STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 12, 2002

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

Decision 02-12-027 is being mailed without the Dissent of Commissioner Carl. W. Wood. The dissent will be mailed separately.

Very truly yours,

/s/ CAROL A. BROWN
Interim Chief Administrative Law Judge

Attachment

Decision 02-12-027 December 5, 2002

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)

ORDER MODIFYING DECISION (D.) 02-11-022 FOR PURPOSES OF CLARIFICATION AND CORRECTION OF TYPOGRAPHICAL ERRORS, AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. INTRODUCTION

In Decision (D.) 02-11-022, we established mechanisms to implement Direct Access cost responsibility surcharges ("DA CRS") applicable to DA customers within the service territories of California's three major electric utilities, using a cut-off date of February 1, 2001, as set forth in Assembly Bill No. 117 ("AB 117"). The adopted surcharges recover from DA customers their fair share as determined in D.02-11-022 of DWR costs and non-DWR costs, and were adopted with the objective to prevent such costs from being unlawfully and unfairly shifted to "bundled" utility customers.

In D.02-11-022, we were guided by the policy determinations set forth in Order Instituting Rulemaking Regarding Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("Opinion Rejecting Earlier DA Suspension Date") [D.02-03-055] (2002) ___ Cal.P.U.C.2d ___. In that decision, we decided that in lieu of an earlier suspension date than September 21, 2001, we would prevent such serious cost shifting with the adoption of a surcharge, ensuring that DA customers paid their equitable and fair share. (See

generally, id. at pp. 15-18, 28-29 [Finding of Fact Nos. 3, 4 & 6] (slip op.) The development of the surcharges was left to the instant proceedings that resulted in D.02-11-022. (See id. at pp.15-16 & 29 [Findings of Fact No. 7] (slip op.).) The proposed earlier suspension date was July 1, 2001. (Id. at pp. 13-14.) We stated: "Direct access surcharges or exit fees shall be developed . . . [to assure] that there is an equitable allocation of the DWR costs,[1] so that direct access customers pay their share of DWR costs." (Id. at p.31 [Ordering Paragraph 3 (slip op.).) We later clarified that statement in Order Instituting Rulemaking Regarding Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("Order Disposing of Rehearing Applications of D.02-03-055") [D.02-04-067] (2002) ___ Cal.P.U.C.2d ___. In that decision, we reiterated that direct access customers should pay their fair share of DWR costs, and added language that bundled service customers should be indifferent, with the adoption of surcharges in lieu of an earlier suspension. (Id. at pp. 4-5 & 21-23 [Ordering Paragraph Nos. 1] (slip op.), emphasis added.)

In D.02-11-022, we also adopted an interim 2.7 cents per kilowatt-hour ("kWh") "cap" on the cost responsibility to be paid by DA customers. D.02-11-022 ordered further proceedings regarding the interim "cap," which is subject to adjustment. (See generally, D.02-11-022, pp. 102-117.)

The following parties timely filed applications for rehearing of D.02-11-022: (1) Federal Executive Agencies ("FEA"); (2) SBC Services, Inc., The Irvine Company, University of California, the California State University, and Applied Materials, Inc. (collectively, "Joint Parties I"); (3) 7-Eleven, Inc. & El Torito Restaurants, Inc. (jointly, "7-Eleven/El Torito"); (4) The Utility Reform Network

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[1] In Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at p. 12, fn. 8 (slip op.), we permitted the consideration of other issues relating to direct access cost responsibilities, including non-DWR costs, which were interpreted to include CTC related and URG costs. (See generally, D.02-11-022, pp. 8-17; see also, ("Order Disposing of Rehearing Applications of D.02-03-055") [D.02-04-067], supra, at pp. 11-12 (slip op.).)

("TURN"); (5) Strategic Energy, L.L.C. ("Strategic"); (6) Los Angeles Unified School District, City of Corona, Del Taco, Inc. and Lowe's Home Improvement Warehouse (collectively, "Joint Parties II"); (7) California Manufacturers & Technology Association ("CMTA").

In its application for rehearing, FEA claims the following legal error: (1) In adopting the DA CRS, the Commission violated Public Utilities Code Sections 451 and 728; (2) the Commission acted in excess of its powers by authorizing the DA CRS; (3) the DA CRS Decision is not adequately supported by the findings; (4) the imposition of the DA CRS on DA customers constitutes an abuse of discretion and a violation of the due process and equal protection clauses of the 5th and 14 amendment of the federal constitution and Article 1, Section 7 of the California Constitution; (5) in imposing a charge for electricity consumed by federal DA customers, the decision violates the Supremacy Clause by conflicting with a Congressionally established policy; and (6) the DA CRS violates the Intergovernmental Immunity Doctrine based on the Plenary Powers Clause with regard to direct access contracts providing for delivery of electricity to areas under exclusive federal legislative jurisdiction.

Joint Parties I argue that D.02-11-022: (1) improperly uses February 1, 2001 as the DA CRS cut-off date and the date is not based on the record, and thus, the Commission has acted arbitrarily and capriciously; (2) erroneously interprets Assembly Bill 117 ("AB 117") in violation of their due process rights; (3) unlawfully adopted the "billing date" standard which they argue is patently unfair, is arbitrary and capricious, and is not supported by the record. Joint Parties I advocates replacing the "billing date" standard with the "DASR submitted date standard,"[2] which they assert is an appropriate standard that results in a more equitable distribution of costs and reasoned decision-making.

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[2] "DASR" stands for Direct Access Service Request.

In their rehearing applications, 7-Eleven and El Torito argue that the Commission erred by not classifying involuntarily switched DA customers as continuous DA customers for purposes of the DA CRS. On this basis, they argue that the Commission has abused its discretion in violation of Public Utilities Code Section 1757.

TURN challenges the Commission's imposition of a "cap" of 2.7 cent per kilowatt-hour on the cost responsibility to be paid by DA customers. Specifically, TURN alleges that the DA CRS cap is contrary to Public Utilities Code Section 366.2(d) and the mandates for "bundled ratepayer indifference" set forth in D.02-03-055, and the imposition of the cap violates Public Utilities Code Section 453 and the Equal Protection Clauses of the United States and California Constitutions. TURN further argues that the Commission's adoption of the DA CRS cap is without rational basis, arbitrary and capricious, and an abuse of discretion.

Strategic asserts that: (1) the Commission misapplied AB 117 in imposing the DWR Power Charge equally on customers who signed DA contracts both before and after July 1, 2001, and this action is not supported by the record; (2) the imposition of the DWR Power Charge on DA customers is not supported by a finding or by evidence in the record, and is unjust and unlawfully discriminatory; (3) the calculation of the DWR Power Charge on a utility specific, rather than statewide, basis is unjust and discriminatory; and (4) to the extent that D.02-11-022 is construed to impose the DA CRS without proof of cost causation, the decision violates the prohibition on the retroactive impairment of contracts in the U.S. and California Constitutions.

In their rehearing application, Joint Parties II contend that the Commission incorrectly uses AB 117 as the legal basis for determining that all who became DA customers after February 1, 2001 are liable for DWR future costs; in adopting the February 1, 2001, cut-off date, D.02-11-022 violates the due process rights of parties who entered into contracts between February 1 and July 1, 2001; and

the Commission has no authority to impose a surcharge for utility costs on DA customers.

CMTA challenges the Commission's interpretation of Assembly Bill 117 as incorrectly mandating a February 1, 2001 cut off date, and thus, CMTA argues that this interpretation results in DA customers bearing an excess amount of DWR costs.

Responses to the rehearing applications were filed by: (1) California Industrial Users ("CIU") and the California Large Energy Consumers Association ("CLECA") (jointly, "CIU/CLECA"); (2) San Diego Gas and Electric Company ("SDG&E"); (3) Joint Parties I; (4) Pacific Gas and Electric Company ("PG&E"); (5) Southern California Edison Company ("Edison"); (6) Alliance for Retail Energy Markets and the Western Power Trading Forum (jointly, "AREM/WPTF"); (7) Strategic;(8) TURN; and (9) CMTA.

The instant decision resolves all the applications for rehearing of D.02-11-022.[3] We have carefully considered those applications and the responses thereto. We have reviewed each and every issue, and are of the opinion that no legal error has been established. Accordingly, good cause does not exist for the granting of rehearing, and thus, the applications for rehearing are denied. While we conclude that rehearing is not warranted, we modify D.02-11-022 for purposes of clarification and correction of minor typographical errors as specified below.

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3 It is noted that SDG&E filed a petition for modification, asking for clarification of the Navy's 80 MW load. Some of the responses to the rehearing applications address this issue. (See, e.g., PG&E's Response, pp. 13-14; TURN's Response, p. 5.) However, in this order, we do not address the arguments raised in this petition. Rather, we will be addressing the issues raised by the petition in another order that we will be issuing.

In their rehearing application, Joint Parties I seek clarification of the decision regarding the inclusion of any changes to the PX/DA credit in the cap as provided for in D.02-07-032. (Joint Parties I's Application for Rehearing, pp. 15-16.) Edison opposed this clarification, as being unnecessary. (Edison's Response, pp. 13-14.) Because PX/DA credit is the subject of another pending proceeding, A.98-07-003, we do not address this particular issue in the today's decision.

II. DISCUSSION

A. AB 117 Related Issues

AB 117 was enacted and signed into law on September 24, 2002, after the date the record for the instant proceeding was closed. Besides permitting an exemption for community aggregator programs from the suspension of direct access mandated in Assembly Bill No. 1 of the First Extraordinary Session of 2001-2002 ("AB 1X),[4] the Legislature added Public Utilities Code Section 366.2(d). This statute stated:

> "(1) It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the Department of Water Resources' electricity purchase costs, as well as electricity purchase contract obligations incurred as of the effective date of the act adding this section, that are recoverable from electrical corporation customers in [C]ommission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers.
>
> (2) The Legislature finds and declares that this subdivision is consistent with the requirements of Division 27 (commencing with Section 80000) of the Water Code and Section 360.5, and therefore declaratory of existing law."

(Pub. Util. Code, §366.2, subds. (1) & (2), as codified by AB 117, Stats. 2002 (Reg. Sess.), ch. 838, §4.)

In D.02-11-022, we found Section 366.2(d) relevant, and applied this statutory provision to make DA customers who took bundled service from an electrical corporation on or after February 1, 2001, responsible for paying the DWR

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[4] See Water Code, Section 80110, enacted in AB 1X, Stats. 2001 (1st Extraordinary Sess.), ch. 4, which provided for the suspension of the right to acquire direct access service effective on a date determined by the Commission. AB 1X was amended by Senate Bill No. 31 of the First Extraordinary Session of 2001-2002 ("SB 31X"), Stats. 2001 (1st Extraordinary Sess.), ch. 9, but the provision providing for the suspension of direct access was not affected. "AB 1X" is used to represent "AB 1X, as modified by SB 31X."

ongoing power charge component of the DA CRS. (D.02-11-022, pp. 61-62, 141 [Findings of Fact Law Nos. 11 and 12], & 148 [Conclusion of Law No. 16].)[5]

In their applications for rehearing, several parties challenge our application of Public Utilities Code Section 366.2(d). They argue that we incorrectly interpreted Section 366.2(d) and violated their due process rights in applying this statute. They further argue that there is no evidence in the record to support holding DA customers who took bundled service on or after February 1, 2001, responsible for DWR Power Charges. (See generally, Joint Parties I's Application for Rehearing, pp. 1-9; Strategic's Application for Rehearing, pp. 2-10; Joint Parties II's Application for Rehearing, pp. 2-8; CMTA's Application for Rehearing, pp. 2-3.) We find these arguments are without merit for the reasons discussed below.

(1) AB 117 supports the Commission's decision to impose the DWR Power Charge component on DA customers who took bundled service on or after February 1, 2001.

It is very clear from the plain language of Public Utilities Code Section 366.2(d)(1) that the Legislature intended that the Commission make DA customers who took bundled service on or after February 1, 2002 responsible for DWR power charges. As stated:

> "It is the intent of the Legislature that <u>each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the Department of Water Resources' electricity purchase costs, as well as electricity purchase contract obligations incurred</u> as of the effective date of the act adding this section, that are recoverable from electrical corporation customers in [C]ommission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers." (Pub. Util. Code, §366.2, subd. (d)(1), emphasis added.)

[5] It is noted that in D.02-11-022, the Commission inadvertently and mistakenly cites Section 366.2(d) as Section 366(d). In today's order we make the necessary corrections.

Contrary to the assertion in Joint Parties II's Application for Rehearing, p. 4, "retail end use customers" includes DA customers. DA customers purchase retail, as end-users, their electricity from energy service providers ("ESP"), and their distribution and transmission services from the electrical corporation. (See Re Pacific Gas and Electric Company ("HPC Decision") [D.02-07-032, p. 27 [Conclusion of Law No. 3] (slip op.)] (2002) ___ Cal.P.U.C.2d ___.)[6] Thus, DA customers who took bundled service on or after February 1, 2001 are "retail end-use customer[s] that [have] purchased power from an electrical corporation on or after February 1, 2001".

Therefore, in interpreting Section 366.2(d) and applying the statute to DA customers who were on bundled service on or after February 1, 2001, we simply applied the plain language of the statute. The interpretation is consistent with the legal principles of statutory construction.

A fundamental task in statutory interpretation is to determine the intent of the Legislature. (See City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 90.) The Commission "must ascertain legislative intent so as to effectuate a law's purpose." (See Neumarkel v.Allard (1985) 163 Cal.App.3d 457, 461, citing Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645; Palo Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658.) This is to be accomplished first by turning to the language of the statute. (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798; see also, Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230-231.) Unless it is demonstrated that the natural and customary import of a statute's language is repugnant to the general purview of the statute, effect must be given to the statute's plain meaning. (Tiernan v. Trustees of California State University and Colleges (1982) 33 Cal.3d 211, 218-219.)

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[6] We note that there are several applications for rehearing pending on D.02-07-032. Our reference to D.02-07-032 in today's decision is not intended to either prejudge or dispose of those rehearing applications.

Thus, in interpreting Section 322.2(d), we "first look[ed] to the words of the statute" and gave "effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations omitted.]" (Public Utilities Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal.App.3d 437, 444, internal quotation marks omitted.)

Joint Parties II argues that AB 117 applies only to community aggregation programs and not to direct access. (Joint Parties II's Application for Rehearing, pp. 4-6.) However, this argument is without merit.

Although AB 117 mainly involves the community aggregation programs and the exemption for those programs from the suspension of direct access mandated by AB 1X, the plain language of Public Utilities Code Section 366.2(d)(1) demonstrates that Section 366.2(d) applies not only to community aggregator programs. Section 366.2(d)(1) explicitly applies to "each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001." If Public Utilities Code Section 366.2(d)(1) were to be limited to community aggregation programs, the Commission would be violating a fundamental principle of statutory construction which prohibits an interpretation that would "add to or alter the words of the statute to accomplish a purpose that does not appear on the face of the statute or from its legislative history if the words of the statute are clear." (Public Utilities Com. v. Energy Resources Conservation & Dev. Com., supra, 150 Cal.App.3d at p. 444, internal quotation marks omitted.) In addition, the Commission should not be seeking "hidden meanings not suggested by the statute or by the available extrinsic aids." (Id.)[7] Therefore, such a limited statutory construction that "will lead to results contrary to the legislature's apparent purpose," and thus

[7] There is no discussion in the legislative history of AB 117 that explains why the Legislature enacted Public Utilities Code Section 366.2(d). It was added in the last amendment to AB 117, which occurred on August 27, 2002. Thus, the interpretation of AB 117 must rest on the language in AB 117.

prohibited. (See People ex rel. Lungren v. Superior Court (American Standard, Inc.) (1996) 14 Cal.4th 294, 305-306, internal quotation marks omitted.)

Further, AB 117 states:

> "The Legislature finds and declares that this subdivision is consistent with the requirements of Division 27 (commencing with Section 80000) of the Water Code and Section 360.5, and therefore declaratory of existing law." (Pub. Util. Code, §366.2, subd. (d)(2).)

The plain language in Public Utilities Code Section 366.2(d)(2) establishes that the Legislature enacted Public Utilities Code Section 366.2(d)(1) specifically as a clarification of "existing law" including its mandated suspension of direct access in Water Code Section 80110. Further, the "existing law" was the suspension of direct access as of September 21, 2001, as determined by the Commission in D.01-09-060, as modified by D.01-10-036, as well as the Commission's determination in Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, to adopt DA CRS in lieu of an earlier suspension.

Public Utilities Code Section 366.2(d)(1) makes sense if it applies to "each retail end use customer," including all DA customers who took bundled service on or after February 1, 2001, and not just DA customers participating in community aggregation programs. The community aggregation programs and the exemption for DA customers participating in these programs were not part of existing law, which is AB 1X.

Further, prior to the enactment of AB 117, we were conducting the DA CRS proceedings to determine, as mandated by D.02-03-055, a surcharge that would result in DA customers paying their "fair share" and in preventing the shifting of DWR and non-DWR costs. In adding Public Utilities Code Section 366.2(d) and clarifying the existing law, namely AB 1X, the Legislature must have been aware of the Commission's implementation of the provisions of Water Code Section 80110, and it did not change the requirements in this statute. Thus, it is reasonable to infer

that the Legislature was aware of the DA CRS proceedings and did not disapprove. (See Robinson v. Fair Employment and Housing Commission (1992) 2 Cal.4th 226, 235, fn. 7; California Welfare Rights Organization v. Brian (1974) 11 Cal.3d 237, 241, fn. 2; Coca-Cola v. State Board of Equalization (1945) 25 Cal.2d 918, 922; Horn v. Swoap (1974) 41 Cal.App.3d 375, 382, citing El Dorado Oil Works v. McColgan (1950) 34 Cal.2d 731, 739; Goodward v. Board of Trustee (1928) 94 Cal.App. 160, 163.)

Further, certain terms in Public Utilities Code Section 366.2(d) demonstrate that the Legislature was well aware of both the Commission's AB 1X suspension of direct access and the Commission's determination to adopt surcharges in lieu of an earlier suspension. The Legislature employed language in Public Utilities Code Section 366.2(d) that is similar to that used in D.02-03-055 and D.02-04-067, including "fair share" and that the "shifting"of costs should be prevented. (See generally, Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at p. 14, 16-17 & 33 (slip op.); Order Disposing of Rehearing Applications of D.02-03-055 [D.02-04-067], supra, at pp. 4-5, 8, 13, & 22 (slip op.).) Thus, it is logical to presume that the Legislature was both aware of and approved of our implementation of AB 1X and our determinations to impose cost responsibility surcharges. (See Moore v. California State Board of Accountancy (1992) 2 Cal.4th 999, 1018 ["Such a presumption should also be applied on a showing that the construction or practice of the agency has been made known to the Legislature."] By enacting Public Utilities Code Section 366.2(d) and utilizing similar language, the Legislature essentially was confirming by clarification that our implementation of AB 1X and our policy determinations were consistent with its intent in enacting AB 1X.

Edison and PG&E noted that we did not need AB 117 to impose the DWR Power Charge on DA customers who took bundled service after February 1, 2002. (Edison's Response, p. 3; PG&E's Response, pp. 9-10.) We would agree. In the absence of AB 117, we had the legal authority (pursuant to AB 1X and our general regulatory authority for ratemaking and allocating costs) to impose the DA CRS on

those particular DA customers, or on those DA customers who took bundled service on or after July 1, 2001. However, the clarifying language in Public Utilities Code Section 366.2(d) explicitly specified which DA customers would be responsible, namely those who took bundled service on or after February 1, 2002. (D.02-11-022, pp. 11 & 61.)[8]

(2) Contrary to the assertions, the parties did have notice and an opportunity to be heard regarding AB 117.

Upon the filing of the reply briefs on September 6, 2002, the evidentiary record for the proceeding was closed. AB 117 was enacted and signed into law by the Governor on September 24, 2002. TURN and Eastside Power Authority ("Eastside") raised the legal significance of AB 117 in their opening comments, filed on October 15, 2002. In its opening comments to the Proposed Decision ("PD") and Commissioner Wood's Alternate Decision ("AD"), TURN quotes language from Public Utilities Code Section 366.2(d), which was enacted in AB 117, as a basis for determining which DA customers must pay the DA CRS for DWR long-term contract costs.[9] TURN also made this same point about AB 117 in its comments to the ADs of President Lynch and Commissioner Peevey, filed on October 17, 2002. (TURN's Opening Comments to ADs of Lynch & Peevey, pp. 1-2.)[10] Also, in its opening comments to the PD, Eastside, an energy service provider, notes the applicability of

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[8] On this basis, CMTA's rehearing argument that the Commission is not "mandated" to impose DA CRS on those DA customers who took bundled service on or after February 1, 2001, is rejected. (See CMTA's Application for Rehearing, p. 2)

[9] TURN asserts that the July 1, 2001 date is relevant to the "overall indifference calculation" and not for "purposes of deciding which DA customers must pay the CRS." TURN asserts that AB 117 is controlling. (TURN's Opening Comments to PD & Wood AD, p. 4.)

[10] TURN raised the argument again in its Reply Comments filed on October 21, 2002, pp. 1-2. In these comments, TURN noted: "It is quite remarkable that AB 117 is not even mentioned by the vast majority of the parties, most of whom are highly sophisticated and fully aware of legislative development." TURN further noted the relevance of AB 117 to the instant proceedings in its Comments to the Alternate Pages to Commissioner Wood's Alternate Decision, filed on November 5, 2002, p. 1.

AB 117 in this proceeding, although for a different purpose. (Eastside's Opening Comments to PD, pp. 3-4.)

We presume that these opening comments were served on the parties in this proceeding. Thus, the parties had notice that the applicability of AB 117 was raised as an issue. However, except for Callaway Golf Company ("Callaway"), no other party took the opportunity in its reply comments to address the AB 117 issue raised in opening comments of TURN and Eastside. Callaway, the sole party that discusses AB 117, refers to the statute in support of its position that "customers that have not purchased power from DWR on or after February 1, 2001 (i.e., continuous direct access customers)" are expressly excluded from DWR cost responsibility. (Callaway's Reply Comments, pp. 2-4.) Callaway made reference to TURN's opening comments on AB 117. (Callaway's Reply Comments, p. 4.)

Based on the above, the parties had notice and an opportunity to be heard on AB 117 and its applicability to the Commission determinations on the DA CRS. For whatever reason, the parties, other than TURN, Eastside and Callaway, neither refuted this applicability, as they do now in their applications for rehearing, nor even addressed the issue in their reply briefs; thus, they have waived their opportunity to be heard. Accordingly, these parties were not denied due process.

(3) The "effective date" of AB 117 does not prevent the Commission from determining that DA customers who took bundled service on or after February 1, 2001, are responsible for paying the DWR Power Charge component of the DA CRS.

Joint Parties II argue that AB 117 provides no valid authority for the Commission's decision to impose the CRS equally on all non-continuous DA customers, since that statute does not become "effective" until January 1, 2003. (Joint

Parties II's Application for Rehearing, p. 3.)[11] While it is true that AB 117 goes into effect or becomes operative January 1, 2003 because it was enacted in a regular legislative session (see Cal. Const., art. IV, §8), the argument is without merit.

D.02-11-022 does not apply the DWR Power Charge to DA customers who took bundled service on or after February 1, 2001 until January 1, 2003. (D.02-11-022, p. 155 [Ordering Paragraph Nos. 8 & 11].) Therefore, there is no conflict between the effective or operating date of AB 117 and the decision's implementation of the DWR Power Charge on January 1, 2003. Consequently, the effective date of the Legislation has no bearing on the Commission's determination as to which customers are responsible, as long as the DWR Power Charges are not applied to the DA customers prior to January 1, 2003.

Also, Joint Parties II assert that we have impermissibly applied AB 117 retroactively. (Joint Parties II's Application for Rehearing, pp. 6-7.) This assertion lacks merit.

We are not applying any surcharges to DA customers retroactively. The DA CRS, including the DWR Power Charge component, is a prospective charge applied to DA customers' usage in each billing cycle after January 1, 2003. We have properly assigned cost responsibility to DA customers to be recovered on a going-forward basis. (See discussion, infra.) The recovery is of costs permitted by AB 1X, as clarified by AB 117. The DA CRS represent the "fair share" of costs assignable to DA customers who took bundled services on or after February 1, 2001.

(4) The contract impairment arguments have no merit.

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[11] " 'Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner. [Citation.] In the usual situation, the "effective" and "operative" dates are one and the same, ...' " (People v. Camba (1996) 50 Cal.App.4th 857, 865-866, citing People v. Henderson (1980) 107 Cal. App. 3d 475, 488.) If the dates are different, the operative date is " the date upon which the directives of the statute may be actually implemented," and the "effective date, then, is considered that date upon which the statute came into being as an existing law." (Id. at p. 866, internal quotation marks omitted.)

Joint Parties II argue that such an alleged retroactive application of AB 117 constitutes an impairment of contract and an interference with contractual obligations or vested rights. (Joint Parties II's Application for Rehearing, pp. 6-8.) Strategic raises similar arguments (Strategic's Application for Rehearing, p. 12.) These arguments are without merit.

The assignment of cost responsibility to those who took bundled service on or after February 1, 2001, does not constitute any impair of contracts or an interference of contractual obligations or vested rights. In equitably allocating DWR and non-DWR costs between DA customers and bundled customers (pursuant to AB 1X, AB 117 and its general regulatory authority), we have not ordered changes to any term or condition of a contract or affected the contractual relationship between any DA customer and an ESP. Rather, we have lawfully exercised our police powers in our proper regulation of matters assigned to us by the Legislature, including the recovery of DWR and non-DWR costs from all retail end use customers,[12] and not in violation of the Contract Clause of the federal or the state constitutions (U.S. Const., art. I, §10; Cal. Const., art. I, §9).

A threshold question regarding whether there is an unlawful impairment of contracts is whether there is a substantial impairment. (See Allied Structural Steel co. v. Spannaus (1978) 438 U.S. 234, 244-245; Energy Reserves v. Kansas Power & Light (1983) 459 U.S. 400, 411-412; United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 31; see also Interstate Marina Development Co. v. County of Los Angeles

[12] Contrary to the argument raised by Joint Parties II in their Application for Rehearing, pp. 8-9, the Commission does have legal authority to impose the DA CRS. In D.02-11-022, we describe the basis for our legal authority to impose cost responsibility surcharges on DA customers. This legal authority includes, but is not limited to, AB 1X and various Public Utilities Code sections discussed in the decision. (See D.02-11-022, pp. 11-17 & 146-147 [Conclusion of Law Nos. 6-8].) AB 117 confirms and clarifies the Commission's legal authority. (See Pub. Util. Code, §366.2, subd. (d)(2).)

(1984) 155 Cal.App.3d 435, 445-446.)[13] A mere vague assertion that a contract has been impaired is not sufficient. As the United States Supreme Court stated:

> "Although the Contract Clause appears literally to proscribe 'any' impairment, this Court observed in *Blaisdell* that 'the prohibition is not an absolute one and is not be read with literal exactness like a mathematical formula.' 290 U.S., at 428. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. . . .[W]e must attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereignty power,' [citation omitted], necessarily reserved by the States to safeguard the welfare of their citizens."

(United States Trust Co. v. New Jersey, supra, 431 U.S. at pp. 21-23; see also, Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach (2001) 86 Cal.App.4th 534, 553-554.)

Except for a generalized claim, Joint Parties II fail to state exactly what contractual obligations or vested rights have been impaired, and to what extent. Strategic's claim is similarly stated. These rehearing applicants fail to support their claim with citation to the record.[14] Thus, they have not established any claim of impairment, let alone a "substantial" impairment.[15] Accordingly, their contract impairment claims have no merit.

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[13] The impairment of contract analysis is the same under both the federal and state constitution. (Interstate Marina Development Co. v. County of Los Angeles, supra, 155 Cal.App.3d at pp. 445-446.)

[14] Strategic also based their contract impairment on an assertion that the Commission could not impose DA CRS on these customers because there was no proof of cost causation. This assertion is without merit. As discussed below, the record demonstrates cost causation by the DA customers who took bundled service on or after February 1, 2001.

[15] The parties who are DA customers have resisted any request for providing specific information regarding their DA contracts. Rather, they have simply made broad and overly generalized statements regarding their contracts. For example, the parties were

(continued on the next page)

Moreover, there is no right to be free of all regulation simply because one has a contract that might be allegedly affected. Having a direct access contract does not immunize DA customers from the Commission's proper regulation of matters affecting electricity costs and the allocation of such costs, even those that may indirectly and "technically" somehow affect a contract. As the United States Supreme Court noted: "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " (Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra, 459 U.S. at p. 410, quoting Home Bldg. & Loan Assn. V. Blaisdell (1934) 290 U.S. 398, 444-447; see also, City of El Paso v. Simmons (1965) 379 U.S. 497, 508.)

(5) Contrary to the assertions, the parties did have notice and opportunity to be heard regarding the possible use of a February 1, 2002 cut-off, and there was evidence to support such a cut-off date.

Several rehearing applicants argue that the parties did not have notice and an opportunity to be heard regarding whether DA customers who took bundled service on or after February 1, 2001, could be made responsible for DWR Power Charges. (Joint Parties I's Application for Rehearing, pp. 4-6; Joint Parties II's Application for Rehearing, p. 8.).) We disagree.

Independent of AB 117, the parties had notice and an opportunity to be heard on the issue of imposing DWR power charge component of the DA CRS on DA customers who took bundled service prior to July 1, 2001. Several parties proposed making all DA customers, including those who took service on or after February 1,

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asked to provide contracts or other evidence as to what they were paying. This information was relevant in our determination of the cap. They did not provide any evidence; rather the "DA customers made with filings that claimed that "the Commission could not mandate the production of privileged contract information." (See Edison's Opening Comments, p. 2, fn. 4.)

2001, subject to the charge. The proposals were made in the testimony, briefs and comments, and the parties had the opportunity to response to these proposals.

In their testimony, several parties recommended making all or most DA customers responsible for DWR costs, and not just those who took bundled service pre-July 1, 2001. Logically, this would have included DA customers who took bundled service on or after February 1, 2001. PG&E offered testimony that recommended that all DA customers should be made responsible. (See Exh. 41: Keane/PG&E, p. 2-4; Exh. 42: Keane/PG&E, p. 2-2.) Also, TURN presented testimony, proposing: "the CRS should be assigned to all DA customers who did not take direct access service for the entire period during which DWR was procuring power." (See TURN's Response, pp. 2-3, citing to Exhibits 18 and 19.)[16]

The main basis for PG&E and TURN's recommendation was that the DA customers helped to incur the DWR costs. The following evidence in the record supports this basis:[17] TURN's testimony shows that DWR purchased for DA customers who took bundled service before July 1, 2001. Its witness, William Marcus, stated in his prepared direct testimony:

> "[DWR] signed the bulk of its contracts long before July 1. Those contracts were reasonable based on load forecasting assumptions that there would be few direct access customers. First, existing direct access customers were dropping out rapidly. . . .Under AB 1X, direct access was expected to be limited. Thus, at the time [DWR] was signing the vast bulk of its contracts – in the time frame from February through May – [DWR] could have reasonably expected that

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[16] Even CLECA, who represents DA customers, acknowledged that "a bundled service customer who received DWR power during the first half of 2001, but is now a DA customer," had "an obligation to help repay the undercollection associated with this period." (Exh. 28: Barkovich & Yap/CLECA, pp. 6-7.

[17] This evidence supports the findings of facts and conclusions of law for imposing the DWR Power Charge on DA customers who took bundled service on or after February 1, 2001, and to what extent. See infra, for a discussion of the legal sufficiency of these findings and conclusions.

> remaining [DA] would be very limited and that it would be procuring power based on a forecast containing the bulk of the IOU loads. [Footnote omitted]" (Exh. 18: Marcus/TURN, pp. 17-18.)

This witness further noted this forecast was documented in DWR's July and August revenue requirement filings. (Exh. 18: Marcus/TURN, p. 18, fn. 8.) Table 1 in Exhibit 18 showed that the DA load on average was about 2 percent from February 1 and July 1, 2001. (Exh. 18: Marcus/TURN, Table 1.) Mr. Marcus also observed:

> "[T]he DA forecast presented in Scenario 7 essentially gives those DA customers who signed DASRs in July an unfair exemption from paying for the shortfall for the entire period from January to September. Figures 1 and 4 show that: (1) most of these customers for whom an exemption was sought were bundled service customers using expensive DWR power for a significant portion of the period from January through June and (2) many of them did not physically come back to Direct Access until August or September." (Exh. 18, Marcus/TURN, p. 18.)

In his rebuttal testimony, Mr. Marcus stated:

> "[DWR's] July 2001 load forecast, provided in response to Data Request IOU-3 in the [DWR] revenue requirements phase of A.00-11-038 et al., shows that CDWR was forecasting extremely small amounts of direct access at the time it was completing its contracting activities. The information shown on page 5 of TURN's direct testimony demonstrates that direct access loads dropped off rapidly from January to March 2001 and remained at depressed levels through early July. This was the context in which [DWR] was making its purchases. Later forecasts obviously reflect later events. But to claim that the later forecasts justify assigning DA customers with no responsibility for [DWR] purchases violates common sense." (Exh. 19: Marcus/TURN, p. 11)

PG&E presented evidence of how DA customers helped to incur DWR costs.[18] In his rebuttal testimony, Dennis Keane stated:

> "[A]t the time DWR began purchasing power and negotiating contracts customers were returning to bundled service in droves. The DA share of PG&E's total sales eventually plummeted to below 2 percent. In assuming the role of "default provider," DWR needed to plan to serve all of this load. Even the small percentage of customers who remained on DA service throughout 2001 could have, at any time, returned to bundled service. DWR was obligated to procure power on their behalf in the event that these customers would return. It is thus appropriate that all DA customers should share the DWR NBC obligation." (Exh. 42: Keane/PG&E, p. 2-2.)

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[18] To support its recommendation for holding all DA customers responsible, PG&E provided testimony on how DA customers, including those who did not take bundled service, benefited from DWR purchases. In his direct testimony, PG&E's Witness Dennis Keane describes how "DWR's actions benefited not only bundled service customers, but also DA customers, the vast majority of whom had returned to bundled service by that time." He stated:

> "Because DWR's entry into the power market helped to stabilize the electricity prices, all customers benefited from DWR's actions and, accordingly, should bear responsibility for the ongoing cost of DWR's long-term contract purchases. Even the small percentage of customers who remained on DA service throughout 2001 should share this obligation, since, at any time, they could have returned to bundled service. DWR assumed the role of "default provider," and had no way of knowing, at the time it signed long-term power purchase contracts, whether or not any direct access customer would return to bundled service. Had these customers returned (and most of the DA sales did), DWR was obligated to procure power on their behalf. Thus all DA customers should be obligated for the DWR NBC." (Exh. 41: Keane/PG&E, p. 2-4.)

Mr. Keane noted: "All DA customers, the many that returned to bundled service for some time as well as the few that remained on DA throughout 2001, benefited from the price stability that resulted from DWR entering the market, and thus all should be obligated to pay the DWR [nonbypassable charge]." (Exh. 42: Keane/PG&E, p. 2-2.) Mr. Keane applied this same reasoning to voluntarily or involuntarily returning DA customers. (See (Exh. 42: Keane/PG&E, p. 2-3.)

CLECA's testimony describes the effects of DA migration prior to July 1, 2001. The testimony states:

> "The number of DA customers, and the corresponding amount of DA load, fell at the end of 2000 when many former DA customers were returned to bundled service by their ESPs, and grew again beginning in mid-2001. Thus, many of these customers did receive and use DWR power (via bundled service) during the first half of 2001. It is also clear that DWR did not receive revenues sufficient to fully cover the costs of its power purchases during this period. Thus, any customer who received DWR power during this period has an obligation to repay DWR for its share of the undercollections." (Exh. 28: Barkovich & Yap/CLECA, pp. 6-7.

CLECA also acknowledges that DWR's "procurement strategy was based on the assumption that this level of DA would not increase" beyond the 2%. (Exh. 28: Barkovich&Yap/CLECA, p. 17.)

DWR's testimony indicated that its modeling was based on costs attributable to DA customers. The testimony stated: "Inherent in the DA-in-and-out model was costs attributable to DA customers. Attributing costs to DA customers in the model was a given, and not challenged by the parties. Except as to the numbers, the factoring in of costs attributable to DA customers was a given, and not challenged by the parties. (See generally, Exh. 4: McMahon/DWR, pp. 15-,28; see also, generally, Exh. 8: McDonald/DWR, Appendix A.) DWR's testimony also noted: "The surcharge is applied to all Direct Access load that took bundled service for any period of time between January 2001 and July 1, 2001. [DWR] assumed that 2 percent of load never took any bundled service. Current Direct Access load is approximately 13.62 percent of IOU service area loads. Thus, the surcharge is

applied to the incremental 11.62 percent of load." (Exh. 8: Craig McDonald/DWR, p. 8; see also, WS RT Vol. 3 (April 12, 2002), p. 209 (McMahon/DWR.).)[19]

In its testimony, Edison asserted that "[t]o the extent that costs can be directly linked to DA customers' load and those costs are not already reflected in their rates, DA customers should pay additional charges." (Exh. 22: Collette/Edison, p. 6.)

In their opening and reply briefs, several parties advocated for holding all or most of the DA customers responsible, including those who took bundled service on or after February 1, 2001, mainly because they should be held responsible for the DWR costs they helped to incur. (See PG&E's OB, pp. 18-22 & 24-26; PG&E's RB, pp. 15-19 &21; TURN's OB, pp. 17-18; TURN's RB, pp. 6-7; ORA's RB, p.3; Edison's OB, pp. 21-22.)[20] As noted by Edison in its opening brief:

> "In other words, during the height of the energy crisis, DA customers returned back to bundled service and were on bundled service for the first seven months of 2001 until market energy prices resumed more normal levels. However, it is during these very months that DWR began signing long-term contracts to bring electricity to California for the benefit of all bundled service customers, including the DA customers that had returned to bundled service. . . .While this may all have been occurring at the height of the energy crisis, March through May 2001, it is clear that all of this additional bundled load from returning DA customers contributed to the number, site, and duration of contracts that DWR signed." (Edison's OB, pp. 21-22.)

Also, Eastside noted in its reply brief: "The issue is not when a customer converted to direct access, the issue is when the customer took bundled service while DWR purchased power – did the customer cause DWR to buy long-term power? A direct access customer, who, as a previously bundled customer, set a

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[19] "WS RT" refers to a transcript of a workshop held by the Commission. One workshop was the one hold on April 12, 2002, during which DWR witnesses explained DWR's modeling assumptions.

[20] "OB" refers to Opening Brief, and "RB" refers to Reply Brief.

demand providing a basis for DWR to purchase power, is obligated to pay a fair share of that contract. . . ." (Eastside's RB, p. 3.)

In its comments to the Proposed Decision ("PD") and the Alternate Draft Decisions ("AD"), PG&E continued to argue that the Commission should hold all DA customers responsible for the DA CRS charges. (See PG&E's Opening Comments, pp. 2-4; see PG&E's Reply Comments, pp. 2-3.) In its comments, TURN continued to maintain that DA customers who took bundled service prior to July 1, 2001 should be responsible, and that only continuous DA customers are exempted from paying the DA CRS for DWR long-term contract costs. TURN further argues that AB 117 supported this position. (TURN's Opening Comments on the PD & Wood AD, pp. 4-5.)

Based on the above, parties had ample notice of the recommendation that DA customers who took bundled service on or after February 1, 2001, could have been made responsible for paying DA CRS, including the DWR Power Charges. The parties had an opportunity to present evidence explaining why they agree or disagree with this approach, as well as stating any objections to this recommendation in their briefs and comments.

In the context of this due process and record argument, Joint Parties I claim that the determination to hold DA customers who took bundled service on or after February 1, 2001 is inconsistent with the July 1, 2001 cut-off date chosen in D.02-03-055. (Joint Parties I's Application for Rehearing, pp. 5-6.) This claim has no merit.

> D.02-03-055, as modified by D.02-04-067, did not choose July 1, 2001 as a cut-off date as to who pays. Rather the July 1, 2001 date was adopted as a basis for determining bundled customer indifference, namely the date to use for calculating an "equitable surcharge" to prevent cost-shifting and ensure an equitably allocation of DWR costs, so that DA customers pay their fair share of these costs. July 1, 2001 represented the earlier suspension date that the Commission would likely have adopted if it had not determined that imposing surcharges

> in lieu of an earlier suspension date better served the public interest. (See generally, Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at pp. 13-17 & 33 [Ordering Paragraph No. 33]. (slip op.).) Accordingly, and consistent with D.02-03-055, we applied the July 1, 2001 cut-off date as basis for calculating the "fair share." (See D.02-11-022, pp. 23-28.)

Therefore, the assertion that D.02-03-055 limited the Commission's ability to impose DA CRS on those DA customers who took bundled service prior to July 1, 2001, is without merit.

(6) There were sufficient findings of fact and conclusions of law for the Commission's determination to impose the DWR charges on DA customers who took bundled service on or after February 1, 2001, and to what extent.

Contrary to the assertion made in Strategic's Application for Rehearing, pp. 7-8, D.02-11-022 contains sufficient findings of facts and conclusions of law regarding this issue. There are findings of fact related to the Commission's authority to impose the DWR Power Charges component of the DA CRS on these particular DA customers. (See e.g., Finding of Fact Nos. 9, 10, 11 & 12 and Conclusion of Law Nos. 6, 7, 8, 9, 13, 15, 17, 19, & 20.) The findings of fact and conclusions of law that relate to bundled customer indifference, cost causation, cost responsibility, and cost-shifting define the extent of the "fair share" of those DA customers who took bundled service on or after February 1, 2001. (See e.g., Findings of Facts No. 2, 4, 5, 8, 10, & 35 and Conclusions of Law Nos. 3, 12, 15, 17, 20, 21, & 22-25.) These findings and conclusions are legally sufficient and comply with Public Utilities Code Section 1705, which requires the decision to "contain, separately stated, findings of fact and conclusions of law by the [C]ommission of all issues material to the decision." (Pub. Util. Code, §1705.) Viewed together, they are sufficient " 'to afford a rational basis for judicial review and to assist the court in ascertaining the principles relied on by the [C]ommission and to determine whether it acted arbitrarily.' " (California

Manufacturers Assn. v. Public Utilities Com. (1979) 24 Cal.3d 251, 258.) Also, they were sufficient to "assist the parties in preparing for rehearing or review." (Id. at pp. 258-259.)

Although we believe that the findings and conclusions are legally sufficient, we will modify Findings of Fact Nos. 9 and 12 and Conclusion of Law No. 9 for purposes of clarification. We want to make ensure that there is no possible ambiguity concerning our determinations of which DA customers are responsible for paying the DWR Power Charges and our calculation of the "fair share" of these customers.

B. Issues Related to the Interim 2.7 Cents Per kWh Cap

In its rehearing application, TURN argues that the 2.7 cents/kWh cap is unlawful and inconsistent with the requirements of AB 117. It also asserts that the cap shifts "costs to bundled service customers at least for the foreseeable future, and thus, it is inconsistent with AB 117's requirement that DA customers pay their fair share, and the policy determinations set forth in D.02-03-055 and D.02-04-067." (TURN's Application for Rehearing, pp. 1-4.) TURN further claims that the cap results in unlawful discrimination in violation of the Equal Protection Clause and Public Utilities Code Section 453. (TURN's Application for Rehearing, p. 5.) It also argues that the Commission's adoption of the cap is arbitrary and capricious and is not supported by the record. (TURN's Application for Rehearing, pp. 3-4.) These challenges raised by TURN are without merit.

(1) TURN's challenges to the interim cap adopted in D.02-11-022 are without merit.

TURN is wrong that the interim cap shift costs to bundled customers, resulting in DA customers not paying their fair share as required by AB 117 and D.02-03-055, as modified by D.02-04-067. This is because the cap affects the timing of DA CRS recovery, but not the collection of the amount of the DA CRS that must ultimately be paid. Thus, there is no cost shifting. Further, DA customers who are

assigned the responsibility for the DA CRS will pay interest on any undercollection. (D.02-11-022, p. 116.) Thus, bundled customers will be made whole over a period of time, and accordingly are indifferent.

Moreover, the cap is an interim cap and subject to adjustment. Any concerns regarding the cap for each of the utilities beyond July 1, 2003 and the impact that an undercollection might have on bundled customers will be addressed in further proceedings. (D.02-11-022, pp. 112-113, 156-157 [Ordering Paragraph Nos. 21-24.]) Further, neither AB 117 nor D.02-03-055, as modified by D.02-04-067, prohibits the adoption of such a cap, so long as there is no cost-shifting.

TURN's discrimination argument also has no merit. The fact that bundled customers will be required to "finance" the CRS shortfalls that result from the cap does not constitute unlawful discrimination within the meaning of Public Utilities Code Section 453 and the Equal Protection Clause. First, for the prohibition of undue discrimination to apply, the customers must be similarly situated. (See Griffin v. Superior Court (2002) 96 Cal.App.4th 757, 775 ["The equal protection clause requires the law to treat those similarly situated equally unless disparate treatment is justified," and "[t]he 'similarly situated' requirement means that an equal protection claim cannot succeed, and does not require further analysis, unless the claimant can show that the two groups are sufficiently similar."]) However, bundled service customers are different from DA customers. Second, even if they are arguably similarly-situated based on the fact that they are retail end use customers, discrimination between such customers is lawful if there is a rational basis for the different treatment in the Commission's economic regulation. (Id. at p. 776; see also, Toward Utility Rate Normalization v. Pub. Utilities Com. (1978) 22 Cal.3d 529, 543-544, In re Antazo (1970) 3 Cal.3d 100, 110-111.) In the instant case, the Commission's policy to maintain the economic viability of direct access constitutes a rational basis.

(2) There is evidence in the record to support the 2.7 cents per kWh interim cap.

TURN's argument that the record does not support the cap should be rejected. The Commission's decision to adopt a cap was based on evidence on the record. Several parties proposed a cap as a means for keeping direct access viable and economic, which they assert is consistent with Commission policy. The following evidence in the record supports the adoption of a cap: Edison believed that "adopting a cap is sound policy, and consistent with the Commission's intention to maintain DA as a viable customer option." (Exh. 23: Jazayeri/Edison, pp. 34, citing to D.02-03-055, p. 16; RT Vol. 4, pp. 506-507 (Jazayeri/Edison).) DWR indicated that adversely affecting direct access would be contrary to Commission policy. (RT Vol. 2, p. 169 (McDonald/DWR).)[21] In her prepared rebuttal testimony, Barbara Barkovich, witness for CLECA, explained the necessity for the cap and how its adoption provides "the best balance for keeping cost recovery as accurate as possible," and makes the DA CRS "non-punitive," thus preventing DA from becoming uneconomic. (See generally, Exh. 29: Barkovich/CLECA, pp. 7-10.) Other evidence supporting the reasoning for adopting a cap to keep DA viability and to prevent it from becoming uneconomic can be found in the record as follows: Exh. 33: Chalfant/CIU, p. 3; RT Vol. 5, p. 721 (Chalfant/CIU); RT Vol.3, p. 432; RT Vol. 2, p. 167 (McDonald/DWR); RT, Vol. 6, p. 1082-1083 (Khoury/ORA); Exh. 23: Jazayeri/Edison, p. 28.

Maintaining the viability of DA is consistent with Commission policy. In D.02-03-055, we discussed the benefits provided by DA. We recognized that the importance of direct access in helping diversify California's electric power market and that during the critical summer 2001 period, direct access contributed to a significant reduction in DWR's revenue requirement through the end of 2002.

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[21] "RT" refers to the Reporter's Transcripts.

(Opinion Rejecting Earlier DA Suspension Date") [D.02-03-055], supra, at pp. 15-16 (slip op.).) In D.02-07-032, we also expressed our concern for a reasonable interim cap that would not make direct access uneconomic, and thus concluded that a cap of 2.7¢/kWh would be reasonable. (HPC Decision [D.02-07-032], supra, at pp. 23-24 (slip op.).)

With respect the adoption of an interim cap of 2.7 cents per kWh, several parties recommend and discussed different caps in their testimony. (See California Farm Bureau Federation's Reply Brief, dated September 6, 2002, p. 7, for a summary of the different caps, ranging from 2 cents/kWh to 4 cents/kWh.) For example, CLECA proposed individual caps and time period for each of the utilities, e.g. 2.0 cents per kWh ($20/Mwh) for PG&E over 15 years, 2.25 cents ($22.50/MWh) for Edison over 15 years, and 2.75 cents per kWh ($27.50/MWh) for 20 years. (Exh. 28: Barkovich & Yap/CLECA, pp. 37-38.) During evidentiary hearing, Dr. Barkovich discussed the feasibility and range of numbers for a cap (i.e. 2 cents/kWh, 3 cents/kWh and 4 cents/kWh that might affect the feasibility of DA customers staying on DA service. (RT Vol. 4, pp. 569-570 (Barkovich/CLECA).) She noted that a majority could survive a 2 cents/kWh cap and some could possibly survive a 3 cent/kWh cap. (See generally, RT Vol. 4, p. 569 (Barkovich/SDG&E).) CIU's witness, Alan Chalfant, testified that CIU's proposed 2 cent per kWh was a judgment based on trying to keep too many direct access customers from being required to return to bundled service. (RT Vol. 5, pp. 719-720 Chalfant/CIU). Edison's Witness Akbar Jazayeri stated: "[T]he 2.0¢/cKwh cap is too low. The cap should initially be set at a level to at least allow the recovery of [Edison's] HPC (of approximately 2.5¢/kWh, though the actual rate varies by rate group) and the Bond Charge. Setting the cap at 3.0¢/kWh will allow recovery of both of these items, . . ." (Exh. 23: Jazayeri/Edison, p. 34.) In his rebuttal testimony, ORA's Witness Dexter Khoury agreed that "a cap to the DA surcharge would be preferable to levelizing the on-going part of the surcharge," and recommended that the cap be set at 4 cents per kWh,

which is the level of the average surcharge increase imposed in 2001." (Exh. 51: Khoury/ORA, p. 1-6.)

Thus, the evidence in the record established the need for a cap and offered the Commission a range for determining the appropriate cap. Accordingly, there was a reasonable basis, based on the record, for adopting 2.7 cents per kWh interim cap. Accordingly, in exercising our broad regulatory authority, we did not act arbitrarily or capriciously in adopting this interim cap.[22]

C. Issues Related to the "DA Active Date" ("Billing Date")

In D.02-11-022, we chose the "DA active date" ("billing date") rather than the contract execution date or the "DASR-submitted date," as the cut-off for when a customer's migration from bundled service to DA service became effective. (D.02-11-022, pp. 62-66.) Joint Parties I argue that our adoption of the "billing date" as a basis for determining the date of migration from bundled to DA service is not rationally based and not supported by evidence in the record. (Joint Parties I's Application for Rehearing, pp. 9-12.) They also argue that the use of the "billing date" is unfair and would lead to an unjust and unreasonable result in violation of Public Utilities Code Section 451. (Joint Parties I's Application for Rehearing, pp. 9-12.) We disagree.

(1) The Commission's adoption of the "DA active date" ("billing date") instead of the contract execution date or DASR submitted date was reasonable.

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[22] The California Supreme Court has consistently affirmed the Commission's broad discretion in adopting ratemaking or cost allocation methodologies and principles when exercising its authority. (See, e.g., Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n (1965) 62 Cal.2d 634, 647; Wood v. Pub. Util. Comm'n (1971) 4 Cal.3d 288, 294-295; Dyke Water Co. v. Pub. Util. Comm'n (1961) 56 Cal.2d 105, 129 citing Federal Power Com. v. Hope Natural Gas Co., (1944) 320 U.S. 591, 602.) In the absence of express Legislative direction embracing a particular method in determining rates or cost allocation, we are free to use this discretion in designing and implementing rates. (See Market St. R. Co. v. Railroad Comm'n (1944) 24 Cal.2d 378, 393, aff'd, 324 U.S. 548 (1945).

In D.02-11-022, we explained the reasoning for choosing the "billing date" over the contract execution date and "DASR-submitted date." (See D.02-11-022, pp. 62-66.) We found that a "DA active date" was consistent with costs incurred, easily identifiable, and consistent across parties involved. (See D.02-11-022, p. 64.) It also involved less uncertainty and risks. (See D.02-11-022, pp. 64.) As we determined, "the DA active date is the best criterion for measuring bundled load on the cutoff date." (D.02-11-022, p. 66.) Therefore, the use of the "DA active date" was just and reasonable.

Further, cost shifting between bundled service customers and DA customers is a function of what is or isn't billed. Cost shifting is thus a function of when customers are billed, namely what bundled customers would have had to pay if the suspension had occurred on July 1, 2001. (D.02-11-022, p. 66.) This is consistent with the objective of ensuring bundled service indifference, as set forth in D.02-03-055. Moreover, as SDG&E noted: "The amount of bundled load drove DWR's procurement decisions, not the unknown amount of customers that signed DA contracts or had DASRs submitted on their behalf. The use of a criterion other than the DA active date, therefore, would only serve to benefit the particular customers . . . ." (SD&GE's Response, p. 4; see also, D.02-11-022.) Thus, the use of the "DA active date" date was fair, just and reasonable.

(2) The Commission's adoption of the "DA active date" ("billing date") is supported by the record.

Further, the following evidence in the record supports our determination to use the "DA active date." In her prepared direct testimony, SDG&E Witness Dawn Osborne recommended that the exemption date should be based on "the DA active date, a date that is known by the customer and already exists within the billing system, be defined as the customer's official start date on DA for the exemption." (Exh. 54, Chapter III: Osborne/SDG&E, p. 11.) This same witness further elaborated in her prepared rebuttal testimony the difficulties surrounding the use of the

customer's contract date or DASR process date as the exemption criteria, including the creation of "too many variables and uncertainties." (Exh. 55, Chapter 3: Osborne/SDG&E, pp. 6-8; see also, RT, Vol. 10, pp. 1337, 1342 & 1351 (Osborne/SDG&E).) As Ms. Osborne noted: "The establishment of an exemption date based on DASR submittal, or other perhaps variable contract dates as recommended by other parties' proposals, would produce too many variables and uncertainties, and would result in a longer implementation timeframe." (Exh. 55, Chapter 3: Osborne/SDG&E, p. 8.) Thus, based on these considerations, SDG&E recommended using the "DA active date," because it provided "the most efficient process, . . . the best estimate of exempted load and the best alternative to meet the [C]ommission's goal of establishing [DA CRS] within a reasonable amount of time." (Exh. 55, Chapter 3: Osborne/SDG&E, p. 8.) Thus, there is substantial evidence in light of the whole record to support our determination to use the "DA active date," and reject the other proposals.

D. Issues Raised By FEA

In its application for rehearing, FEA raises the following legal issues: (1) In adopting the DA CRS, the Commission violated Public Utilities Code Sections 451 and 728; (2) the Commission acted in excess of its powers by authorizing the DA CRS; (3) the DA CRS Decision is not adequately supported by the findings; (4) the imposition of the DA CRS on DA customers constitutes an abuse of discretion and a violation of the due process and equal protection clauses of the 5th and 14 amendment of the federal constitution and Article 1, Section 7 of the California Constitution; (5) in imposing a charge for electricity consumed by federal DA customers, the decision violates the Supremacy Clause by conflicting with a Congressionally established policy; and (6) the DA CRS violates the Intergovernmental Immunity Doctrine based on the Plenary Powers Clause with regard to direct access contracts providing for

delivery of electricity to areas under exclusive federal legislative jurisdiction. These arguments raised in FEA's rehearing application are without merit.[23]

(1) The Commission did not violate Public Utilities Code Section 451.

FEA alleges that the imposition of a 2.7 cent/kWh charge is not based on "prospective costs to serve direct access customers" and is "based on amounts that may have been illegally charged the state by energy companies." (FEA's Application for Rehearing, pp. 2-3.) Based on these allegations, FEA argues that the DA CRS is unreasonable and is not authorized under Section 451.

This argument lacks merit. Contrary to FEA's allegations, there is a rational relationship between the DA customers and the DWR costs. Based on evidence in the record, the Commission's determination to impose DA CRS on DA customers is based on principles of cost causation and bundled customer indifference. (See discussion, supra.) These are reasonable bases for making the determination regarding the adoption of the DA CRS. Accordingly, the DA CRS is just and reasonable, and thus, consistent with Public Utilities Code Section 451.

Whether the DWR costs are the result of illegal charges made by the energy companies is an issue pending before FERC and other forums. Accordingly, the question was not a matter for consideration during the DA CRS proceedings that resulted in D.02-11-022.

(2) The Commission did not violate the prohibition against retroactive ratemaking.

FEA argues that imposing the DA CRS, which includes historical procurements costs collected through the DWR Bond Charges, violates the

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[23] Joint Parties I state that they adopt and incorporate by references the arguments (2) through (6) made by FEA in its Application for Rehearing. (Joint Parties I's Application for Rehearing I, p. 2.) In rejecting FEA's arguments, we are also denying the challenges Joint Parties I have incorporated by reference.

prohibition against retroactive ratemaking that is set forth in Public Utilities Code Section 728. (FEA's Application for Rehearing, p. 4.) FEA's argument has no merit.

As we explained in D.02-11-22, we had the legal authority to impose the DA CRS, including those components involving the DWR Bond Charges and DWR Power Charges. (D.02-11-022, pp. 11-12.) AB 1X, AB 117 and the Public Utilities Code sections cited in D.02-11-022 gives the Commission the authority to impose the DA CRS. (See discussion, infra.) Moreover, the DA CRS is a going-forward charge applicable to DA customers' usage over the future billing cycles. The decision does not apply a charge to historical usage of customers. Accordingly, it does not constitute retroactive ratemaking.

The prohibition against retroactive ratemaking only applies in the situation where we are "promulgating general rates" " (Southern California Edison Company v. Pub. Utilities Com. (1978) 20 Cal.3d 813, 816.) Further, the California Supreme Court has concluded that although the effect may be retroactive, a Commission's decision to further adjust a fuel adjustment clause "so as to compensate for substantial past overcollections" does not constitute retroactive ratemaking. (Id. at pp. 829-830.)

Similarly, our imposition of the DA CRS does not constitute general ratemaking. Rather, we were only allocating costs to determine the "fair share" for which DA customers are legally responsible. Although the DA CRS involves the recovery of a past undercollection, the DA customers' fair share will be collected prospectively. Thus, the adoption of the DA CRS, including the DWR costs, does not constitute retroactive ratemaking that is prohibited by Public Utilities Code Section 728.

(3) The Commission acted within its authority in adopting the DA CRS.

FEA claims that because D.02-11-022 allegedly violates Public Utilities Code Section 451 and the rule against retroactive ratemaking set forth in Public Utilities Code Section 728, the Commission has acted in excess of its powers.

However, as discussed above, FEA's allegations are without merit. Accordingly, we have acted within our authority in imposing the DA CRS.

(4) FEA's vague and unspecified claims of insufficient findings and violation of due process and equal protection are without merit.

In its application for rehearing, FEA asserts, without any specificity, that D.02-11-022 does not contain sufficient findings to support our determination to authorize a DA CRS. (FEA's Application for Rehearing, p. 5.) FEA fails to demonstrate why the findings of fact in D.02-11-022 are inadequate to support the DA CRS, and thus, we find no legal error. Similarly, FEA's due process and equal protection argument are too vague to address (FEA's Application for Rehearing, p. 5.), and are rejected accordingly.

In failing to provide specificity, FEA has failed to comply with the requirements of Section 1732 of the Public Utilities Code Section, which provides: "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application. (Pub. Util. Code, §1732.)

Rule 86.1 of the Commission Rules of Practice and Procedure requires: "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission."

Thus, we reject FEA's arguments on these issues, as it has failed to establish legal error justifying rehearing and to comply with Public Utilities Code Section 1731 and Rule 86.1.

(5) Contrary to FEA's assertions, D.02-11-022 does not interfere with Federal Government direct access contracts and is not inconsistent with federal policy.

In its rehearing application, FEA contends that we have violated the Intergovernmental Immunity Doctrine by allegedly imposing DA CRS on existing federal government direct access contract. It further asserts that imposition of DA CRS for purchases made by the Navy is inconsistent with federal policy, and thus, prohibited by the Supremacy Clause and the Plenary Powers Clause of the Federal Constitution. (FEA's Application for Rehearing, pp. 6-8.)

We note that in its analysis, FEA does not mention the federal law that requires federal government agencies to abide by state regulation in the procurement of electricity. Section 8093 of Department of Defense Appropriations Act of 1988, P.L. 100-202, provides that:

> "[F]unds appropriated or made available by this or any other Act, . . . [may not be used] by any Department, agency , or instrumentality of the United States to purchase electricity in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements." (101 Stat. 1329-79.)[24]

This requirement is also stated in 48 CFR §41.201. Thus, the federal policy and law requires a federal department, such as the Navy, to comply with state law and the Commission's decisions in implementing state law in the department's purchase of electricity to comply with state law and the Commission's

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[24] Section 3093 "is a general directive that federal agencies and installations follow state law in the procurement of their electric service. . . .[T]he legislative history clearly states that this legislation was intended to protect against utility abandonment by their federal customers." (West River Electric Assoc. Inc. v. Black Hills Power & Light Co. (8th Cir. 1990) 918 F.2d 713, 719.)

implementation of state law. Accordingly, the Commission's determination to impose the DA CRS is not in conflict with federal policy or law. Thus, the Supremacy Clause and Plenary Powers Clause are not implicated. (See Louisiana Public Service Commission v. Federal Communication Commission (1986) 476 U.S. 355, 368-369 [Preemption does not apply if there is no actual conflict between federal and state law].)

Also, Congress has permitted state regulation of the federal department's purchases of electricity. (See Hunt Building Corporation v. Bernick (2000) 79 Cal.App.4th 213, 221.) "It is also clear that federal statutory provisions and regulations require that the [federal department] must follow state law and regulations, including utilities regulations and franchise agreements, in its purchase of the commodity electricity. Pub.L. 100-202, § 8093; 48 C.F.R. §§ 41.201 (d) & (e)." (Baltimore Gas and Electric Company v. United States (D. Md 2001) 133 F.Supp.2d 721, 738.) Interestingly, "[T]he legislative history [Section 3093] clearly states that this legislation was intended to protect against utility abandonment by their federal customers." (West River Electric Assoc. Inc. v. Black Hills Power & Light Co., supra, 918 F.2d at p. 719.)

FEA's reliance on Public Utilities Commission of California v. United States (1958) 355 U.S. 534, and similar cases, is misplaced. In that case, the statute that the Commission was implementing required it to approve the contract price negotiated by the federal agencies. (Id. at pp. 543-545.) However, in adopting the DA CRS, we were not regulating the contract executed or the contract price negotiated by the Navy. The DA CRS is not made part of the contract. Rather, we were only exercising our regulatory authority to provide for the recovery of DWR and non-DWR costs for which DA customers are responsible for paying. Under the federal law, the Navy is required to comply with D.02-11-022.

Further, the "Intergovernmental Immunity Doctrine" does not apply. As previously discussed, federal law requires that the Navy must comply with state

law in its purchase of electricity. Under Section 3093, there is no exemption from compliance with state law for electricity consumed on federal property.

E. Issues Involving the Voluntarily Returned Customers

In D.02-11-022, we determined that involuntarily returned DA customers would be treated the same as voluntarily returned DA customers. (D.02-11-022, pp. 57-58.) We explained that if such customers received special treatment, "bundled customers would be forced to bear the burden of wrongful actions of ESPs," and "[a]s result, bundled customer indifference would not be achieved and the mandates of D.02-03-055 would not be met." (D.02-11-022, p. 58.) Further, we noted that involuntarily returned customers had a legal recourse in the court, and thus, a special exemption was not necessary. (D.02-11-022, p. 58.)

(1) The Commission did not err in not treating involuntarily returned DA customers as continuous DA customers and exempting them from paying the DA CRS.

In their rehearing application, 7-Eleven and El Torito argue that the Commission has abused its discretion in not treating involuntarily returned DA customers to bundled service as continuous DA customers. (7-Eleven/El Torito's Application for Rehearing, p. 2.)[25] These rehearing applicants cite to no law requiring such an exemption. Essentially, this application for rehearing raises policy issues rather than legal error. Therefore, 7-Eleven and El Torito have failed to establish that the Commission committed error in deciding that involuntarily switched customers should pay the DWR bond charge and the DWR power charge. Thus, we will deny their rehearing application.

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[25] In their application for rehearing, 7-Eleven and El Torito also raises an argument inferring that the Commission erred by not finding that Enron had violated Rule 22. (7-Eleven/El Torito's Application for Rehearing, p. 4.) The question of the lawfulness of Enron's behavior with respect to Rule 22 is beyond the scope of the proceeding, and thus, we will not address this issue.

(2) The record supports rejection of an exemption for these customers.

The record supports the rejection of a special exemption for involuntarily returned DA customers. TURN's Witness Mr. Marcus rebutted the assertion that customers who were "dumped" by Enron should receive some sort of special treatment from this Commission. (Ex. 19, pp. 12-13.) Mr. Marcus noted: "Enron customers were indisputably being physically provided with bundled service and with [DWR] power. [DWR] had no basis on which to forecast that a court would return them to Enron. . . . " (Exh. 18: Marcus/TURN, p. 18.) He further testified that there should be "no free ride for Enron customers who were shifted back to bundled service," and that such customers should seek recovery through the bankruptcy court with the filing of a claim against Enron and not a claim against bundled service customers in this case. (Exh. 19: Marcus/TURN, pp. 12-13) CLECA's testimony demonstrates that although these customers did not choose to return to bundled service or to have DWR procure power for them, they did receive power from the DWR during this period for which they did not fully compensate the DWR." (See generally, Exh. 28: Barkovich & Yap/CLECA, pp. 6-8.) PG&E's Witness Mr. Keane stated:

> "All DA customers, whether their return to bundled service was voluntary or involuntary – or whether or not they returned at all (as noted above) – benefited from the stability that DWR brought to the market, and it is thus appropriate that all DA customers pay the DWR NBC. Similar arguments, that DWR was never asked to purchase power on a particular customer's behalf, can be made by millions of bundled service customers as well, but it is simply not relevant to the question of who should pay DWR's costs. Both bundled and DA customers . . . benefited from DWR's entry into the market, and thus equity considerations dictate that all should pay." (Exh. 42: Keane/PG&E, p. 2-3.)

Based on the above, the record supports our decision to not exempt involuntarily returned DA customers from paying their fair share of the DWR costs.

F. Issues Related to Setting the DWR Power Charges on a Utility-Specific Basis.

Strategic argues that the Commission erred in setting the DWR Power Charges on a utility-specific, rather than a statewide, basis. (Strategic's Application for Rehearing, pp. 11-12.) It argues that calculating the DWR Power Charges on a utility-specific basis was unjust and resulted in an unlawful discrimination between DA customers in different areas. Also, Strategic argues that the record does not support the adoption of a utility-specific calculation. These arguments are without merit.

(1) The adoption of a utility basis for the calculation of the fair share for the DWR Power Charges was lawful.

In D.02-11-022, we were not convinced by the arguments made by SDG&E and others for "a single uniform statewide rate for DWR [P]ower [C]harges." (D.02-11-022, p. 86.) We concluded that the adoption of a utility-specific calculation was "consistent with the manner in which bundled customer electricity charges are set, including charges for large industrial customers that take bundled service." (D.02-11-022, p. 86.) Further, we noted that "[u]tility specific charges are more consistent with established principles of cost causation and will be less likely to mask the true cost and service associated with providing service." (D.02-11-022, p. 86.) Accordingly, these reasons justified setting DWR Power Charges on a utility-specific basis.

SDG&E and certain DA customers had advocated adopting a single statewide DWR Power Charge because under the "total portfolio approach" and a utility-specific calculation, DA customers in SDG&E incurred a higher DWR Power Charges component than those in Edison or PG&E's service territories. This is because retail end use customers in the SDG&E service territory relied more on DWR

purchased power because SDG&E has less utility retained generation ("URG") (See RT Vol. 4, pp. 589-590 (Barkovich/CLECA; .Ex.28: Barkovich & Yap/CLECA, p.26.)[26] This is the basis for Strategic's discrimination argument. The argument has no merit because SDG&E's DA customers are not in the same situation as other utilities' DA customers. Therefore, there is no discrimination. Rather, what has happened in San Diego service territory is a result of the differences in the utility's procurement resource mix rather than any discrimination by the Commission.[27]

Further, setting the DWR Power Charges on a statewide basis would have resulted in unfair cross-subsidization by the retail end use customers in service territories of Edison and PG&E. As PG&E noted: "The direct access DWR power charge is a direct consequence of the Commission's indifference standard for bundled customers. Utility-specific factors affect the determination of the amount necessary to hold each utility's bundled customers indifferent to post-July 1, 2001, direct access migration. The unavoidable result, unless the Commission were to use the customers of one utility to subsidize those of another utility, is utility-specific direct access DWR power charges." (PG&E's Response, p. 13) Thus, utility-specific DA CRS, including DWR Power Charges, are essential to a fair allocation of the costs being collected.

Therefore, our adoption of a utility-specific calculation for the DWR Power Charges was just and reasonable. The use of a utility-specific calculation did not result in any unlawful discrimination. (See Toward Utility Rate Normalization v.

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[26] Accordingly, "a customer in San Diego who switched to DA "stranded" twice as much DWR contract power as a similar-situated PG&E customer. Even if the cost per MWh of DWR power is the same in each service territory, more DWR costs are stranded by DA in the service territories that rely more heavily on that source of supply, as opposed to URG. Any reasonable concept of cost causation would have to take this factor into account. Any other approach would result in significant cost-subsidies between customers of the various utilities, with no public purpose or rationale to justify such action." (TURN's OB, pp. 16-17.)

[27] However, we have not been unsympathetic to this situation and has tried to mitigate the concerns raised by SDG&E and certain DA customers by imposing the interim cap. (D.02-11-022, p. 86.)

Pub. Utilities Com., supra, 22 Cal.3d at pp. 543-544, holding that the Commission may reasonably allow contiguous utilities to use different methods of billing and charge different rates if there is a rational basis for so doing.)

(2) The record supports the Commission's adoption of a utility basis for the calculation of the fair share for the DWR Power Charges.

The following evidence from the record supports setting the DWR Power Charges on a utility-specific basis: CLECA proposed a utility specific DA CRS "to allow an accurate reflection of the cost experience in each of territory." (Exh. 28: Barkovich & Yap/CLECA, p. 38.) CLECA anticipated "that the exit fee for DA customers in each of the SCE, PG&E and SDG&E territories would vary as a reflection of the different mix of URG and DWR power in each and the different cost structure for each utility's URG portfolio. The three utilities have different URG portfolios, with different cost structures. Each utility's URG power makes up a different percentage of its total power requirements; in other words, the net short amounts are different for each utility, both absolute and percentage terms." (Exh. 28: Barkovich & Yap/CLECA, pp. 35-36.) Thus, CLECA questioned whether a single state-wide total portfolio in calculating the DACRS was appropriate. (Exh. 28: Barkovich& Yap/CLECA, p. 36.) CLECA's testimony stated:

> "The application of a single, state-wide [surcharge] developed on a total utility portfolio basis, as we have discussed above, implies that the URG resources of one utility may be shared for cost purposes with the customers of another utility. We strongly suspect that the utilities may have some concerns with that notion, and we are unaware of another situation in which assets of one utility were shared or mixed, for ratemaking purposes, with the assets of another utility. If the Commission adopted a single, state-wide [surcharge], it would represent a major change in ratemaking policy." (Exh. 28: Barkovich& Yap/CLECA, p. 36.)

Edison and PG&E also recommended a utility-specific calculation. (Exh.22: Nelson/Edison, p. 18; Exh. 41: Burns/PG&E, p. 3-5; Exh. 42: Burns/PG&E,

pp. 3-5 to 3-7.) In her prepared direct testimony, PG&E Witness Sandra Burns stated: "Decision 02-02-052 allocates DWR's costs to the three utilities. The resulting allocation results in each utility paying a different rate for net short power. The allocation to DA customers of each utility should be consistent with DWR's allocation of cost responsibility to each utility. Since the price paid by bundled customers varies by utility, the price paid by DA customers may vary as well [Foonote omitted.] Thus, PG&E has used utility-specific data on the basis for its calculations." (Exh. 42: Burns/PG&E, p. 3-5.) Ms. Burns further stated:

> "Different charges for different utility customers do not mean unlawful discrimination. "Different charges for different utility customers do not appear to violate Commission policy. In fact, in its ratesetting, the Commission has historically established different charges for different customer classes and different charges for customers of different utilities. SCE, PG&E and SDG&E currently have different rates for different customer classes, and there are different rates between the utilities for customers in similar rate classes. Moreover, the Commission allocated DWR costs and adopted different rates for DWR net short power for the three utilities." (Exh. 42: Burns/PG&E, pp. 3-6 to 3-7.)

Accordingly, the record evidence supports our adoption of DWR Power charges on a utility-specific basis.

G. Issue Related to Utility Costs Component of the DA CRS

Joint Parties II argue that "the Commission has no statutory (or other) authority to impose a surcharge on DA customers for any of the utility costs referenced" in D.02-11-022. (Joint Parties II's Application for Rehearing, p. 8.) To the extent they are arguing that we do not have the authority to require DA customers to pay their share of eligible above-market utility retained generation ("URG"), this argument is unfounded. AB 1890 mandates that all customers, including DA customers, pay their share of these costs through the on-going CTC. (See, e.g., Pub. Util. Code, §§367 & 370.) In D.02-11-022, we established a DA CRS that includes

an ongoing CTC component designed to recover these eligible above-market URG costs. (D.02-11-022, pp. 12-16.) Accordingly, the URG-related charge is an appropriate component of the DA CRS.

Further, the evidence in the record supports the Commission's determination regarding these costs. For example, Edison's testimony noted: "The [Commission] moved the remaining Utility Retained Generation (URG) and power purchase contracts to a cost-of-service-based ratemaking and the California Department of Water Resources (DWR) began procurement service to provide the residual net-short energy needs" of the IOUs. (Exh. 22: Collette/Edison, p. 1.)

Further, as a result of Assembly Bill No. 6 of the First Extraordinary Session (AB 6X), the utilities were required to retain their remaining generating assets. Also, in D.02-04-016, the Commission included QF and inter-utility contract costs into its determinations regarding URG costs. (See generally, Re Southern California Edison Company ("Opinion Adopting Revenue Requirements for Utility Retained Generation [D.02-04-016] (2002) ___ Cal.P.U.C.2d ___, modified on other grounds in Order Modify Decision (D.) 02-04-016 and Denying Rehearing of the Decision, as Modified [D.02-10-067] (2002) ___ Cal.P.U.C.2d ___.) Thus, these URG costs were recoverable from DA customers, pursuant to the legal authority discussed in D.02-11-022, pp. 12-17.

III. CONCLUSION

Therefore, based on the above discussion, we find that no legal error has been established and thus, the applications for rehearing of D.02-11-022 are denied. However, we will modify D.02-11-022 to correct inadvertent references to Public Utilities Code Section 366(d) instead of Public Utilities Code Section 366.2(d), and some minor typographical errors. Further, for purposes of clarification, we will modify Findings of Fact Nos. 9 and 12, and Conclusion of Law No. 9 in the manner specified below.

THEREFORE, IT IS ORDERED:

1. The following modifications to D.02-11-022 shall be made:

a. The first paragraph and quote on page 61 is modified to read as follows:

> "Recently, the Legislature passed Assembly Bill No. 117 ("AB 117"), which was signed into law on September 24, 2002. (AB 117, Stats 2002 (Reg. Sess.), ch. 838.) Although AB 117 is primarily about community aggregation programs, the Legislature took the opportunity to add Public Utilities Code Section 366.2(d) in order to clarify its intent concerning the cost responsibility of each retail end-use customers who was a customer on or after February 1, 2001, and the existing law concerning AB 1X. This statutory provision states:
>
> > 'It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the [DWR's] electricity purchase costs, as well as electricity purchase contract obligations incurred. . . that are recoverable from electrical corporation customers in commission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers.' (Pub. Util. Code, § 366.2 subd. (d)(1).)
>
> Public Utilities Code Section 366.2 further provides:
>
> > 'The Legislature finds and declares that this subdivision is consistent with the requirements of Division 27 (commencing with Section 80000) of the Water Code and Section 360.5, and therefore declaratory of existing law.' (Pub. Util. Code, § 366.2 subd. (d)(2).)"

b. The word "were" between the words "who" and "took" on line 7 in the second full paragrah on page 61 is deleted.

c. The reference to “February 1, 2002” on the second to the last line on page 61 is changed to read: “February 1, 2001”.

d. The reference to “(Pub. Util. Code, §366, subd. (d)(1).)” is corrected to read as “(Pub. Util. Code, § 366.2, subd. (d).) on page 62, line 13.

e. Finding of Fact No. 9 on page 141 is clarified to read as follows:

> “Consistent with AB 1X and AB 117, DA customers that took bundled service on or after February 1, 2001 are responsible for paying a "fair share" of the DWR revenue requirements, including both previously incurred costs, as well as an ongoing cost component. For purposes of the ongoing DWR cost component, the "fair share" is based upon the incremental costs necessary to make bundled customers indifferent between suspension of DA on July 1, 2001 versus September 20, 2001.”

f. Findings of Fact Nos. 11 and 12 on page 141 are clarified to read as follows:

> “11. Recently, the Legislature passed Assembly Bill No. 117 (“AB 117”), which was signed into law on September 24, 2002. (AB 117, Stats. 2002 (Reg. Sess.), ch. 838.)
>
> 12. The legislature amended Public Utilities Code Section 366.2 to add subsection (d) in order to clarify its intent concerning the cost responsibility of each retail end-use customer who took bundled service on or after February 1, 2001. Although the beginning date is February 1, 2001 for assessing which customers pay for cost responsibility under the provisions of Section 366.2(d), it is still reasonable to compute the "fair share" of DA customers' cost responsibility for ongoing DWR costs based upon a calculation of a surcharge necessary to make bundled customers indifferent between a DA suspension date of July 1, 2001 versus September 20, 2001, in accordance with the directives of D. 02-03-055. This is also consistent with D.02-03-055 directives to prevent cost-shifting.”

g. Conclusion of Law No. 9 on page 147 is clarified to read as follows:

> “Within its broad statutory authority, the Commission has specific authority to establish charges for the collection of costs incurred by DWR pursuant to AB 1X applicable not just to bundled

customers, but also applicable to DA customers to the extent that DWR purchased power on their behalf or for their benefit. For purposes of determining the "fair share" of ongoing DWR purchased power purchased applicable to DA customers, as referenced in AB 117, it is reasonable to perform a calculation of surcharges required to make bundled customers indifferent between a DA suspension date of July 1, 2001 versus September 20, 2001, in accordance with the directives of D. 02-03-055. The total portfolio approach, incorporating modeling simulations of the differences between inclusion versus exclusion of incremental DA load that migrated between July 1, 2001 and September 20, 2001, as adopted in this order, constitutes a reasonable measure of the "fair share" of ongoing DWR procurement costs which is the responsibility of DA customers."

h. Conclusion of Law No. 16 on page 148 is modified to read as follows: "Section 366.2(d), which was added by AB 117, is relevant to this DA CRS proceeding."

i. The reference to "February 1, 2002" in Finding of Fact No. 10 and Conclusion of Law No. 20 is changed to "February 1, 2001".

j. The reference to "Public Utilities Code Section 366(d)(1)" is changed to state: "Public Utilities Code Section 366.2(d)(1).

2. Rehearing of D.02-11-022, as modified, is hereby denied.

This order is effective today.

Dated December 5, 2002, at San Francisco, California.

HENRY M. DUQUE
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

President Loretta M. Lynch, being necessarily absent, did not participate.

I will file a dissent.

/s/ CARL W. WOOD
Commissioner