

Decision 09-06-052

June 18, 2009

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902M) for authority to update its gas and electric revenue requirement and base rates effective on January 1, 2008.	Application 06-12-009 (Filed December 8, 2006)
Application of Southern California Gas Company for authority to update its gas revenue requirement and base rates effective on January 1, 2008. (U904G)	Application 06-12-010 (Filed December 8, 2006)
Order Instituting Investigation on the Commission's own motion into the rates, operations, practices, services and facilities of San Diego Gas & Electric Company and Southern California Gas Company.	Investigation 07-02-013 (Filed February 15, 2007)

**ORDER DENYING REHEARING OF DECISION (D.) 08-07-046****I. INTRODUCTION**

Decision (D.) 08-07-046 (or “Decision”) involves the Test Year 2008 general rate cases for San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”). The Commission adopted a settlement on many of the issues.

Applications for rehearing of the Decision were timely filed by the Greenlining Institute (“Greenlining”) and jointly by the Division of Ratepayer Advocates (“DRA”) and The Utility Reform Network (“TURN”).<sup>1</sup> In its rehearing application,

<sup>1</sup> This order addresses and disposes of the application for rehearing filed by Greenlining on August 29, 2008. Greenlining also filed a related motion to withdraw the two earlier versions of the same rehearing application. We grant this motion.

Greenlining contests the Commission's rejection of the Six Year Leadership Agreement ("Agreement") between Greenlining and SDG&E and SoCalGas on corporate philanthropy and diversity. Specifically, Greenlining challenges D.08-07-046 on the following grounds: (1) the rejection of the agreement is inconsistent with established Commission policy and precedent; (2) the determination to not adopt the agreement harms ratepayers because it discourages corporate social responsibility, undermines the Commission's leadership, and impedes economic development; and (3) the Decision treats minorities in a discriminatory manner by not adopting the Agreement while choosing to adopt the settlement between Disability Rights Advocates and SDG&E and SoCalGas.<sup>2</sup>

In their joint rehearing application, DRA and TURN allege the following legal error: (1) the Decision's guidance relating to depreciation testimony in future proceedings, funding for incentive compensation plans, DRA's position on working cash, and TURN's position on employee ownership plan – tax deduction violates the rights of DRA, TURN, and potentially other consumer advocates under the prior restraint on free speech provisions of the United States Constitution and the California Constitution; (2) the Decision contains language which impermissibly attempts to bind future Commissions in violation of Public Utilities Code section 1708, and gives the appearance of prejudging evidence in future proceedings; and (3) the Decision factually erred or failed to address evidence in its discussion and "guidance" on several issues and, as a result, is arbitrary and capricious, is not supported by findings, and contains findings that

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<sup>2</sup> Preliminarily, it is noted that all of Greenlining's contentions are offered without specific legal grounds, and therefore do not comply with the requirements of Public Utilities Code Section 1732 which requires the rehearing applicant to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." (Pub. Util. Code, §1732.) Rule 16.1(c) of the Commission's Rules of Practice and Procedure further requires that "[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law." (Code of Regs., tit. 20, §16.1, subd. (c).) We could reject Greenlining's contentions on this basis alone. Nevertheless, as explained below, Greenlining's contentions are otherwise without merit and are rejected because no legal error is demonstrated.

are not supported by substantial evidence in light of the whole record. The joint rehearing application asks the Commission to grant rehearing of D.08-07-046 to remove unlawful language and the corresponding findings of fact and conclusions of law.

Responses to the rehearing applications were filed by SDG&E and SoCalGas, and Southern California Edison Company (“Edison”). SDG&E and SoCalGas support the application for rehearing filed by Greenlining, and Edison opposes this rehearing application. SDGE and SoCalGas, and Edison oppose the application for rehearing filed by DRA and TURN.

We have reviewed each and every allegation in the applications for rehearing. We modify D.08-07-046 in order to further clarify the Commission’s position on several issues. With the modifications, good cause has not been established to grant rehearing. Accordingly, we deny the applications for rehearing of D.08-07-046, as modified herein, because no legal error has been show. We also grant Greenlining’s related motion to withdrawn two earlier versions of their rehearing application.

## II. DISCUSSION

### A. Greenlining’s Application for Rehearing

#### 1. The Commission acted lawfully in its determination to not act on the Agreement between Greenlining and SoCalGas and SDG&E.

##### a. Philanthropy

Greenlining contends that rehearing is warranted in light of Commissioner Peevey’s past public encouragement of corporate philanthropy<sup>3</sup> and the Commission’s past recognition of agreements concerning corporate philanthropy.<sup>4</sup> (Rehrg. App., pp. 11-

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<sup>3</sup> Specifically, Greenlining points to Commissioner Peevey’s May 2004 public encouragement of California regulated utilities to increase their levels of charitable contributions to 2% of pre-tax earnings with an allocation of 80% of the funds to support under-served communities. (Rehrg. App., p. 11.)

<sup>4</sup> In a similar but slightly different argument, Greenlining contends that a determination to not adopt the Agreement would be at odds with the Commission’s historical encouragement and

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13.) Greenlining cites several examples of Commission action regarding philanthropy, including an Assigned Commissioner’s Ruling in Edison’s recent general rate case,<sup>5</sup> as well as adoption of agreements containing philanthropy commitments in the Verizon/MCI merger proceeding,<sup>6</sup> the AT&T/SBC merger proceeding,<sup>7</sup> and the 2006 Pacific Gas and Electric Company (“PG&E”) general rate case.<sup>8</sup> This contention lacks merit.

Although we have on occasion adopted agreements that address some philanthropic issues, such as the most recent GRC for PG&E, we determined that there was not a need to adopt the settlement on philanthropy in this proceeding for several reasons.

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acceptance of negotiated settlements in complex proceedings. (Rehrg. App., p. 7.) This contention lacks merit and is rejected. The Decision adopts eight settlements in this proceeding, and we will continue to approve settlement agreements in future proceedings where appropriate. However, for reasons discussed below, we determined there was not a need to adopt this particular proposed settlement (the “Agreement”).

<sup>5</sup> A.07-11-011, Assigned Commissioner’s Ruling Clarifying Scope (“Peevey ACR”), March 26, 2008, p. 3 (“[I]n past general rate cases [the Commission has] endorsed agreements reached between Greenlining and the utilities on matters related to corporate philanthropy.”).

<sup>6</sup> See *Decision Authorizing Change in Control (“Verizon / MCI Merger Decision”)* [D.05-11-029] (2005) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 2 (slip op.). Notably, the standard we apply in our determination to authorize a merger is significantly different from the standard we apply in rate proceeding determinations. In a merger proceeding we are required to determine whether the merger as a whole, including any settlement contained in the merger proposal, is in the public interest. (See Pub. Util. Code, § 854, subd. (c)(1-8).) In a rate proceeding we make determinations based on the interests of the affected ratepayers specifically.

<sup>7</sup> Greenlining cites to the AT&T/SBC merger decision and provides an alleged quotation from the decision regarding a philanthropy settlement. However, the citation provided is to a page (“p. 168”) that does not exist. We reviewed the version provided by Lexis and the official mailed version of the decision but could not locate the page or quotation cited in the Application.

<sup>8</sup> See *Opinion Authorizing Pacific Gas and Electric Company’s General Rate Case Revenue Requirement for 2007-2010 (“2006 PG&E GRC”)* [D.07-03-044] (2007) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 270 (slip op.).

First, we have repeatedly held that corporate philanthropic contributions are generally a shareholder matter, not a ratepayer issue.<sup>9</sup> Accordingly, philanthropic contributions are not an issue for resolution in this ratesetting proceeding. In the Assigned Commissioner's Ruling cited by Greenlining, Commissioner Peevey explained the rationale behind this Commission policy as follows:

In *Pacific Tel. & Tel. Co. vs. Public Util. Comm.* (1965) 62 Cal.2d 634, 669, the [California Supreme Court] found that amounts related to charitable contributions must be excluded from authorized rates. Following the court's decision, the Commission adopted a corollary policy that the Commission would not, as part of its ratemaking responsibilities, interject itself into utility management decision regarding corporate philanthropy. D.04-05-055, *mimeo.*, p.110.

(Peevey ACR, pp. 2-3.) The ACR went on to acknowledge that we have previously recognized agreements related to corporate philanthropy, but it emphasized that the Commission "did not approve these settlements under Rule 12.1 of the Commission's Rules of Practice and Procedure, but [it] took the opportunity to commend the utilities for working to improve in areas over which this Commission has no jurisdiction...."

(Peevey ACR, p. 3.) Our determination to not adopt the Agreement is consistent with that Commission precedent and policy. As stated in the Decision, "[t]he nature, amount and recipients of any shareholder philanthropic activities are not within the ratesetting scope of any general rate proceeding." (D.08-07-046, p. 73.)

In addition, since the philanthropy proposal in the Agreement is not subject to our review for this GRC proceeding, we did not adopt the settlement's proposal on this

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<sup>9</sup> See e.g. D.06-05-016, which states: "For many reasons, including good corporate citizenship, social responsibility, and public perception, philanthropy is an important consideration for Edison/EIX and corporations in general. However, as we have previously indicated, we have no jurisdiction to order a change in Edison's giving practices. (*Opinion on Southern California Edison Company's Test Year 2006 General Rate Increase Request* ("Edison 2006 GRC Decision") [D.06-05-016] (2006) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 183 (slip op.), citing *Opinion on Base Rate Revenue Requirement and Other Phase 1 Issues* [D.04-07-022] (2004) \_\_\_ Cal.P.U.C.3d \_\_\_, pp. 209-210 (slip op.).)

issue. Accordingly, that portion of the Agreement is merely a matter between Greenlining and SDG&E and SoCalGas, rather than a matter for our oversight and enforcement in the future. Similarly, any past recognition by us of an agreement concerning philanthropic commitments does not give rise to a legal requirement that we must adopt the philanthropy portion of the Agreement here.

Lastly, no order by us is necessary for an agreement to exist between the parties as to matters of corporate philanthropy. SDG&E and SoCalGas have indicated their commitment to uphold the settlement terms of the Agreement regardless of our action on the application.<sup>10</sup> We applauded SDG&E and SoCalGas' commitment to corporate philanthropy and we can continue to encourage good corporate citizenship from jurisdictional utilities. However, as stated above, shareholder philanthropic activities are beyond the scope of any general rate proceeding and an agreement between parties as to philanthropic commitments need not receive our approval in a GRC proceeding to be binding. No law requires us to act in the manner Greenlining states we must act.

**b. Diversity**

**(1) Management diversity**

Greenlining contends that rehearing is warranted in light of the Commission's past promotion of management diversity as well as past recognition of agreements concerning management diversity. (Rehrg. App., pp. 8-9.) Specifically, Greenlining cites to the 2006 PG&E general rate case wherein we adopted an agreement that addressed workforce diversity goals.<sup>11</sup> This contention lacks merit.

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<sup>10</sup> SDG&E and SoCalGas' response to the application specifically states that "[a]pplicants continue to support their Settlement with Greenlining and will uphold its terms." (Response of San Diego Gas & Electric Company and Southern California Gas Company to Application of Greenlining for Rehearing or Decision 08-07-046 ("Response of SDG&E and SoCalGas"), p. 2, emphasis added.)

<sup>11</sup> 2006 PG&E GRC [D.07-03-044], *supra*, p. 270 (slip op.).

There is no legal requirement that we must adopt the proposed settlement regarding workforce diversity. In a general rate proceeding, we typically focus only on issues that have a discernable ratepayer impact; namely customer service, economic regulation (i.e., rate-making and cost allocation), and safety. There are no allegations in this proceeding of any unlawfulness regarding hiring. Similarly, any past recognition by us of an agreement concerning management diversity commitments does not give rise to a legal requirement that we must adopt the management diversity portion of the Agreement here.

In addition, no order by us is necessary for an agreement to exist between the parties as to matters of management diversity. As noted above, SDG&E and SoCalGas have indicated their commitment to uphold the settlement terms of the Agreement regardless of our action on the application. (Response of SDG&E and SoCalGas, p. 2.)

Lastly, Greenlining is mistaken in its underlying contention that by deciding not to adopt the settlement we are expressing a newfound lack of support for workforce diversity. As the Decision indicates, “the Commission strongly urges SDG&E and SoCalGas - and all other jurisdictional utilities - to strive for work-force parity with the served-community for all levels of employees, officers, and directors, and to meet or exceed the GO 156 WMDVBE goals as adopted elsewhere by the Commission.” (D.08-07-046, p. 76, emphasis added.) The Decision’s encouragement of diversity efforts should be sufficient notice to Greenlining and regulated utilities that we continue to strongly support workforce diversity as good corporate policy.

## **(2) Supplier diversity**

Greenlining contends that rehearing is warranted in light of the Commission’s past promotion of supplier diversity as well as past recognition of agreements concerning supplier diversity. (Rehrg. App., pp. 9-11.) Greenlining cites several examples of Commission action, including the adoption of General Order 156 (“G.O. 156”), discussion of supplier diversity at *en banc* hearings, as well as adoption of agreements containing supplier diversity commitments in the Verizon/MCI merger

proceeding,<sup>12</sup> the AT&T/SBC merger proceeding,<sup>13</sup> and the 2006 PG&E general rate case.<sup>14</sup> This contention lacks merit.

There is no legal requirement that we must adopt the proposed settlement regarding supplier diversity. The only general requirement in terms of our review regarding supplier diversity is compliance with the goals of G.O. 156. Here, the proposed settlement contains an expression of SDG&E and SoCalGas's intention to make progress in supplier diversity and a commitment to "a minimum of 30 percent of its contracts to women, minorities, and disabled veteran-owned businesses" within the next six years. (Agreement, p. 2.) The goals in the proposed settlement exceed the goals provided in G.O. 156 and, accordingly, there is no legal requirement that we must adopt the proposed settlement regarding supplier diversity. Similarly, any past discussion of supplier diversity at *en banc* hearings or past recognition by us of an agreement concerning supplier diversity commitments does not give rise to a legal requirement that we must adopt the proposed settlement in this proceeding. Nevertheless, we can continue to emphasize that supplier diversity goals beyond those provided in G.O. 156 are appreciated as a voluntary act of good corporate citizenship and social responsibility.

In addition, no order by us is necessary for an agreement to exist between the parties as to matters of supplier diversity. As noted above, SDG&E and SoCalGas have indicated their commitment to uphold the settlement terms of the Agreement regardless of our action on the application. (Response of SDG&E and SoCalGas, p. 2.)

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<sup>12</sup> *Verizon/MCI Merger Decision* [D.05-11-029], *supra*, p. 2 (slip op.).

<sup>13</sup> See fn. 7. Greenlining again cites to the AT&T/SBC merger decision and provides an alleged quotation regarding supplier diversity settlement. The citation provided is to the same page ("p. 168") that, as described above, does not exist. We reviewed the version provided by Lexis and the official mailed version of the decision but could not locate the page or quotation cited in the rehearing application.

<sup>14</sup> *2006 PG&E GRC* [D.07-03-044], *supra*, p. 270 (slip op.).

**c. Modification regarding settlement on diversity**

Although Greenlining fails to demonstrate legal error in its rehearing application, we recognize that the Decision's stated rationale for not adopting the proposed settlement on diversity is unclear. We deny the proposed settlement on diversity because it has no quantifiable effect on test year or post test year revenue requirements. Moreover, the determination to not adopt the settlement does not prevent us from emphasizing that we encourage workforce and supplier diversity efforts as voluntary acts of good corporate citizenship and social responsibility. Accordingly, as described below in the ordering paragraphs, we will modify the Decision to clarify the basis of our action on the settlement.

**d. Modification regarding funding of diversity efforts**

The Decision's language does not clearly reflect our instruction regarding allocation of funding for diversity related efforts. Accordingly, we will modify the Decision in the manner specified in the ordering paragraphs.

**e. Other arguments**

Greenlining makes two additional assertions regarding why the Commission must adopt the Agreement.

First, Greenlining contends that the Agreement must be adopted because no Commission member or party to this proceeding has argued for a departure from the Commission's historical encouragement and acceptance of negotiated settlements. (Rehrg. App., p. 7.) In contrast, Greenlining asserts that it has put forth a valid reason in favor of addressing settlements in a way similar to past decisions: "[T]he policy of encouraging settlements promotes judicial economy and avoids unnecessary litigation." (Rehrg. App., p. 7.) This contention lacks merit. We determined that, regardless of whether any party in this proceeding has argued against the policy of encouraging settlements, there was no legal requirement for us to adopt this particular settlement (the Agreement) in order to encourage philanthropy and diversity efforts. In fact, as stated

above, the Decision emphasizes that we encourage philanthropy and diversity efforts as acts of good corporate citizenship and social responsibility. (See D.08-07-046, pp. 73-77.)

Second, Greenlining contends that the Agreement must be adopted because Greenlining, when it negotiated the Agreement, detrimentally relied on the Commission's historical encouragement and acceptance of negotiated settlements. (Rehrg. App., pp. 7-8.) Greenlining asserts that without this reliance their strategy "would have involved additional litigation, added advocacy, and much stronger opposition regarding [SDG&E and SoCalGas's] request for a rate cycle greater than three years." (Rehrg. App., pp. 7-8.) This contention lacks merit. Each proceeding before us is considered on its own merits, and no result is guaranteed. Moreover, we urge Greenlining to consider the tangible result of their negotiations with SDG&E and SoCalGas; namely, a settlement that does not need our approval to exist and a commitment from SDG&E and SoCalGas to uphold the terms of the settlement regardless of our action on the application. (Response of SDG&E and SoCalGas, p. 2.)

Consistent with the above stated reasons, Greenlining's additional contentions fail to demonstrate legal error and are rejected.

**2. The Commission's determination to not act on the Agreement does not harm California ratepayers.**

**a. Discouragement of corporate responsibility**

Greenlining contends that a determination to not adopt the Agreement will discourage corporate responsibility and ultimately result in a negative economic impact on ratepayers. (Rehrg. App., pp. 13-14.) Specifically, Greenlining speculates that SDG&E and SoCalGas will, as a result of the Agreement, make investments in their service territory to assist underserved communities and minority owned businesses. In addition, Greenlining speculates that the Agreement will provide economic benefits to ratepayers and minority owned businesses outside of SDG&E and SoCalGas's service territory by encouraging other utilities to improve their philanthropy and diversity programs. Presumably, these economic benefits will not exist and regulated utilities will

have little incentive to improve their programs unless the Commission adopts the Agreement. This contention lacks merit.

Greenlining's contention is speculative and based on the false premise that our approval of the Agreement provides the only incentive for SDG&E and SoCalGas and other utilities to invest in philanthropy and diversity efforts. Again, SDG&E and SoCalGas have indicated their commitment to uphold the settlement terms of the Agreement regardless of our action on the application. (Response of SDG&E and SoCalGas, p. 2.) Moreover, Greenlining provides no evidence, beyond speculation, that a determination to not adopt the Agreement will discourage other utilities in their efforts to improve their diversity and philanthropy programs.

Accordingly, Greenlining's contention fails to demonstrate legal error and is rejected.

**b. The Commission's leadership on issues of corporate responsibility**

Greenlining contends that a determination to not adopt the Agreement will undermine the Commission's established leadership position and past successful efforts in the promotion of philanthropy, diversity, and economic growth in low and middle income communities; leadership and efforts that Greenling insists were essential to past progress and are essential to future progress in this area.<sup>15</sup> This contention lacks merit.

Greenlining's contention offers broad and unsubstantiated assertions regarding impact on the public interest. Contrary to Greenlining's assertion, the Decision encourages corporate responsibility and clearly emphasizes the importance of

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<sup>15</sup> In the same argument, Greenlining make a vague and unrelated assertion that a determination to not adopt the Agreement will hamstring the ability of consumer protection organizations to intervene on behalf of ratepayers. Specifically, Greenlining asserts earlier in the rehearing application that failure to adopt the Agreement will result in "an uphill battle for any intervenor seeking compensation for work related to these topics" and "a significant decline in the quality and quantity of intervention before the Commission." (Rehrg. App., p. 5.) These arguments are speculative, offered without substantiation, and are therefore rejected. Whether intervenor compensation is awarded is based on the eligibility of the intervenor and its substantial contribution made to the decision. (See generally Pub. Util. Code, §1801.)

philanthropy and diversity as good policy for regulated utilities.<sup>16</sup> However, for reasons described above, we simply did not find it necessary in this particular case to adopt the settlements regarding diversity and philanthropy in this proceeding.

Accordingly, Greenlining's contention fails to demonstrate legal error and is rejected.

**3. The Decision does not unlawfully discriminate against Greenlining.**

Greenlining contends that the Decision treats minorities in a discriminatory manner by not adopting the Greenlining Agreement while choosing to adopt the settlement reached between Disability Rights Advocates and SDG&E and SoCalGas. (Rehrg. App., p. 16.) According to Greenlining, these settlements should be treated similarly because both relate to corporate responsibility and raise issues that are in the public interest. This contention lacks merit.

The settlement with Disability Rights Advocates and the Greenlining Agreement address distinguishable issues, and the Decision's differing treatment of the settlements is lawful and justified. The settlement with Disability Rights Advocates addresses customer services issues,<sup>17</sup> such as accessibility to branch offices and authorized payment locations, which, as with economic regulation (i.e., rate-making and cost allocation) and safety, we have broad authority to regulate under the Public Utilities Code.<sup>18</sup> The Greenlining Agreement, on the other hand, addresses philanthropy and diversity commitments which are not within the scope of the GRC proceeding, and there are no ratepayer issues, e.g. customer subsidization of philanthropy/charitable

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<sup>16</sup> See generally D.08-07-046, pp. 72-77.

<sup>17</sup> Specifically, the settlement with Disability Rights Advocates addresses issues including "public access and right of way access to streets and sidewalks. [sic] etc., affected by permanently installed utility property or during construction, internet access, emergency communications with customers, the structure of branch offices, and non-utility payment locations authorized to accept payment for the utility." (D.08-07-046, pp. 79-80.)

<sup>18</sup> See e.g., *Southern California Edison Co. v. Peevey*, (2003) 31 Cal.4<sup>th</sup> 781, 792 (citations omitted).

contributions. Accordingly, there is no unlawful discrimination between Greenlining and Disability Rights Advocates, because they are not similarly situated with respect to the issues each party raises. Therefore, Greenlining's contention fails to demonstrate legal error and is rejected.

## **B. DRA and TURN's Application for Rehearing**

### **1. Prejudging evidence in a future proceeding**

DRA and TURN's application<sup>19</sup> focuses on the Decision's treatment of several issues litigated in the SDG&E and SoCalGas rate cases but identified by the settling parties in a joint response<sup>20</sup> as policy issues left unresolved by the adopted revenue requirement settlements. Specifically, DRA and TURN take issue with the Decision's discussion regarding the following issues in Section 5.2 Unresolved Test Year Issues: Depreciation expense, funding for Incentive Compensation, Working Cash expense, and the Employee Stock Ownership Plan ("ESOP") tax deduction.<sup>21</sup> The settlements adopt revenue requirements for all of these issues.<sup>22</sup> However, due in part to

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<sup>19</sup> See generally, Rehr. App., pp. 1-25.

<sup>20</sup> Joint Response to Administrative Law Judge Long's Questions Regarding 2008 Test Year Settlement Agreements ("joint response"), January 22, 2008, pp. 2-3.

<sup>21</sup> The remaining two issues listed in Section 5.2 relate to branch offices and payday lenders. DRA and TURN note that their application does not address these issues because the issues do not have a direct revenue requirement impact. (Rehr. App., p. 4, fn. 11.)

<sup>22</sup> The motion of joint parties for each of the revenue requirement settlements states that "[t]he Settlement Agreement resolved or otherwise disposes of all the issues associated with [the utility's] test year 2008 revenue requirement." (Motion of Joint Parties (Southern California Gas Company, Division of Ratepayer Advocates, and The Utility Reform Network) for Adoption of Settlement Agreement Regarding Test Year 2008 Revenue Requirement ("SoCalGas Settlement"), December 21, 2007, p. 2; Motion of Joint Parties (San Diego Gas & Electric Company and Division of Ratepayer Advocates) for Adoption of Settlement Agreement Regarding Test Year 2008 Revenue Requirement ("SDG&E Settlement"), December 21, 2007, p. 2.) Notably, TURN did not settle with SDG&E. The settlement agreements specifically state that the issues relating to depreciation (SoCalGas Settlement, Section III.P; SDG&E Settlement, Section III.Q), working cash (SoCalGas Settlement, Section III.U; SDG&E Settlement, Section III.V), and the ESOP tax deduction (SoCalGas Settlement, Section III.Q) are all subsumed in the revenue requirement agreed to by the settling parties. Regarding incentive compensation, the settling parties agreed on an amount and stated that the amount "does not resolve any policy issues related to the funding of these items." (SoCalGas Settlement, Section III.L; SDG&E

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a reminder from UCAN that SDG&E has settled every GRC since 1984,<sup>23</sup> the Decision addresses these issues in order to “...resolve these litigated disputes to provide both a critical review of the current unpersuasive arguments and guidance for the next proceeding.” (D.08-07-046, p. 19.) DRA and TURN contend that this language and the corresponding issue discussions and findings constitute an impermissible appearance of prejudging evidence in future proceedings and should be removed. (Rehrg. App., p. 16.)

We considered the parties’ arguments on these issues, and we weighed the relative merits of the arguments presented from all parties in order to determine that the settlements should be approved as reasonable and in the public interest. Our intention with the discussion of these unresolved issues was simply to provide guidance, and in no way was our guidance intended to be controlling for future proceedings. However, we recognize that our discussion has caused confusion. Accordingly, we will modify the Decision to remove language that might have caused such confusion. These policy issues will remain unresolved and will be dealt with in a future GRC so long as the parties do not settle.

Accordingly, the Decision is modified to remove our discussion of the unresolved policy issues as identified by DRA and TURN in the manner set forth below in the ordering paragraphs.

## **2. Prior restraint on free speech provisions of U.S. Constitution and California Constitution**

DRA and TURN contend that the Decision’s “guidance” regarding the above mentioned unresolved policy issues violates the prior restraint on free speech

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Settlement, Section III.M.)

<sup>23</sup> See fn. 26, *infra*.

provisions of the U.S. Constitution<sup>24</sup> and California Constitution.<sup>25</sup> (Rehrg. App., pp. 4-12.) Specifically, DRA and TURN allege that, regardless of the Decision's stated benign intent, the effect of the Decision's "guidance" on these issues is to prevent DRA, TURN, and UCAN from exercising their right to free speech in future proceedings because of hostility to the ideas they expressed in this proceeding.<sup>26</sup> With the above modifications these contentions are moot and will not be addressed.

### **3. Public Utilities Code Section 1708**

DRA and TURN contend that the Decision's "guidance" for the next proceeding violates Public Utilities Code Section 1708 which provides that, with proper notice and an opportunity to be heard, a future Commission may rescind, alter, or amend previous decisions. (Rehrg. App., pp. 15-16.) According to DRA and TURN, the Commission has previously stated that Section 1708 prevents any Commission from binding future Commissions. (Rehrg. App., p. 15.) This contention is speculative and lacks merit. However, with the above modifications this contention is moot and need not be addressed.

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<sup>24</sup> U.S. Const., 1<sup>st</sup> Amend., applied to the states by U.S. Const., 14<sup>th</sup> Amend.

<sup>25</sup> Cal. Const., art. I, Section 2; Cal. Const. art. I, Section 3.

<sup>26</sup> DRA and TURN also argue that the Decision improperly uses UCAN's Comments as a pretext for these alleged constitutional violations. (Rehrg. App., pp. 12-14.) Specifically, DRA and TURN take issue with the following Decision language:

This decision provides guidance to all parties where, regardless of the settlements before us, we found herein various litigation positions to be unpersuasive. SCE and PG&E correctly point out that the settlements were contested by UCAN and that resolving issues litigated by UCAN, and unresolved by the settlements, was a necessary party [sic] to analyzing the settlements themselves in light of the whole record.

(D.08-07-046, p. 89.) According to DRA and TURN, this language regarding UCAN's challenge is factually inaccurate and legally unsupportable. Because this language is deleted in the modification as described below in the ordering paragraphs, DRA and TURN's argument is moot and will not be addressed.

#### 4. Record evidence

DRA and TURN contend that the record does not support the Commission's determinations regarding several of the unresolved policy issues discussed above,<sup>27</sup> as well as determinations regarding the use of 2006 recorded data by the parties.<sup>28</sup> With the modifications set forth in the ordering paragraphs of today's decision, the contention regarding the unresolved policy issues becomes moot and will not be addressed. Regarding the use of 2006 recorded data by the parties, DRA and TURN allege that statements made in two portions of Section 3.1 2006-Recorded Data are factually incorrect or so incomplete that they are not support by substantial evidence in light of the whole record.

First, DRA and TURN challenge the accuracy of the following Decision language in Section 3.1 Recorded Data:

However, we find that the 2006 data was not in a format compatible with the adjusted data for 2005 and prior years. We, therefore, agree with SDG&E and SoCalGas that it is unreasonable in this instance to use unadjusted 2006-recorded data to substitute for the 2006 forecast based on adjusted 2005-recorded data because it is an inconsistent base for re-forecasting 2007 and 2008.

(D.08-07-046, p. 9.) DRA and TURN contend that the Decision fails to mention several pieces of evidence that contradict this conclusion or render the Decision's discussion incomplete. For example, DRA and TURN note that the Decision does not mention the evidence in the record that 2006 recorded data provided by SDG&E for its Electric Distribution Capital Expenditures and used by DRA was in fact in a format compatible with 2005 data and prior years.<sup>29</sup> Since the Decision adopts the revenue requirement

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<sup>27</sup> Rehrig. App., pp. 16-22.

<sup>28</sup> Rehrig. App., pp. 23-25.

<sup>29</sup> In addition DRA and TURN note that the Decision fails to mention that the utilities represented to DRA that the 2006 recorded data they provided in late March 2007 was adjusted, and that a utility witness testified that some errors in the 2006 recorded expenses were discovered in early April 2007 but the utilities' case management team decided not to inform

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settlements, DRA and TURN correctly note that this discrepancy does not affect the outcome of the Decision. Nonetheless, the language requires modification for purposes of clarity. Therefore, we modify the decision as described below in the ordering paragraph.

Second, DRA and TURN challenge the accuracy of the following Decision language in Section 3.1 2006-Recorded Data:

Neither DRA nor any other intervenor used 2006-recorded data for every instance of re-forecasting 2007 and deriving a different Test Year 2008. In fact, SDG&E and SoCalGas assert that the intervenors only used 2006-recorded data when the unadjusted 2006-recorded data was a lower amount than the applicants' forecast 2006. No party rebutted this assertion.

(D.08-07-046, p. 9.) According to DRA and TURN, the implication that intervenors only used unadjusted 2006 recorded data when it yielded a lower amount is factually incorrect. For example, DRA and TURN note that DRA's testimony on capital expenditures for SDG&E shows that roughly half of the 2006 recorded amounts DRA used were higher than the amounts originally forecasted by SDG&E.<sup>30</sup> Moreover, in order to rebut any implication by this passage that the utilities consistently used the same base for their forecasts, DRA and TURN cite several examples where SDG&E and SoCalGas used 2006 recorded data to justify requested rate increases. (Rehrg. App., p. 24.)

Although the challenged language is accurate in that no party rebutted the utilities' assertion regarding intervenor use of 2006-recorded data, we acknowledge that that this discussion is unnecessary and the Decision should be modified to remove the challenged language. Therefore, the Decision is modified to remove the above cited passage on page 9 of Section 3.1 2006-Recorded Data. Removal of this passage does not

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*(footnote continued from previous page)*

DRA of this discovery. (Rehrg. App., p. 23.) In light of the modification below, DRA and TURN's contention is moot and these specific examples will not be addressed.

<sup>30</sup> Ex. DRA-07, p. 7-3, Table 7-1.

alter the ultimate stated conclusion of Section 3.1 2006-Recorded Data; namely the finding that intervenors did not reasonably use unadjusted 2006-recorded data to derive their 2008 test year forecasts.

### III. CONCLUSION

For the reasons stated above, D.08-07-046 is modified to reflect the clarifications specified below. The applications for rehearing of D.08-07-046, as modified, are denied because no legal error has been shown. We grant Greenlining's motion to withdraw two earlier versions of their rehearing application.

**THEREFORE, IT IS HEREBY ORDERED** that:

1. Greenlining's motion to withdraw two earlier versions of their rehearing application (the first filed August 20, 2008, and the second filed on August 21, 2008) is hereby granted.

2. D.08-07-046 is modified as follows:

- a. The three paragraphs contained in Section 15.3 Diversity - Greenlining on pages 74-75 are deleted, and replaced with the following language:

We deny the proposed settlement on workforce and supplier diversity because it has no quantifiable effect on test year or post test year revenue requirements in this proceeding. We nevertheless emphasize that SDG&E and SoCalGas should continue to be guided by G.O. 156. We appreciate the companies' voluntary efforts to be good corporate citizens.

No order by the Commission is necessary for an agreement to exist between the parties as to management and supplier diversity goals, and it is within the discretion of SDG&E and SoCalGas management to honor the diversity commitments made to Greenlining.

- b. The first sentence of the second paragraph in Section 15.1 Summary on page 73 is deleted, and replaced with the following language:

As discussed below, we find that corporate philanthropic contributions are generally a shareholder matter, not a ratepayer issue, and thus, are not issues for resolution in this ratesetting proceeding. In addition, we find that the diversity portion of the settlement has no quantifiable effect on test year or post test year revenue requirements in this proceeding. Accordingly, we do not adopt the proposed settlement agreement.

- c. The Decision is modified to remove the first paragraph on page 4, and replace this paragraph with the following language:

This decision addresses two other proposed settlements as follows:

1. Six Year Leadership Agreement with The Greenlining Institute - on Corporate Philanthropy and Diversity of SDG&E and SoCalGas, with The Greenlining Institute. The philanthropy portion of the settlement is outside the scope of the proceeding and beyond the Commission's authority to impose a lawful order on SDG&E and SoCalGas. The diversity portion of the settlement has no quantifiable effect on test year or post test year revenue requirements. Accordingly, we reject this proposed settlement; and
  2. Settlement Agreement Regarding Local 483 Issues - for SoCalGas. We reject this proposed settlement as not in the public interest, and not reasonable, based on the record of the proceeding.
- d. The three sentences in Section 4.4 Reasonable in Light of the Whole Record on page 16 are deleted and replaced with the following language:

The settlements as discussed below, except for the proposed settlement with Local 483, are reasonable in light of the whole record. We find no factual or policy basis in the record to

adopt the settlement with Local 483. All of the other settlements are supported by the factual record and sound policy recommendations.

- e. A footnote is inserted after the word “recommendations,” on page 16, at the end of the third sentence of the above modification to Section 4.4 Reasonable in light of the Whole Record (ordering paragraph d). The footnote text reads as follows:

We recognize that SDG&E and SoCalGas reached a settlement with Greenlining Institute. We take no position as to the reasonableness, consistency with the law, or public interest value of this settlement. However, as more fully discussed in this decision, we deny the settlement with Greenlining Institute because the philanthropy portion of the settlement is outside the scope of the proceeding and beyond the Commission’s authority to impose a lawful order on SDG&E and SoCalGas, and the diversity portion of the settlement has no quantifiable effect on test year or post test year revenue requirements.

- f. The second sentence of Section 4.6 In the Public Interest on page 16 is deleted and replaced with the following language:

The settlements as discussed below, except for the proposed settlement with Local 483, are in the public’s interest.

- g. Findings of Fact 40 and 41 on page 94 are modified to read as follows:

40. The proposed settlement with Greenlining on diversity has no quantifiable effect on test year or post test year revenue requirements.

41. No order by the Commission is necessary for an agreement to exist between the parties as to management and supplier diversity goals, and it is within the discretion of SDG&E and SoCalGas

management to honor the diversity commitments made to Greenlining.

- h. Conclusions of Law 7, 8, 9, 10, and 15 on pages 99-100 are modified to read as follows:
  - 7. The settlements, except for the settlement with Local 483, are reasonable in light of the whole record. We take no position as to the reasonableness, consistency with the law, or public interest value of the settlement with Greenlining.
  - 8. The settlement with Local 483 is not reasonable when examined in the light of the whole record. We take no position as to the reasonableness, consistency with the law, or public interest value of the settlement with Greenlining.
  - 9. The settlements, excluding the settlement with Local 483, are consistent with the law, and do not contravene or compromise any statutory provision or Commission decision. We take no position as to the reasonableness, consistency with the law, or public interest value of the settlement with Greenlining.
  - 10. The settlements, except for the settlement with Local 483, are in the public interest. We take no position as to the reasonableness, consistency with the law, or public interest value of the settlement with Greenlining.
  - 15. The proposed settlement with Greenlining on diversity has no quantifiable effect on test year or post test year revenue requirements in this proceeding.
- i. The second and third paragraphs contained in Section 15.5 Funding of G.O. 156-Related Efforts on pages 76-77 are deleted and replaced with the following language:

We do not adopt the Greenlining settlement on diversity, instead, we emphasize that expenses included in the adopted Test Year 2008 revenue requirements settlements that either support WMDVBE activities, or are associated with workforce diversity, must be fully and only utilized as adopted. Such allocation is not subject to diversion or reallocation as might reasonably happen with other funding to meet the actual operational needs of SDG&E and SoCalGas to provide safe and reliable service to ratepayers.

We expect the companies to make every effort to competently staff at all times the full forecast of positions for WMDVBE activities and efforts in diversity. Diversity is good public policy and we believe it is good for SDG&E and SoCalGas. Otherwise, any such diversion will be investigated in the companies' next GRC.

- j. Finding of Fact 42 is modified to read as follows:
  - 42. Diversity is good public policy, therefore SDG&E and SoCalGas should competently staff at all times the full forecast of positions for WMDVBE activities and efforts in diversity.
- k. Conclusions of Law 24 is modified to read as follows:
  - 24. The Commission has the discretion and authority to require that expenses included in the adopted Test Year 2008 revenue requirements settlements that either support WMDVBE activities, or are associated with workforce diversity, must be fully and only utilized by SDG&E and SoCalGas as adopted.
- l. Ordering Paragraph 29 on page 107 is modified to read as follows:
  - 29. Expenses included in the adopted Test Year 2008 revenue requirements settlements that either support WMDVBE activities, or are associated with workforce diversity, must be fully and only utilized as adopted. Such

allocation is not subject to diversion or reallocation as might reasonably happen with other funding to meet the actual operational needs of SDG&E and SoCalGas to provide safe and reliable service to ratepayers. Otherwise, any such diversion will be investigated in the companies' next GRC.

- m. The following sections are deleted: Section 5.2 Unresolved Test Year Issues, Section 5.2.3 Incentive Compensation, Section 5.2.4 Depreciation, Section 5.2.4.1 Net Salvage, Section 5.2.5 Working Cash, and Section 5.2.6 Employee Stock Ownership Plan - Tax Deduction.
- n. Insert the following language immediately after Section 5.1.2 SoCalGas - Summary:

**Section 5.2. Unresolved Test Year Issues**

The proposed settlements for Test Year 2008 resolve the revenue requirements and all matters necessary for purposes of this GRC. The settling parties, in a joint response, identified several policy issues which the settlements specifically left unresolved although the settlements otherwise agree to Test Year 2008 revenue requirements. (Joint Response to Administrative Law Judge Long's Questions Regarding 2008 Test Year Settlement Agreements, January 22, 2008, pp. 2-3.) These issues need not be decided here in order to approve the settlements. These unresolved policy issues, among which are incentive compensation, depreciation, net salvage, working cash and tax deduction with respect to the Employee Stock Ownership Plan, deserve resolution in this case. However, because the parties intended for the settlements to address all of the issues presented in this case, including issues related to incentive compensation, depreciation, net salvage, working cash and tax deduction with respect to the Employee Stock

Ownership Plan, we do not further opine on these policy matters. Although the settlements do not address many policy issues that remain outstanding, we expect that the parties will adequately address these issues, in testimony and briefs, in the future so that these policy matters may be addressed and resolved in the next General Rate Case.

These unresolved issues, as described in the joint response, include:

- a. Whether or not, as a matter of policy, the CPUC should assign Sempra Energy shareholders with responsibility for funding SoCalGas or SDG&E incentive compensation plans;
- b. Whether or not, as a matter of policy, the CPUC should consider the proposals raised by TURN (with respect to SoCalGas only) or DRA related to the calculation of SoCalGas or SDG&E depreciation expense;
- c. Whether or not, as a matter of policy, the CPUC should consider the proposals raised by TURN (with respect to SoCalGas only) or DRA related to the calculation of SoCalGas or SDG&E working cash expense, including whether Customer Deposits should be considered as a source of working cash; and
- d. Whether or not, as a matter of policy, the CPUC should consider the proposals raised by TURN related to the SoCalGas Employee Stock Ownership Plan and its relationship to the calculation of SoCalGas' income tax expense.

However, we do offer some limited guidance below regarding the following two issues left unresolved as identified by the settling parties: authorized non-utility payment locations and branch offices (Section 5.2.1 Authorized Non-

Utility Payment Locations and Branch Offices; Section 5.2.2 Authorized Non-Utility Payment Locations), and a study of depreciation-related practices for the next GRC (Section 5.2.4.2 Settlement).

- o. The last two sentences of Section 5.2.4.2 Settlement on page 27 are deleted, and replaced with the following language:

We agree that this is a worthwhile study, and we expect that the parties may either agree or disagree on a methodology.

- p. The second, third, fourth, and fifth sentences on page 17 regarding summary of the test year settlements are deleted and replaced with the following language:

The settling parties, in a joint response, identified several issues which the settlements specifically left unresolved although the settlements otherwise agree to Test Year 2008 revenue requirements. These issues need not be decided here in order to approve the settlements. However, we do offer some limited guidance regarding authorized non-utility payment locations and branch offices, and a study of depreciation-related practices for the next GRC.

- q. The third paragraph of Section 21 Comments on Proposed Decision on pages 88-89 is deleted.

- r. Findings of Fact 18, 19, 23, 24, 25, 27, and 28 are modified to read as follows:

18. The settlements for Test Year 2008 resolve the revenue requirements for purposes of this GRC.

19. The settlements for Test Year 2008 resolve all matters necessary for purposes of this GRC.

23. The settling parties, in a joint response, identified several policy issues which the settlements specifically left unresolved.
  24. The settlements agree to Test Year 2008 revenue requirements regardless of the unresolved policy issues as identified by the settling parties.
  25. The policy issues left unresolved by the settlements, as identified by the settling parties, include the following: depreciation expense, funding for incentive compensation, working cash expense, employee stock ownership plan tax deduction, branch offices, and payday lenders.
  27. Several of the unresolved issues identified by the settling parties do not need to be decided in order to approve the settlements. These issues include the following: depreciation expense, funding for incentive compensation, working cash expense, employee stock ownership plan tax deduction.
  28. The unresolved issues identified by the settling parties but left unaddressed by the Decision will remain unresolved and will be dealt with in a future GRC so long as the parties do not settle.
- s. Conclusions of Law 5, 20, 21, and 23 are modified to read as follows:
5. It is not necessary to resolve every issue left unresolved by the settling parties in order to approve the settlements.
  20. The Commission has the discretion and authority to protect ratepayers with a moratorium on branch office closures.
  21. The Commission has the discretion and authority to protect ratepayers with a

moratorium on new authorized payment locations within “payday lenders.”

23. The Commission has the discretion and authority to address unresolved issues from this proceeding as identified by the settling parties in a future GRC so long as the parties do not settle.
- t. The second sentence of the first full paragraph on page 9, Section 3.1 2006-Recorded Data, is deleted and replaced with the following language:

However, we find that the 2006 data was for the most part not in a format compatible with the adjusted data for 2005 and prior years.
- u. Finding of Fact 3 is modified to read as follows:
  3. The 2006 recorded data is for the most part not in a format to be comparable to 2005 and earlier data as presented in the application.
- v. The fourth, fifth, and sixth sentences of the first full paragraph on page 9, Section 3.1 2006-Recorded Data, are deleted.
4. Rehearing of D.08-07-046, as modified, is hereby denied.
5. This proceeding, A.06-12-009, is hereby closed.

This order is effective today

Dated June 18, 2009, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners