among Commission decisions.

CMUA further seeks to justify its requested modification to exempt new MDL from the DWR Bond Charge by arguing that DWR never procured power for new MDL. Yet, granting such an exemption would provide new MDL with a more favorable treatment than was accorded to CGDL. CMUA fails to address why MDL should be treated more favorably than CGDL with respect to responsibility for DWR Bond Charges.

In D.04-12-059, the Commission stated:

“With respect to excepted new MDL, there appears to be no statutory or policy justification warranting an exception from having to pay the DWR Bond Charge. Thus, consistent with CGDL CRS Decision, new MDL should be held responsible for the DWR Bond Charge, pursuant to Public Utilities Code

² D.04-12-059 at 25-26.

³ In taking issue with D.04-12-059, CMUA makes the claim that PG&E, in its Application for Rehearing, was NOT seeking rehearing on the new MDL exemption from the DWR Bond Charge. As support for this claim, however, CMUA cites to an excerpt from PG&E's August 1, 2003 Application for Rehearing of D.03-07-028. Yet, that Application for Rehearing is not applicable to D.04-12-059. CMUA omits reference to PG&E's Application for Rehearing of D.04-11-014, filed November 29, 2004, which is the relevant pleading in reference to the Commission's actions in D.04-12-059.

Section 366.2(d),⁴ even though they will not have to pay the DWR Power Charge.” (D.04-12-059 at page 25-26).

Moreover, we find that CMUA’s argument on the issue of DWR Bond Charge cost responsibility goes beyond a request for clarification, and essentially asks the Commission to reconsider its substantive basis for its conclusions in D.04-12-059 with respect to new MDL cost responsibility for DWR Bond Charges. As such, CMUA attempts to relitigate a substantive issue that has already been decided by the Commission’s rehearing order in D.04-12-059. Accordingly, CMUA’s request to modify D.04-12-059 with respect to new MDL cost responsibility for the DWR Bond Charge is denied.

VI. Comments on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on June 6, 2005 and reply comments on June 13, 2005. We have taken the comments into account as appropriate in finalizing this decision. We have revised the conclusions in the Draft Decision with respect to the question of whether new MDL served by existing POU’s identified in the PG&E Bypass Report are subject to a specific cap on energy usage that is excluded from DWR cost responsibility. As discussed above, we determine that such new MDL that occurs within the geographic region served by existing POU’s named in the Bypass Report remain subject to the overall exemption cap as identified in the Bypass Report associated with transferred MDL.

⁴ See Order Denying Rehearing of D.03-07-028 [D.03-08-076], supra, at pp. 4-8 (*slip. op.*) for a discussion of the Commission’s authority to impose the DWR Charges of the CRS on new MDL.

Also, certain parties took issue with Draft Decision's characterization of the entities eligible for the 80 MW new load exemption the Commission granted in D.04-11-014, as modified by D.04-12-059. Although the amount of this exemption is not at issue in CMUA's Petition for Modification, parties disagree with the Draft Decision's characterization of those entities whose new load customers are eligible for the already established 80 MW exemption. The Draft Decision stated that "*the 80 MW exemption adopted in D.04-12-059 applies only to new MDL served by POUs that were formed and serving at least 100 customers as of July 10, 2003, that are only serving 'new load' but no transferred load.*"

(Draft Decision, page 13.) Parties believe that this statement inadvertently perpetuates an incorrect and limited interpretation of the new load exemption that is not consistent with the adopted decisions.

As noted in both D.04-11-014 and D.04-12-059, the Commission provided for a limited exemption for customers of entities not specifically named in the Bypass Report. This limited exemption was intended to avoid creating an incentive for a POU to form and site facilities with the express purpose of enabling customers to escape the CRS. Accordingly, the Commission provided that "there should be a cap on the amount of new MDL granted exceptions to CRS for those entities that are not specifically named in the Bypass Report." (D.04-11-014 at p. 14, D.04-12-059, Ordering Paragraph 1.)

Parties thus seek to have the Draft Decision amended to reflect that all entities not named in the bypass report are eligible for the MDL CRS 80 MW exemption on behalf of their new load customers.

PG&E disagrees. By arguing that seeking to have the phrase "only serving 'new load' but no transferred load' replaced with "not specifically named in the

Bypass Report,” these parties propose to eliminate a crucial **condition** of the “new load” exemption. PG&E contends that this is not a “correction”; it is a fundamental re-writing of D.04-11-014.

Pursuant to Section 1731, applications for rehearing of decisions issued pursuant to AB 1X (such as D.04-11-014) must be filed within 10 days of issuance of the decision. Several parties filed for rehearing of D.04-11-014, but Hercules, Northern California Power Authority, and Turlock Irrigation District (TID) did not. Except for the level of the MW exemption, none of the applications for rehearing took issue with OP 2. Notably, in its response to the applications for rehearing, TID expressly supported OP 2 by stating: “The Decision’s exemption from the CRS for up to 150 MW of new load is consistent with the last and commission precedent, and is supported by the record.

In D.04-12-059, the Commission modified OP 2 to replace 150 MW with 80 MW as the appropriate CRS cap. No other changes were made to OP 2. No party sought rehearing or judicial review of D.04-12-059. Therefore, D.04-11-014, as amended by D.04-12-059, is final and unappealable. PG&E argues that parties cannot circumvent the rehearing deadlines established in Section 1731 by requesting changes to OP 2 of D.04-11-014 through comments on a subsequent decision.

We agree with PG&E that parties’ comments seeking changes to OP 2 is not a procedurally appropriate vehicle for that purpose.

The change sought by parties is a substantive revision, not merely correction of an error. We thus decline to make the change as requested.

VII. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Thomas Pulsifer is the assigned ALJ in this proceeding.

Findings of Fact

1. The correction made in D.03-08-076, replacing the term “CRS” with the term “CTC,” was done so by Commission independently of any request from a party in order to properly reflect the limited applicability of the statute.

2. Section 369 states that the obligation to pay CTC is not avoided by the formation of a publicly owned electrical corporation after December 20, 1995, or by annexation of any portion of an electrical corporation’s service area.

3. The statutory language in § 369 is expressly limited to CTC, and no statutory provision was identified by CMUA that warrants extending its applicability to cover other elements of CRS.

4. There is no ambiguity in D.04-12-059 with respect to new MDL cost responsibility for the DWR Bond Charge, nor any conflict between D.04-12-059 and other relevant Commission decisions.

5. The language in D.04-12-059 is clear that new MDL is responsible for the DWR Bond Charge

6. D.04-12-059 was responsive to PG&E’s Application for Rehearing, filed November 29, 2004, (see page 23) which expressly sought clarification that there is no MDL exemption for either the DWR Bond Charge or Tail CTC

7. In requesting modification to exempt new MDL from the DWR Bond Charge based on arguments that DWR never procured power for new MDL, CMUA fails to address why MDL should be treated more favorably than CGDL with respect to responsibility for DWR Bond Charges.

8. In the forecast of new load was developed to produce the forecast provided to DWR in February 2001, PG&E produced a forecast of sales for *all* electric consumers in PG&E's service territory, whether served by PG&E or not.

9. This PG&E forecast included a provision for additional usage by existing customers as well as new load due to new customers moving into the service territory.

10. Because the PG&E load forecasts utilized by DWR for procuring power included a provision for serving all new load within the geographic regions covered by Bypass Report, such new MDL rightly bears responsibility for paying a fair share of DWR-related costs.

11. If no numerical limit was imposed on the energy consumption from such MDL within the regions served by POUs named in the PG&E Bypass Report, such new MDL would escape paying its "fair share" of DWR-related costs.

12. New MDL served by POUs formed on or after July 10, 2003 that are only serving new load, but no transferred load remain subject to the interim 80 MW exemption cap adopted in D.04-12-059.

Conclusions of Law

1. The Petition for Modification, filed in R.02-01-011 by the CMUA should be denied, as set forth in the order below.

2. The Commission acted lawfully in correcting the reference in D.03-08-076 to "CRS" to "CTC" with respect to the applicability of exemptions for "stand-alone" transactions consistent with the statutory limits of § 369.

3. Consistent with the fact that DWR procured supplies to serve new load within the regions covered by the Bypass Report, it is reasonable to assign a "fair share" of cost responsibility for such new load served by POUs named in the Bypass Report.

4. A “fair share” of cost responsibility for such new load served by POUs named in the Bypass Report is achieved by requiring that exceptions for such new MDL, in combination with the applicable transferred MDL exception, be capped at the levels set forth in PG&E’s Bypass Report.

5. CMUA has not provided any justifiable basis for revising the requirement in D.04-12-059 affirming that new MDL is responsible for the DWR Bond Charge.

6. Consistent with the treatment of CGDL, new MDL should be held responsible for the DWR Bond Charge, pursuant to Pub. Util. Code § 366.2(d), even to the extent they will not have to pay the DWR Power Charge.

7. CMUA’s request to relitigate MDL responsibility for the DWR Bond Charge cost responsibility is beyond the scope of a Petition for Modification.

ORDER**IT IS ORDERED** that:

1. The Petition for Modification (Petition), filed by the California Municipal Utilities Association in Rulemaking (R.) 02-01-011 is denied. Clarifications in Decision (D.) 04-12-059 are adopted as set forth below.
2. The DWR-related capped exclusions based on the Bypass Report apply jointly both to transferred MDL and the new MDL within the region. New MDL, however, in excess of this capped exclusion within the geographic region reflected in the Bypass Report is not eligible for an additional exclusion from DWR-related cost responsibility.
3. The new MDL subject to this cap applies specifically to that load served by existing POU's within the geographic regions named in the PG&E Bypass Report. This category of new MDL is separate and distinct from new MDL that is subject to the 80 MW exception, as adopted in D. 04-12-059. The 80 MW exemption adopted in D.04-12-059 applies only to new MDL served by POU's that were formed and serving at least 100 customers as of July 10, 2003, that are only serving new load, but no transferred load.
4. The Petition filed in R.02-01-011 is denied in all other respects.

This order is effective today.

Dated _____, at San Francisco, California.