

Decision 07-04-047

April 12, 2007

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

Application for Rehearing of Resolution  
E-3999Application 07-01-008  
(Filed January 23, 2007)**ORDER DENYING REHEARING  
OF RESOLUTION E-3999****I. SUMMARY**

In Resolution E-3999 we approved, with modifications, Advice Letter (“AL”) 2433-E-C filed by Pacific Gas and Electric Company (“PG&E”) and AL 1980-E filed by Southern California Edison Company (“Edison”). These advice letters proposed tariffs which would allow for the billing and collection of charges applicable to transferred municipal departing load (“MDL”).<sup>1</sup>

Merced Irrigation District and Modesto Irrigation District (“Joint Applicants”) jointly filed an application for rehearing of Resolution E-3999. They assert that the procedure for issuing Resolution E-3999 was flawed because no workshops or hearings were held to address what they considered to be material issues. They next maintain that the Change of Party provisions in the tariffs misapply the provisions of Public Utilities Code section 366.2(d) and amount to a tax.<sup>2</sup> Since the Commission has

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<sup>1</sup> MDL refers to departing load served by a “publicly owned utility” (“POU”) as that term is defined in Public Utilities Code section 9604(d), including municipalities and irrigation districts. Transferred MDL is load that was served by an investor-owned utility (“IOU”) on or after December 20, 1995, and subsequently departed to be served by a POU.

<sup>2</sup> Unless otherwise specified, all statutory references are to the Public Utilities Code.

no taxing authority, Joint Applicants assert that the Change of Party provisions are unlawful. Finally, they contend that the Lump Sum Payment provisions are oppressive and overreaching, and, thus, should be deleted.

We have carefully considered each of the arguments raised by Joint Applicants and are of the opinion that they have failed to demonstrate grounds for granting rehearing. Therefore, for the reasons discussed below, rehearing of Resolution E-3999 is denied.

## II. DISCUSSION

### A. The Commission properly addressed MDL CRS billing and collection issues through Resolution E-3999.

Joint Applicants first charge that the Commission did not follow proper procedures when it adopted Resolution E-3999. Specifically, they maintain that *Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060* (“MDL CRS Decision”) [D.03-07-028] (2003) \_\_\_ Cal.P.U.C.3d \_\_\_ “promised” to use a workshop process to address billing and collection issues. Thus, they assert the Commission failed to comply with this order because billing and collection issues were addressed through the advice letter process. (Rhg. App., p. 3.) Further, they maintain that the workshop that was held did not address the Change of Party and Lump Sum Payment provisions in a “meaningful” manner and that hearings should have been held. (Rhg. App., pp. 3-4.) These arguments are without merit.

In the *MDL CRS Decision*, we ordered that a technical workshop be held to “address necessary implementation measures to enable the MDL CRS billing and collection to take effect.” (*MDL CRS Decision* [D.03-07-028], *supra*, at p. 69 (slip op.)) Further, “[t]he ALJ is directed to issue a procedural ruling initiating further procedural measures to integrate MDL into the DA CRS modeling process and *to implement the*

*tariff filings and the accounting, billing and collection of MDL CRS*, as ordered in this order.” (*Id.* at pp. 69 & 79 (Ordering Paragraph No. 14) (slip op.)) Thus, contrary to Joint Applicants’ assertions, the Commission never “promised” to address and implement billing and collection issues solely through a workshop process. Rather, it was contemplated that certain issues would be addressed as part of implementation of the tariffs.

As ordered in the *MDL CRS Decision*, a workshop addressing implementation issues was held on January 31, 2005. A workshop report summarizing parties’ discussions on how to resolve various implementation issues was issued. The report noted that while the general assumption was that parties would reach agreement on issues, various approaches were considered in the event that there was no POU assistance. (Report on Technical Workshop: Process to Implement Billing and Collection Relating to Cost Responsibility Surcharges (CRS) for “Municipal Departing Load” (MDL) Pursuant to Decision (D.) 03-07-028 as modified by D.03-08-076, D.04-11-014, and D.04-12-059 (“Workshop Report”), issued March 28, 2005, pp. 6-8.)<sup>3</sup> One of these approaches was to adopt the filed advice letters. Further, as contemplated in the *MDL CRS Decision*, we implemented the procedures for accounting, billing and collection of MDL CRS. Thus, we complied with the orders in the *MDL CRS Decision*.

Joint Applicants also claim that they were not provided an opportunity to address the Change of Party and Lump Sum Payment provisions in a “meaningful” manner through workshops or hearings. (Rhg. App., p. 4.) Although not explicitly stated, Joint Applicants are essentially arguing that they were denied due process because they only commented on these provisions through paper filings. Such an argument is unfounded.

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<sup>3</sup> Although the final report was issued on March 28, 2005, the Workshop Report itself is dated March 11, 2005.

Due process requires that parties be given notice and opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon the evidence and not arbitrarily. (*Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393.) However, this does not mean that a full evidentiary hearing is required in every instance. Rather, the amount of process due depends on the particular situation. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 343.)

As discussed above, there was no requirement that the implementation issues be resolved solely through a workshop or evidentiary hearings. Thus, the fact that the Change of Party and Lump Sum Payment provisions were not discussed in detail during the workshop does not constitute a denial of due process. Rather, the advice letter process provided sufficient due process. Parties, including Joint Applicants, have had more than ample opportunity to present their arguments concerning these two provisions through various rounds of protests, as well as in their comments and responses to comments to the draft Resolution. Further, the issue of hearings had been raised by parties in their protests and comments to the draft Resolution. These arguments were considered and rejected on the basis that there were no disputed issues of material fact. (Resolution E-3999, pp. 11-14 & 46-47 (slip op).) In particular, we considered the argument that hearings should have been held on the lump sum payment calculation proposed by the IOUs, and determined that hearings were not necessary as parties failed to raise “any factual issue with respect to this calculation, much less any *material* issue.” (Resolution E-3999, p. 47.) Likewise, we considered the argument that evidentiary hearings should have been held to determine whether the IOU’s pursuit of CRS payments would result in any cost shifting, and determined that such hearings were not necessary because parties failed to “articulate why this issue is *material* to the implementation of

previous Commission decisions. Furthermore, this resolution is not the proper forum for addressing the ‘just and reasonableness’ of the IOU’s billing and collection costs.’<sup>4</sup> (Resolution E-3999, p. 47.) Joint Applicants have failed to raise any new or persuasive arguments demonstrating that evidentiary hearings should have been held.<sup>5</sup> Thus, while Joint Applicants may have desired to present their arguments in a different manner than through the paper filings, they have failed to demonstrate that they were denied due process.

For the reasons discussed above, the MDL CRS billing and collection issues were properly addressed through the advice letter process. Joint Applicants have failed to demonstrate grounds for granting rehearing on this issue.

## **B. Change of Party Provisions**

In Resolution E-3999, we determined that PG&E’s and Edison’s Change of Party provisions were lawful and justified. (Resolution E-3999, pp. 18-21.) These provisions require a party who moves into the premises of a transferred MDL customer to assume liability for the transferred MDL CRS. (See PG&E AL 2433-E-C, Schedule E-MDL, Special Condition 1.b. & 3.c.; Edison AL 1980-E, Schedule TMDL, special

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<sup>4</sup> In particular, we considered and rejected a request by the Hercules Municipal Utility to add a provision to exempt transferred MDL customers from paying CRS if the costs for billing and collecting CRS charges exceeded the amount of CRS to be collected. “Although this resolution addresses issues arising from implementation details of proposed tariffs, it must comply with the directives of [prior Commission decisions implementing the CRS applicable to MDL]. Those decisions clearly did not exempt any MDL customers from their payment obligations due to billing and collection implementation costs.” (Resolution E-3999, p. 45.)

<sup>5</sup> One of Joint Applicants’ grounds for arguing that hearings were necessary was based on the length of Resolution E-3999. (Rhg. App., p. 4.) However, we are unaware of any requirement that the length of a resolution is determinative of whether hearings are warranted. Various issues were raised in protests to PG&E’s and Edison’s advice letters. (Resolution E-3999, pp. 6-8.) These issues were addressed in detail in Resolution E-3999. The fact that this resulted in Resolution E-3999 being lengthier than most resolutions, however, does not mean parties were denied an opportunity to present their arguments for the Commission’s consideration. Therefore, Joint Applicants’ argument is without merit.

Condition 3.d. & 3.e.) Joint Applicants challenge this determination on numerous grounds. (Rhg. App., pp. 7-8.) First, they contend that since the “new party”<sup>6</sup> had no previous relationship with the IOUs, imposing the CRS obligation on the new party due to the location of the property constitutes a tax. Further, they assert that the Commission improperly relied on section 366.2(d) in determining that imposing CRS on these new parties was lawful.<sup>7</sup>

Requiring a new party to bear responsibility for its fair share of costs incurred on its behalf is not a tax. As discussed in *Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060* (“MDL CRS Rehearing Decision”) [D.03-08-076, at pp. 6-8 (slip op.)] (2003) \_\_\_ Cal.P.U.C.3d \_\_\_, it is within the Commission’s jurisdiction to ensure the proper allocation of costs to prevent cost-shifting. This would include allocating costs to parties who have had no prior relationship with the IOU.<sup>8</sup>

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<sup>6</sup> PG&E refers to these parties in their tariff as a “new party,” while Edison refers to them as “new TMDL.” This order refers to these parties as a “new party.”

<sup>7</sup> Joint Applicants also maintain that the Change of Party provisions were not properly adopted since they were not discussed and resolved in a workshop. (Rhg. App., p. 8.) This issue has been addressed in the previous section. As discussed, there was no requirement that the Change of Party provisions be addressed and resolved in a workshop, and Joint Applicants failed to demonstrate legal error in adopting these provisions through the advice letter process.

<sup>8</sup> Joint Applicants, along with other parties, sought judicial review of the *MDL CRS Decision* and the *MDL CRS Rehearing Decision*. Among other things, they challenged the Commission’s interpretation that section 366.2(d) applied to not only to former bundled customers, but also to retail customers who had no past relationship with the IOU, but were made responsible as result of using load that had been forecasted. The California Supreme Court summarily denied review of these challenges on February 18, 2004. (See *Modesto Irrigation District et al. v. Public Utilities Com.*, Case No. S119310; *California Municipal Utilities Association v. Public Utilities Com.*, Case No. S119365; *Merced Irrigation District v. Public Utilities Com.*, Case No. S119368; *City of Corona et al. v. Public Utilities Com.*, Case No. S119376.) Thus, to the extent Joint Applicants are challenging the Commission’s authority to impose the CRS on parties who have had no prior relationship with the IOU, such a challenge is precluded under section 1709, which states: “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” (Pub. Util. Code, § 1709; see also *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 630.)

More importantly, Joint Applicants erroneously conclude that the Change of Party provisions are based on a new party's "ownership and occupancy of [a] location." (Rhg. App., p. 7.) Although a new party will be taking over the premises of a transferred MDL customer, responsibility for the CRS is triggered due to the transferred **load** that will be assumed by the new party, not by the **location** of the property. As we explained:

It is reasonable, as PG&E and SCE have done, to impose the cost responsibility obligation on the entity taking electricity service at the premise because IOU forecasts given to DWR for electricity procurement purposes were based on load projections at locations served by the IOUs' electric systems, as well as load projections for locations in areas that the IOUs expected to serve. This cost responsibility obligation continues even if the customer responsible for the charges changes. Thus, any New Party taking over the location which was included in the forecasts upon which DWR relied in order to decide how much power to procure, must still contribute to the recovery of those costs.

(Resolution E-3999, p. 21.) Indeed, Resolution E-3999 modified PG&E's and Edison's tariffs to state that transferred MDL CRS would be billed based on the new party's actual usage (i.e., load) if the new party's metered data was provided. In the absence of this data, CRS would be based on either historic metered usage data or an estimate based on the nature of the new party's business. (Resolution E-3999, pp. 30-32.) Thus, Joint Applicants are mistaken that ownership and occupation of a location automatically results in imposition of the CRS obligation.

Joint Applicants next contend that the Commission improperly relied on section 366.2(d) to conclude that the transferred MDL CRS should be paid by a new party. They maintain that section 366.2(d) only applies to customers who had "actually, really physically purchased power from an IOU." Further, they maintain that section 366.2(d) only applies to costs incurred by DWR and not any of the other cost components of CRS. (Rhg. App., pp. 7-8.) Both of these arguments are without merit.

Joint Applicants raised a similar argument in their challenge of the *MDL CRS Decision* with respect to the Commission's authority to impose CRS on new MDL customers under section 366.2(d). As the Commission explained, its jurisdiction to impose CRS responsibility on new MDL customers who had no previous relationship with the IOU is based on the relationship between the load used by the new MDL customer and the costs incurred by DWR on behalf of that load.<sup>9</sup> (See generally *MDL CRS Rehearing Decision* [D.03-08-076], *supra*, at pp. 57-58 (slip op.)). Similarly, these costs have been incurred on behalf of the transferred MDL customers. Thus, to permit a new party to bear no responsibility for costs associated with the transferred load for which it is assuming would result in unfair cost-shifting and be contrary to the mandate of section 366.2(d). Accordingly, we properly relied on section 366.2(d) in determining that a new party should bear CRS responsibility for the transferred load it assumes.

Joint Applicants are also incorrect that section 366.2(d) only applies to DWR costs. Section 366.2(d)(1) 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 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 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) (emphasis added).) Joint Applicants base their arguments solely on the first sentence of section 366.2(d)(1). However, the second

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<sup>9</sup> As noted in footnote 7 above, the California Supreme Court had summarily denied petitions for writ of review of the *MDL CRS Decision* and the *MDL CRS Rehearing Decision*.

sentence clearly states that it was “further” the Legislature’s intent “to prevent any shifting of recoverable costs between customers.” Had the Legislature intended to limit recovery to only DWR costs, it would not have been necessary to include this second sentence. (See, e.g., *Moyer v. Workers’ Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230 (discussing need to consider “every word, phrase, sentence and part of an act” when determining legislative intent); *People v. Baker* (1968) 69 Cal.2d 44, 50 (courts should not insert or delete words in a statute or give a different meaning to the words used).) Clearly, the other cost components of CRS, such as ongoing CTC, PG&E’s Energy Recovery Charge Amount, and Edison’s Historical Procurement Charge are recoverable costs. Therefore, they squarely fall within the mandate of section 366.2(d). Accordingly, we properly determined that section 366.2(d) applied to all components of CRS.

With respect to the non-bypassable charges, Joint Applicants are wrong that the Commission relied on section 366.2(d) for authority to impose these costs. As discussed in Resolution E-3999, responsibility for non-bypassable charges (i.e., nuclear decommissioning, public purpose programs and trust transfer amount) “had already been established by statute and had been previously implemented in the IOU’s tariffs applicable to departing load customers.” (Resolution E-3999, p. 15 (footnote omitted).) In proposing to consolidate these charges into a single tariff applicable to transferred MDL, PG&E was complying with the requirements of Resolution E-3903, which directed PG&E to “consolidate all information applicable to a particular type of DL in a single tariff covering such customers.” (Resolution E-3903, at p. 10 (slip op).) Similarly, Edison’s request to consolidate these various charges in a single tariff was approved. Accordingly, we properly determined that these non-bypassable charges be included in the tariffs.

### **C. Lump Sum Payment Provisions**

Joint Applicants' final challenge concerns the Lump Sum Payment provisions. Specifically, they maintain that the proposed tariffs are effectively adhesion contracts and that, given the lack of privity between the IOUs and the MDL customers, the Lump Sum Payment provisions are oppressive. (Rhg. App., p. 9.) These arguments are meritless.

Joint Applicants are mistaken that the tariffs should be considered adhesion contracts. The tariffs were proposed by PG&E and Edison in their advice letters. Parties were provided an opportunity to protest these advice letters, and changes to the proposed tariffs were made by the Commission. Further changes to the proposed tariffs were made in response to comments on the draft Resolution. Thus, the adopted tariffs included modifications made by the POU's on behalf of their transferred MDL customers. Moreover, Resolution E-3999 specifically requires the IOUs to allow the IOUs and POU's, or individual customers, to enter into bilateral agreements as an alternative to the tariffs. (Resolution E-3999, pp. 44 & 59.) Therefore, if the POU's, or individual customers, did not desire to be subject to the terms of the proposed tariffs, they could negotiate different terms with the IOUs for the billing and collection of CRS.

Moreover, we considered whether it was reasonable to adopt these provisions and concluded:

In D.97-06-060, we found that a lump sum payment provision was justified and should be applied to departing load customers for failure to provide notice and failure to pay CTC in part because the utility has limited or no ability to exact payment, e.g., the utility cannot threaten to terminate service if the departing load customer fails to meet its obligations. . . . Because the CRS and other NBCs are akin to the CTC for departing load, it is reasonable, for the same reasons discussed in D.97-06-060, to include a lump sum payment provision to apply to these charges.

(Resolution E-3999, p. 39.) Indeed, such a conclusion was reasonable in light of Joint Applicants' comments that "should a POU customer fail to pay CRS, it is up to the IOU, not the POU, to enforce payment." (*Joint Comments of Merced Irrigation District and Modesto Irrigation District Regarding March 11, 2005 Report on Technical Workshop Concerning Process to Implement Billing and Collection Relating to Cost Responsibility Surcharges for Municipal Departing Load*, filed April 20, 2005, p. 6.)

Finally, the Lump Sum Payment provisions would only apply under four specific circumstances. (See PG&E AL 2433-E-C, Schedule E-MDL, Special Condition 3.h.; Edison AL 1980-E, Schedule TMDL, Special Condition 3.k.) Language in the proposed provisions indicates that a demand for lump sum payment would only arise if all prior attempts to enforce payment of the CRS are unsuccessful. While Joint Applicants assert that the IOUs have no reason to work with the transferred MDL customer due to the lack of privity (Rhg. App., p. 9), it is this very reason why such a provision is necessary. As noted above, the IOU has limited or no ability to exact payment from transferred MDL customers who fail to meet their CRS and NBC obligations. Therefore, it was reasonable to include the Lump Sum Payment provisions.

For the reasons discussed above, we properly concluded that the Lump Sum Payment provisions should be included in the proposed tariffs. Accordingly, Joint Applicants' request for rehearing of this issue should be denied.

### **III. CONCLUSION**

For the reasons discussed herein, we have found no good cause for granting the application for rehearing.

Therefore **IT IS ORDERED**

1. Rehearing of Resolution E-3999 is denied.
2. This proceeding is closed.

This order is effective today.

Dated April 12, 2007 at San Francisco, California.

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

Commissioner Timothy Alan  
Simon being necessarily absent,  
did not participate.