Decision _____

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 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 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 also 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 fact that we have permitted exceptions to the full CRS for certain CGDL customers is based on separate policy

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 AB117, involving MDL and the legislative mandates involving the Commission's regulation over electric corporations or the provisions 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 those two load categories differently. Accordingly, we decline to adopt the modification, as requested by CMUA, to exempt new MDL in "stand-alone" transactions, for all elements of CRS. We do clarify, however, that new MDL utilizing CGDL in "stand-alone" situations, may be subject to CRS exceptions, as detailed in D.03-04-030 and D.03-05-039.

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 POUs 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 POUs 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 CMUA is correct in its interpretation of the extent of the new MDL exception within the geographic region covered by the PG&E Bypass Report. Accordingly, there is no specific numerical cut-off for energy usage of new MDL served by existing POUs within the geographic areas covered by the PG&E Bypass Report. By contrast, 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, but not specifically named in PG&E's Bypass Report.

We likewise conclude that PG&E has drawn incorrect inferences concerning the limitations that apply to new MDL exemptions. Because (1) the CRS exception for transferred MDL is capped at the level set forth in the PG&E Bypass Report, and (2) the transferred MDL exception is to "apply equally to new load" associated with the transferred load, PG&E infers that the new MDL exception must (in combination with the transferred load exception) also be capped at the level set forth in PG&E's Bypass Report.

Contrary to PG&E's argument, the directive that the transferred MDL exception shall "apply equally to new load" does not mean that the excluded load identified in the Bypass Report can interchangeably represent either transferred load or new load. If the load amounts in the PG&E Bypass Report are fully applied as a transferred load exception, those load amounts are no longer available for any new MDL exception. Any new MDL would be in addition to—not interchangeable with—the transferred load exception within the geographic areas identified in the PG&E Bypass Report.

Accordingly, the sense in which the CRS exception for transferred load shall "apply equally to new load" is with respect to its equivalent eligibility status, but not with respect to interchangeability of MW load between the transferred and new MDL categories. Thus, for any given unit of new MDL within the geographic area covered by the transferred load identified in the PG&E Bypass Report, the CRS exception shall apply on the same equivalent basis as for a given unit of transferred MDL within that geographic area.

In this respect, the new MDL exception is, indeed, limited in terms of the geographic area within which it applies. We clarify that the new MDL exception is, in fact, limited to the geographic area being served by the entity named in the Bypass Report at the time of the Bypass Report. In other words, newly annexed geographic areas, annexed after the time of the Bypass Report, are not eligible for the new load exception. There is no specific cut-off, however, in terms of the numerical level of MW of new MDL served by existing POUs with transferred load within those geographic boundaries that existed at the time of the Bypass Report and that may qualify for the CRS power charge exception.[2] There is no

[2] By contrast, new MDL served by new POUs formed on or before July 10, 2003

basis to set a specific numerical MW cut-off on the new MDL within the geographic area covered by the transferred MDL. Because the transferred MDL was never included in the DWR forecasts utilized as the basis for procuring power, it is logical to infer that any subsequent growth in those areas attributable to new load served by the POUs would likewise not have been captured in DWR forecasts of future load to be served. Thus, since such new load was never captured within the DWR forecasts, no specific DWR contractual commitments were made for such new load. Therefore, no cost shifting results from excluding such new load from cost responsibility for the DWR power charge. Consequently, there is no basis upon which to calculate a specific numerical MW limit for such new MDL subject to the CRS power charge exception. Accordingly, we agree with CMUA's interpretation to that extent.

PG&E, in its comments on the ALJ's proposed decision, asserted that, in fact, new MDL was included in the forecasts in the Bypass Report provided to DWR. In fact, they asserted that their forecasts provided to DWR assumed that "all new load in PG&E's service territory would be served by PG&E." There is no inherent logic in this assertion, however, because in the previous paragraph of its comments, PG&E acknowledged that "PG&E continues to compete to serve such [new] loads." Therefore, by its own admission, PG&E would likely not be serving all of the new load and would not or should not have assumed so in its forecasts. Thus, we continue to believe that providing the exceptions to CRS for new load in the geographic areas covered in the Bypass Report is the fairest and most reasonable policy outcome based on the logic articulated above.

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remains subject to the interim 80 MW exemption cap adopted in D.04-12-059.

In its comments on the alternate decision, PG&E again cites to the testimony of their witness in this proceeding (see footnote 1 of PG&E's comments), where PG&E argues that "the underlying data in the regression model [used for the Bypass Report] was entirely existing PG&E customers who had departed. There was no forecast of new customers that might locate in the Modesto area…and take service from Modesto ID…Similarly, there was no estimate of new load locating near Merced ID and taking service from Merced ID."

However, we are not persuaded by the factual inference drawn by PG&E. We believe that forecasting is not an exact science that allows for perfect anticipation of future situations. Therefore, we believe that a reasonable inference can be drawn that PG&E's forecast that formed the basis for the Bypass Report also did not include a forecast of new customers that might locate in the Modesto or Merced areas and take service from PG&E. The reality is that forecasting is typically not done to such a high level of geographical precision, nor would we expect it to be. Given that situation, we must draw logical factual inferences that support a policy that is reasonable and fair to all parties involved without expecting to glean precision from a forecast that could not reasonably and logically be relied upon to provide such precision. Therefore, we continue to believe that providing CRS exceptions to new load in the geographic areas served by POUs named in the Bypass Report is a reasonable policy, does not result in cost-shifting, and should be maintained.

PG&E also argues that to the extent any new MDL associated with the POUs named in the PG&E Bypass Report receive an "unlimited" exemption from the DWR power charge, then the Commission should revisit its findings concerning the level of the transferred MDL. Specifically, PG&E seeks

reconsideration of its argument that the exemption for transferred MDL should be netted by subtracting the year 2000 cumulative actual amounts from the year 2003 cumulative forecast totals.

Contrary to PG&E's argument, the new MDL exemption is not unlimited. The limitation applicable to new MDL of existing POUs with transferred load as identified in the PG&E Bypass Report, however, is defined by the limits of the geographic coverage. Such new MDL exemption is not a specific numerical cut-off on the MW of such new MDL eligible for the power charge exemption. PG&E's argument seeking to reduce the transferred MDL exemption based on reconsideration of the net-versus-cumulative forecast approach also 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 POUs 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)…"[3] 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.[4] 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

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[3] D.04-12-059 at 25-26.

[4] 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),[5] 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 Alternate Decision

The alternate draft decision of the President Peevey in this matter was mailed to the parties in accordance with Rule 77.6 of the Rules of Practice and Procedure. Comments were filed on July 14, 2005 by Modesto ID, Merced ID, South San Joaquin ID, NCPA, CMUA, SCE, and PG&E. Reply comments were filed on July 18, 2005 by South San Joaquin ID, SDG&E, Merced ID, CMUA, Modesto ID, NCPA, Turlock ID, PG&E, and SCE.

Our responses to these comments are included in the revised text of this decision. There is one major substantive change to the decision in response to comments which we will discuss here. In particular, we are persuaded by the comments of SCE and PG&E that there is no discrimination in treating MDL different from CGDL in "stand-alone" situations. This is consistent with our previous determinations that MDL in "stand-alone" situations is distinguishable

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[5] 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.

from CGDL in "stand-alone" situations. Further, we are concerned that without an exact definition of "stand-alone" MDL, we could inadvertently be opening up a whole new classification of MDL that is ill-defined and subject to further litigation by parties. Therefore, the comments of the IOUs have convinced us to reject the argument that there is should be complete CRS exceptions for MDL in "stand-alone" situations. We do, however, note the potential for exceptions to CRS for MDL that is served by customer generation, under the terms of D.03-04-030 and as clarified by D.03-05-039.

We also clarify that we have intentionally made no distinction, in the text of the decision or in ordering paragraph 4, as to whether or not the POUs subject to the 80 MW cap may be serving only new load or may also be serving transferred load. Our only requirements for eligibility for exceptions under the 80 MW cap are that the POU must have been formed and serving at least 100 customers as of July 10, 2003 and that the POU was not specifically named in the Bypass Report.

Other modifications to this decision are detailed in the text of the decision.

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 establishing the new MDL exception for existing POUs with transferred load within the geographic region covered by the PG&E Bypass Report, the Commission did not intend that the transferred load MW exception amount would be interchangeable with the new load exception.

9. The sense in which the Commission intended that the CRS exception for transferred load shall "apply equally to new load" is with respect to its equivalent eligibility status, but not with respect to interchangeability of MW load between the transferred and new MDL categories.

10. The exemption for existing POUs with new load is not unlimited but is defined by the limits of its geographic coverage rather than by a specific numerical cut-off on the MW eligible for exemption. The geographic coverage is limited to the area identified in the PG&E Bypass Report attributable to transferred MDL, as the existing POU existed at the time of the Bypass Report.

11. By contrast, new MDL served by new POUs formed on or before July 10, 2003 remains 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 granted, in part, and denied, in part, 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. New MDL served by customer generation should be eligible for exceptions to CRS as outlined in D.03-04-030 and D.03-05-039.

4. Any new MDL within the geographic areas served by the POUs identified in the PG&E Bypass Report, would be in addition to—not interchangeable with—the authorized amount of the transferred load exception.

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.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification (Petition), filed by the California Municipal Utilities Association in Rulemaking (R.) 02-01-011 is granted, in part, and denied, in part.

2. The Petition is granted with respect to the request to affirm that the new MDL exception within the geographic area served by an existing publicly owned utility (POU) covered in the Pacific Gas and Electric Company Bypass Report is in addition to, and not interchangeable with, the associated transferred load.

3. The new MDL exception for existing POUs covered in the Bypass Report is not subject to any specific numerical megawatt cut-off, but is limited in terms of the geographic area covered by the transferred load and served by a POU at the time of the PG&E Bypass Report.

4. The 80 MW cap 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, but were not specifically named in the PG&E Bypass Report.

5. The Petition filed in R.02-01-011 is denied in all other respects.

Dated _____, at San Francisco, California.