

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 9, 2003

Agenda ID #3077
Ratesetting

TO: PARTIES OF RECORD IN RULEMAKING 02-01-011

This is the draft decision of Administrative Law Judge Pulsifer. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ PULSIFER** (Mailed 12/9/2003)

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 REGARDING PETITION TO MODIFY DECISION 03-04-057

By this order, we grant, in part, and deny, in part, the Petition for Modification filed on September 25, 2003 by the Alliance for Retail Energy Markets and the Western Power Trading Forum (collectively, the “Joint Parties”). The Joint Parties seek an order modifying two provisions of Decision (D.) 03-04-057, issued on April 17, 2003. As explained below, we grant the requested modification relieving Energy Service Providers (ESPs) of the requirement to sign an affidavit attesting to the compliance of Direct Access (DA) customers with DA load suspension rules. We deny the requested modification, however, seeking to eliminate the account-by-account documentation requirements associated with DA customers’ relocations or replacements of facilities.

Comments in response to the Petition to Modify were filed on October 27, 2003. Comments were filed by Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric (SDG&E). On November 5, 2003, the Joint Parties filed a third-round reply to parties’ comments, pursuant to authorization granted by the Administrative Law Judge.

I. Background

D.03-04-057 addressed an earlier petition of Albertson's, Inc. (Albertson's) to modify D.02-03-055, the Commission's decision adopting rules for implementing the temporary suspension of Direct Access (DA) required under Assembly Bill (AB) 1X. In that petition, Albertson's had requested that rules adopted in D.02-03-055 be modified to allow existing DA customers to add new locations or accounts to DA service provided there is no net increase in the amount of load that is served under DA as of September 20, 2001. The April 17 Decision also discussed the requirement calling for the DA customer and its ESP to sign an affidavit that would state, under penalty of perjury, that the customer's aggregate DA load will not increase by virtue of the relocation or replacement of facilities.

In accordance with D.03-04-057, a proposed affidavit¹ was circulated by SDG&E, PG&E and SCE (collectively, the IOUs). It consists of two parts, an ESP Declaration and a Customer Declaration, as well as an attached form entitled Customer Location Relocation/Replacement Declaration. The language which relates to the subject of this petition is contained in paragraph 4 of the ESP Declaration, and reads as follows:

4. The change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory.

¹ Petitioners attached a copy with their Petition, as Exhibit B, with suggested modification indicated through the use of underlining or strikethroughs.

The Joint Parties argue that the design of the affidavit has proven to be problematical, thus prompting their petition for modification regarding two issues, as discussed below. The Joint Parties request that the Rule 1 language requiring ESPs to attest to no net change in load on behalf of their customers be eliminated, and that such attestation be required solely of the customer. Second, Joint Parties propose that Rules 5 and 7 be modified to remove the requirement that the customer attest that the replacement or relocation facilities will not cause a net increase in the customer's aggregate amount of load that was eligible to be served by DA as of September 20, 2001. Joint Parties argue that the calculation of any net increase should not apply solely to those accounts that have been relocated. Joint Parties argue that the requested clarifications are necessary for affected DA customers and the ESPs who serve them to move forward with the relocations that were the subject of the original Albertson's petition for modification.

II. ESP Affidavit Requirements

A. Positions of Petitioners

D.03-04-057 requires that ESPs sign, under penalty of perjury, an affidavit that the change in location will have no net increase in Customer's aggregate DA load as of September 20, 2001. Joint Parties contend that it is fundamentally impossible, however, for ESPs to adhere to such a requirement because ESPs are not in control of the meter, do not control their customer's operations, and are unable to ensure that the customer will not increase its load. Joint Parties further contend that the body of D.03-04-057 and the Conclusions of Law contained therein indicate that the calculation, verification and attestation that no increase in DA load would occur were to be solely the responsibility of the DA customer.

Because ESPs have no control over the individual operations of direct access customers, Joint Parties argue, ESPs cannot reasonably be required to attest under penalty of perjury that the change in a customer's location will not result in a net increase in the Customer's aggregate DA load. Joint Parties thus propose that ESPs not be required to attest by affidavit, under penalty of perjury, that the load of customers who transfer their direct access rights from one location to another will not exceed the load at the prior location. Joint Parties argue that such affidavit should be solely the responsibility of the DA customer who controls the load.

Joint Parties thus seek modification of the final sentence of the discussion section of Rule 1. (Also, a stray period at the end of the date specified in that discussion section should be removed.) Joint Parties propose to implement the modification relieving ESPs from the affidavit requirement by dividing the final sentence of the discussion section of Rule 1 into two sentences. The first sentence would make it clear that ESPs were required to sign an affidavit for adding customers to their October 5 and November 1 lists. The second would require the affidavit to be signed solely by the customer, and remove the reference to the ESP signing the required affidavit. Specific modifications proposed to the text of the decision are attached as Exhibit A to the Petition.

Joint Parties also propose that Paragraph 4 be deleted from the ESP Declaration, as they believe this representation is already sufficiently covered by Paragraph 5 of the Customer Declaration.

B. Position of other Parties

SDG&E supports the Petition's proposed modifications to the affidavit and to D.03-04-057. As long as customers make the required attestation and

maintain the records required by D.03-04-057, SDG&E submits that this requirement is as unnecessary as it is impracticable.

PG&E agrees that ESPs should not be required to sign an affidavit to the effect that the relocated customer's load will not exceed the customer's load at the prior location because ESPs have little if any control over the operations of their customers. However, PG&E does not believe that ESPs should have no obligation whatsoever in this regard. PG&E proposes instead that ESPs sign a statement saying that after making appropriate inquiries, and based on the ESP's information and belief, the relocated customer's load will not exceed the customer's load at the prior location.

SCE opposes the proposed elimination of the requirement for the ESP to sign the affidavit, arguing that the affidavit requirement in D.03-04-057 is working as intended, and should not be removed. If the Commission decides to change the affidavit requirements, however, SCE suggests alternative language. Rather than deleting the requirement that the ESP attest to the level of its DA customer's load, SCE proposes that it be modified (as indicated by underlined text) to state the following:

After making a reasonable inquiry and investigation of the Customer's Current Location and new location, the ESP represents, on information and belief, that the change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory."

In addition, SCE argues that AReM/WPTF's proposed changes to Rule 1 as shown in its Exhibit A.1 would result in unintended consequences to the original intent of the DA Suspension Decision D.02-03-055. By deleting the

phrase, “both the ESP and,” AReM/WPTF would also relieve ESPs from the legal responsibility of attesting that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. Even AReM/WPTF admits that the ESPs signature on such an affidavit is clearly required (Petition, p. 6).

C. Discussion

We conclude that Joint Parties’ proposed modification is reasonable to the limited extent it seeks to relieve the ESP from the requirement to sign an affidavit attesting that there is no net increase in DA load as a result of relocations. ESPs must still attest that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. We agree, however, that ESPs have no control over the individual operations of DA customers, and thus should not be required to attest under penalty of perjury that the change in a customer’s location will not result in a net increase in the customer’s aggregate DA load. By retaining the requirement that the DA customer attest “under penalty of perjury” that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

PG&E, while conceding that some change to the ESP affidavit requirements is warranted, opposes Joint Parties’ proposal to relieve ESPs from any attestation responsibility with respect to DA load relocations. SCE also argues that if any modification is granted that ESPs attestation to no load increase be qualified with the clause “on information and belief,” rather than “under penalty of perjury.” PG&E and SCE claim that maintaining some lesser requirements on ESPs in this regard will add an additional check on “potential gaming” by DA customers relocating load. SCE’s experience has been that

because ESPs have the responsibility of signing the affidavit, they have been very careful to work with their customers to ensure that there will be no increase in load as a result of a facility relocation before signing the affidavit.

We are unpersuaded, however, as to the necessity for this additional level of administrative burden on ESPs. The legal requirement that remains on the DA customer is an effective check against the potential for a customer not to comply with the rule. This responsibility entails not only the DA customer's relationship with the IOU and Commission rules, but also in coordinating any load relocations with its ESP. Thus, we find it inappropriate to add administrative hurdles on business transactions that are unnecessary, and burdensome. Since it is the customer, and not the ESP, that has control over the load, the ESP is not in a position to violate the load restriction requirements since it is the DA customer that controls the level of the load. Thus, it is sufficient that the affidavit requirement with respect to the no load growth attestation be limited to the DA customer, thereby assigning the appropriate legal responsibility for compliance with the DA customer that has power to control the outcome. We shall accordingly adopt the proposed modification in language to eliminate this attestation by ESPs. We shall also eliminate Paragraph 4 from ESP declaration, as requested.

III. Treatment of Account-by-Account Load Replacements

A. Position of Joint Parties

Joint Parties also propose a modification or clarification of the requirements for determining allowable DA load under the rules adopted in Appendix A of the April 17 Decision. Joint Parties argue that Appendix A should be interpreted to permit a DA customer to calculate the net change in DA load from all replacements and relocations in facilities within its

utility-specific service territory, rather than based merely on an account-by-account interpretation that limits the calculation to a direct one-for-one replacement, as reflected in the utilities' proposed affidavit.

Joint Parties argue that a customer should be permitted to relocate any DA load from an active DA account to a proposed new account so long as there is no net increase across all eligible DA accounts, and that the affidavit adopted by the utilities should be consistent with the proposed modified language to D.03-04-057.

Joint Parties seek modification to permit relocations so long as there is no net increase in the customer's amount of total eligible DA load. Under the proposed approach, eligible DA load would be determined merely by comparing the customer's entire total DA load prior to and after the relocation, rather than on an account-by-account basis or solely as a comparison of the respective loads of relocated accounts. Thus, Joint Parties propose that Rule 5 in Appendix A and related discussion in the text of the decision be modified to delete the requirement that a customer may relocate DA load to a new location only on a "one-for-one" or "account-by-account" basis.

B. Position of Other Parties

PG&E and SCE oppose the proposed modification seeking to eliminate the "one-for-one" or "account-by-account" restrictions. SCE argues that parties have already had the opportunity to address this precise issue in briefs leading to the adoption of D.03-04-057, and that the Commission specifically adopted the "one-for-one" requirement to ensure that the standstill principle was not violated. PG&E believes that the existing rule already allows significant flexibility to address the likelihood that the relocation load does not exactly match the relocated load. PG&E argues that if the location-by-location

requirement were dropped, it would become impossible to determine if relocations were occurring as proposed to prohibited load shifts that did not involve relocations or replacements.

SDG&E, by contrast, agrees with Joint Parties' proposed elimination of the account-by-account requirement. SDG&E believes that as long as there is no increase in DA load across all of the customer's eligible accounts, there would be no compromise of the standstill principle.

C. Discussion

We decline to grant the proposed modification removing the "account-by-account" language in D.03-04-057, as proposed by Joint Parties. The intent behind the requirement for an account-by-account tracking of replacements and relocations as adopted in D.03-04-057 was to guard against violations of the DA suspension rules prohibiting new DA accounts being added after the suspension date. We expressly stated in D.03-04-057 that "appropriate documentation is warranted to verify that DA load associated with a new location or facility is in fact replacing DA load from one or more previous facilities that are no longer in service." (D.03-04-057, p. 15 (slip op).)

Thus, the stated intent of D.03-04-057 was to provide for enforcement of the DA suspension rules by preventing the addition of new accounts that were not attributable to a relocation or replacement of an existing facility. The addition of such new accounts beyond the limited exception for replacements or relocations would constitute a violation of the DA suspension rules. If multiple accounts could be consolidated into one or more new DA accounts without requiring a one-for-one or location-for-location accounting, it would become difficult to prevent "new DA load at a new location merely to make up for slower business and reduced electricity consumption at other facilities that

continue to operate” (*Id.*, at p. 15 (slip op.)) Joint Parties’ proposed modification eliminating this safeguard would open the door for the very sort of violation we prohibited in D. 03-04-057.

Joint Parties argue that a customer “should be permitted to relocate any DA load from an active DA account to a proposed new account without closing the active account, so long as there is no net increase in the amount of load served under the DA as of September 20, 2001.”² If, in fact, DA load is merely being merely relocated from an existing facility, the existing rules already provide the flexibility that the relocated or replaced load need not exactly match the old load. If load at the replacement facility is greater than that of its predecessor facility, DA service is allowed for the higher load provided that the increment cannot exceed the cumulative net reduction in DA load from the customer’s prior “one-for-one” and “account-by-account” replacements or relocations.

We conclude that this existing flexibility is sufficient, and that the account-by-account and one-for-one feature of the relocation policy should be preserved as a necessary means of upholding the integrity of the DA suspension rules and standstill principle. Petitioners’ proposed modification to eliminate any requirement for documentation that load is, in fact, being relocated or replaced, would eviscerate the suspension rules prohibiting customers from acquiring new DA load. The one-for-one relocation policy is necessary for proper administration and tracking of DA relocations. Without the account-by-account documentation requirements, there would be no means of reasonably

² See Reply Comments of Joint Parties filed November 5, 2003, p. 7.

ascertaining whether a new DA account was merely replacing an old account or being set up as a new account in violation of the suspension rules.

A previous petition to modify D.03-04-057, filed August 1, 2003, sought to remove the restrictions on growth in DA load at existing accounts, arguing that the standstill principle was not violated because they were leaving in place the restriction on adding new accounts.³ Now in the instant pleading, petitioners seek to remove the restriction on adding new accounts as long as there is no net increase in existing load. Taken together, these modifications, if adopted, would essentially gut the standstill principle, permitting both new DA accounts and unlimited load growth.

Accordingly, the one-for-one relocation policy must be preserved, and the petition to modify this provision is denied.

IV. Comments on Draft Decision

The Draft Decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

V. Assignment of Proceeding

Carl W. Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

³ A Draft Decision is currently being considered by the Commission in response to the August 1, 2003 Petition to Modify. There is no intent to prejudge the August 1, 2003 Petition.

Findings of Fact

1. ESPs are required to sign an affidavit, pursuant to D.03-04-057 that the change in a customer's location will not result in a net increase in the Customer's aggregate DA load.

2. Because ESPs have no control over the individual operations of direct access customers, they cannot reasonably ascertain whether the change in a customer's location will result in a net increase in the Customer's aggregate DA load.

3. By retaining the requirement that the DA customer attest "under penalty of perjury" that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

4. The intent behind the requirement for an account-by-account tracking of replacements and relocations as adopted in D.03-04-057 was to guard against violations of the DA suspension rules prohibiting new DA accounts being added after the suspension date.

5. Without the account-by-account documentation requirements, there would be no means of reasonably ascertaining whether a new DA account was merely replacing an old account or being set up as a new account in violation of the suspension rules.

6. No party requested evidentiary hearings.

Conclusions of Law

1. The Petition to Modify should be granted, to the extent it seeks to eliminate the affidavit requirement applicable to ESPs.

2. The Petition to Modify should be denied to the extent that it seeks to eliminate the account-by-account documentation for load changes associated with relocated and replacement facilities eligible to be treated as DA load.

O R D E R**IT IS ORDERED** that:

1. The Petition to Modify Decision (D.) 03-04-057 is granted, in part, to the limited extent that it seeks to eliminate the requirement for the ESP to sign an affidavit attesting that the level of a customer's DA load does not exceed permissible levels. The following text modification of the Rule 1 as set forth in D.03-04-057, Appendix A, page 3 is accordingly adopted, limiting such attestation requirements to the DA customer (with additions underlined, and deletions struck through):

We will allow additions to the October 5th and November 1st lists [footnote omitted] for customers with a valid direct access contract as of September 20, 2001 (including additional meters, accounts or sites as provided in Rules 5 and 6 below), using the AReM process, along with an affidavit signed by the customer stating under penalty of perjury that the contract date is correct A separate affidavit, signed by the customer, must state under penalty of perjury that the amount of customer-specific aggregate direct access load for facilities that have been relocated or replaced within the customer's existing service territory that is related to the new meters, accounts or sites does not exceed that in effect as of September 20, 2001, and that the DA customer's load will not increase by virtue of such relocation or replacement of facilities.

2. Paragraph 4 of the ESP Declaration is likewise hereby deleted. The amended ESP Declaration, with the deleted text struck through is set forth in the Appendix of this order.

3. The Petition to Modify is denied, in part, to the extent it seeks to eliminate the requirement for an account-by-account verification with respect to the requirements for permitting DA load relocations and replacements.

This order is effective today.

Dated _____, at San Francisco, California.

Appendix
Adopted Modifications to
Customer Relocation/Replacement Declaration

1. ESP Declaration

I, _____, state as follows:

1. I am an officer of _____ (*Name of ESP*) (“ESP”) authorized to make this declaration. I have personal knowledge of the matters set forth herein and if called upon as a witness could and would testify competently thereto.
2. Under the provisions of the Agreement, the Customer has the right to receive direct access service from ESP for electric service loads located at the Current Location service address under the service accounts identified below and at the New Location. “Current Location” means a single existing customer site where the electric load of one or more customer accounts is currently being served under direct access, or is eligible for direct access service. “New Location” means either (1) the Current Location site after the facilities have been refurbished, reconstructed or remodeled or (2) a different site from the Current Location which has been acquired by customer for the purpose of, or at which the customer has engaged in new construction for the purpose of, accommodating the relocated business and operations from the Current Location.
3. All conditions of the Agreement necessary for a transfer of electric service from Customer’s Current Location to New Location have been satisfied, including any necessary approvals by ESP.
4. ~~The change in service from the Current Location to the new location will cause no net increase in Customer’s aggregate direct access load in effect as of September 20, 2001 for all Customers’ facilities that have been relocated or replaced within utility’s existing service territory.~~

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of _____, _____ at _____, _____ [city, state].

_____ [signature]

_____ [title]