STATE OF CALIFORNIA GRAY DAVIS, *Governor*

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

July 21, 2003 **Agenda ID #2495**

TO: PARTIES OF RECORD IN CASE 02-03-060

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

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

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

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

ANG: avs

Decision **DRAFT DECISION OF ALJ WONG (Mailed 7/21/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Anchor Lighting, a California General Partnership, Thomas H. Simcox dba Tommy's On Broadway, Complainants, vs. Southern California Edison Company, Defendant.	Case 02-03-060 (Filed March 27, 2002)

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Summary

On March 27, 2002, Anchor Lighting (Anchor), and Thomas H. Simcox doing business as Tommy's On Broadway (Tommy's), referred to jointly as "complainants," filed a complaint against Southern California Edison Company (SCE). Complainants alleges that they are small commercial customers within the meaning of Public Utilities Code § 331(h),[1] and that SCE failed and refused to provide them with the 10% rate reduction[2] as mandated in Assembly Bill (AB) 1890 (Stats. 1996, ch. 854) and contained in §§ 330(w) and 368(a).[3]

In the May 8, 2003 scoping memo and ruling, it was determined that the Commission should first address the issue of whether the complainants' allegations regarding the conflict between § 331(h) and the Commission decisions and tariffs implementing the 10% rate reduction were timely or not.

Today's decision dismisses the complaint with prejudice. The complaint challenges the interpretation of § 331(h) as developed and set forth in various Commission decisions and tariffs. However, the complainants failed to apply for

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[1] Unless otherwise stated, all code section references are to the Public Utilities Code.

[2] Instead of a rate reduction, SCE was authorized by the Commission to implement the rate reduction via a bill credit of 10%. (75 CPUC2d at 569, 580.)

[3] Section 330(w) provides in part that: "It is the intent of the Legislature to require and enable electrical corporations to monetize a portion of the competition transition charge for residential and small commercial consumers so that these customers will receive rate reductions of no less than 10 percent for 1998 continuing through 2002.
Section 368(a) provides in part that: "The cost recovery plan shall set rates for each customer class, rate schedule, contract, or tariff option, at levels equal to the level as shown on electric rate schedules as of June 10, 1996, provided that rates for residential and small commercial customers shall be reduced so that these customers shall receive rate reductions of no less than 10 percent for 1998 continuing through 2002."

rehearing of these decisions in a timely manner. In addition, § 841(c) prevents us from revising the costs of providing the 10% rate reduction as set forth in the financing order, D.97-09-056 (75 CPUC2d 555).

Background

AB 1890, the electricity deregulation legislation, was enacted into law on September 24, 1996. The legislation authorized an "immediate rate reduction of no less than 10 percent for residential and small commercial ratepayers," which was to terminate on March 31, 2002. (Stats. 1996, ch. 854, § 1.(b)(2).) In order to finance the rate reduction, the Legislature directed the electric utilities to apply for a financing order with the Commission, and for "rate reduction bonds from the California Infrastructure and Economic Development Bank in amounts sufficient to achieve a rate reduction in the most expeditious manner for residential and small commercial customers of not less than 10 percent for 1998 and continuing through March 31, 2002." (Id., § 1.(e); Pub. Util. Code § 330(w).)

AB 1890 also added § 368 to the Code. Section 368 provides for the submission of a cost recovery plan to the Commission to recover the electric utilities' uneconomic costs related to generation-related assets and obligations identified in § 367. In order for the Commission to authorize recovery, the cost recovery plan must meet the following criteria, among others:

> "(a) The cost recovery plan shall set rates for each customer class, rate schedule, contract, or tariff option, at levels equal to the level as shown on electric rate schedules as of June 10, 1996, provided that rates for residential and small commercial customers shall be reduced so that these customers shall receive rate reductions of no less than 10 percent for 1998 continuing through 2002. These rate levels for each customer class, rate schedule, contract, or tariff option shall remain in effect until the earlier of March 31, 2002, or the date on which the commission-authorized costs for utility

> generation-related assets and obligations have been fully recovered." (Pub. Util. Code § 368(a).)

SCE's cost recovery plan was filed in Rulemaking (R.) 94-04-031 and Investigation (I.) 94-04-032 on October 15, 1996. SCE's cost recovery plan, and the plans of the two other electric utilities, were addressed by the Commission in D.96-12-077 (70 CPUC2d 207). Ordering Paragraph 1 of D.96-12-077 states:

> "The cost recovery plans filed by Pacific Gas and Electric Company …, San Diego Gas & Electric Company …, and Southern California Edison Company (Edison) are approved, subject to the limitations discussed in this opinion." (70 CPUC2d at 232.)

D.96-12-077 also discussed the Commission's role in the review and approval of the cost recovery plans, and the principles or limitations that the cost recovery plans would be subject to. The decision also addressed the "rate freeze" provision of § 368(a) which requires the cost recovery plans to freeze rates at the June 10, 1996 level, and that rates for residential and small commercial customers be reduced by no less than 10%.

D.96-12-077 described the 10% rate reduction as follows:

> "Section 368(a) requires the utilities' plans to include a rate reduction of at least 10% for small commercial [Footnote 2] and residential customers. [Footnote 3][4] This reduction is 'for 1998 and continuing through 2002.' We construe the term of this reduction to be from January 1, 1998 to March 31, 2002, if the rate freeze is not terminated earlier. The latter date is

[4] Footnote 2 of D.96-12-077 states: " 'Small commercial customer' is defined as a customer with a maximum peak demand of less than 20 kilowatts (§331(h))." Footnote 3 of D.96-12-077 states: "Section 330(a) states the Legislature's expectation that the implementation of the bill will lead to a cumulative rate reduction for residential and small commercial customers of at least 20% by April 1, 2002." (70 CPUC2d at 234.)

> specified elsewhere in § 368(a) as the end of the rate freeze." (70 CPUC2d at 220.)

In D.97-09-056 (75 CPUC2d 555), the financing order for SCE was approved, which allowed SCE to finance $3 billion in transition costs through the issuance of rate reduction bonds. One purpose of the rate reduction bonds was to allow SCE to provide the 10% rate reduction during the rate freeze period to residential and small commercial customers. Ordering Paragraph 17 of D.97-09-056 stated:

> "To the extent that rate reduction bonds have been issued, beginning January 1, 1998, Edison shall reduce the rates to eligible residential and (as defined in PU Code Section 331(h)) small commercial customers, from the rates that were in effect on June 10, 1996 by providing a 10% bill credit. For such purpose, eligible customers shall include all residential customers, commercial customers in the Domestic and General Service (GS-1) rate groups." (75 CPUC2d at p. 580.)

In Conclusion of Law 32 of D.97-09-056, the Commission stated:

> "For purposes of eligibility to receive the rate reduction and responsibility to pay for FTA charges, Edison's residential and small commercial customers should be determined as described in Edison's prepared testimony." (75 CPUC2d at p. 578.)

In the "Eligibility" section of D.97-09-056, the Commission stated the following:

> "The rate reduction applies to residential and small commercial customers as defined by AB 1890. For this purpose, Edison's eligible customers are those served on rate schedules in Edison's Domestic and General Service (GS-1) rate group. [Footnote 5.][5] Edison's

[5] Footnote 5 of D.97-09-056 states as follows: "These include all customers on Schedules D, D-APS, D-CARE, DE, DM, DMS-1, DMS-2, DMS-3, DS, TOU-D-1,

Footnote continued on next page

> proposal to address this issue, reflected in its proposed Schedule RRB, and as modified below, is adopted. All other customers will neither receive the rate reduction nor be responsible for FTA charges.
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> "Subject to the bypass provisions discussed below, customers who no longer meet the applicability for service criteria on a rate schedule that qualifies for the 10% reduction will no longer receive the 10% bill credit, nor will they be required to continue to pay the FTA charge. [Footnote 6 omitted.] This provision will apply, for example, when a GS-1 customer's load grows beyond 20 kilowatts and the customer migrates to a rate schedule with a higher demand eligibility criterion, such as schedule GS-2. Edison does not expect that this provision will encourage such migration, because it is unlikely that customers will add load to increase beyond 20 kilowatts, solely for the purpose of avoiding the FTA charges. [Footnote 7 omitted.] This provision is consistent with the treatment of nonbypassable competition transition charges in other proceedings for customers who change rate schedules. Residential customers cannot migrate to a schedule which does not require an FTA charge." (75 CPUC2d at p. 570.)

Anchor filed a civil action against SCE in Los Angeles Superior Court on April 10, 2001, Case No. BC 248372. SCE filed a demurrer to the civil complaint asserting that the Commission has jurisdiction over the dispute. According to the complainants, the Superior Court "sustained the demurrer challenging the Court's jurisdiction as to certain causes of action, namely, violation of Public Utilities Code §2106 (predicated upon a violation of Public Utilities Code §330 *et seq.*), negligence in billing, common counts for overcharging, unjust enrichment based upon improper collections, and constructive trust over

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TOU-D-2, TOU-EV-1, GS-1, TOU-GS-1, TOU-EV-3, and GS-1 customers taking service on GS-APS." (75 CPUC2d at pp. 570, 590.)

ill-gotten gains." (Complaint, p. 3.) The causes of action for a violation of the Unfair Competition Act and fraud were stayed by the Superior Court pending the Commission's determination on whether SCE violated any statute or tariff.[6]

On March 27, 2002, four days before the expiration of the 10% rate reduction, the complainants filed their complaint against SCE with the Commission. SCE filed an answer to the complaint on May 22, 2002. In a September 10, 2002 ruling, the administrative law judge (ALJ) set a prehearing conference for September 24, 2002. The ruling stated in part:

> "Based on the complaint and the answer, the threshold question that faces the Commission is whether or not the Commission made a final determination of the issues presented in the complaint. The issue of eligibility for the 10% rate reduction was developed in A.97-05-006, the proceeding in which D.97-09-055 was issued.[7] No one filed a timely application for rehearing or a petition for modification of D.97-09-055 on the issue of eligibility for the 10% rate reduction.
>
> "Resolution of the threshold question would involve an analysis of several relevant code sections. A review of §§ 841(c), 1709, 1731(b), 1732, and 1756 suggest that the Commission should proceed with the issuance of a decision addressing whether a final determination of the issues raised by the complaint has already been made by the Commission. If such a final determination was made, the application of

[6] The complainants state that this determination is a legal predicate to the cause of action based on a violation of the Unfair Business Practices Act found in Business and Professions Code § 17200.

[7] The September 10, 2002 ALJ ruling mistakenly referred to A.97-05-006 and D.97-09-055. The ruling intended to cite A.97-05-018 and D.97-09-056 as the application and decision number, respectively, as the financing order application and decision for SCE. (*See* May 8, 2003 Scoping Memo and Ruling, p. 4, fn. 3.)

these code sections to this proceeding suggest that the complaint should be dismissed." (Sept. 10, 2002 Ruling, p. 8.)

At the September 24, 2002 prehearing conference, the ALJ directed the parties to file opening and reply briefs on whether the complainants' allegations regarding the lawfulness of the decisions and the tariffs were timely filed or not. The ALJ also allowed parties to brief the issues of (1) whether SCE complied with the financing order decision; (2) even if SCE complied with the financing order decision, whether SCE remains liable based on its failure to comply with other Commission decisions and § 331(h); and (3) whether SCE's Rule 1 was based on SCE's misrepresentations to the Commission. The complainants and SCE filed their respective opening briefs on October 29, 2002, and their reply briefs on November 19, 2002.

The Assigned Commissioner issued the scoping memo and ruling for this proceeding on May 8, 2003.

Position of the Parties

A. The Complainants

The complainants contend that instead of dismissing the complaint, hearings should be held to allow the complainants to prove their case. At a minimum, the Commission should issue findings that address the question of whether SCE's Rule 1 conflicts with the Public Utilities Code, and whether SCE has violated any law. Such findings should be made even if the Commission decides that this action is time-barred.

The complaint alleges, among other things, the following:

- SCE's Rule 1 definition of a "small commercial customer" conflicts with the definition in § 331(h).
- SCE's Rule 1 definition was approved and implemented by the Commission because SCE made repeated false

representations to the Commission, which the Commission relied on.

- As a result of SCE's defective Rule 1 definition, 27,877 customers of SCE were denied the 10% rate reduction.
- Other Commission decisions also conflict with § 331(h).

The complainants contend that SCE' Rule 1 is in conflict with § 331(h) because Rule 1 states:

> "Small commercial customer: For purposes of Rate Reduction Bonds, customers served under Schedules GS-1, TOU-GS-1, and TOU-EV-3."

Section 331(h), however, states: " 'Small commercial customer' means a customer that has a maximum peak demand of less than 20 kilowatts." The complainants assert that they have never exceeded 20 kW of maximum peak demand, and that a small commercial customer could have a maximum peak demand of less than 20 kW, as required by § 331(h), but not be served under one of the rate schedules listed in Rule 1. A conflict exists because under § 331(h), the complainants are considered "small commercial," even though they are served on Schedule GS-2. However, under SCE's Rule 1, the complainants are not considered "small commercial" customers because they do not receive service under the schedules listed in Rule 1. Thus, the complainants, and 27,877 other GS-2 customers, have been denied the 10% rate reduction because they received service on the GS-2 schedule.[8]

SCE's Rule 1 was developed as part of the utilities' direct access implementation plan and the pro forma tariffs which addressed the direct access

[8] The complainants assert that SCE admitted in discovery in the civil action that there are 27,877 GS-2 customers whose maximum demand has never exceeded 20 kW.

terms and conditions.[9] The complainants assert that SCE falsely represented to the Commission that its GS-1 rate schedule was synonymous with the definition of small commercial customer in § 331(h). The complainants contend that this misrepresentation occurred in the direct access implementation plan wherein it was stated:

> "Edison's residential and small commercial customers are those served on rate schedules in the Domestic and GS-1 rate groups. PU Code Section 331(h) defines 'small commercial customer' as a customer that has a maximum peak demand of less than 20 kW, which is consistent with Edison's GS-1 rate schedule." (R.94-04-031, Direct Access Implementation Plan, July 1, 1997, p. 14.)

The complainants assert that the above statement is misleading because SCE failed to mention that small commercial customers with maximum peak demands of below 20 kW, such as the complainants, could also take service on Schedule GS-2. As a result of this misrepresentation, certain small commercial customers were improperly precluded from receiving the 10% rate reduction provided for in § 368.

The direct access implementation plan and the pro forma tariffs were approved in D.97-10-087, and SCE was ordered to file conforming tariffs. (76 CPUC2d 287, 333-334.) In compliance with D.97-10-087, SCE filed Advice Letter 1268-E on November 25, 1997, which included SCE's Rule 1 definition. The advice letter slightly changed the wording of Rule 1 by deleting

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[9] A joint direct access implementation plan was filed in R.94-04-031 on July 1, 1997, and the pro forma tariffs addressing the direct access terms and conditions were filed on July 15, 1997. SCE made subsequent revisions to its proposed tariffs and rate schedules on July 25, 1997, September 16, 1997, and October 15, 1997. (76 CPUC2d at pp. 296, 376, fn. 4.)

the phrase "For purposes of Rate Reduction Bonds." The advice letter subsequently went into effect without protest.

The complainants contend that SCE made the same misrepresentation in its application for a financing order, which was decided in D.97-09-056. SCE's testimony in its financing order application described which rate schedules should be considered eligible for the 10% rate reduction. SCE's testimony stated:

> "For purposes of rate reduction as well as the fire wall provisions of AB 1890, Edison's residential and small commercial customers are those served on rate schedules in the Domestic and General Service ('GS-1') rate groups. [Footnote: 'These include all customers on Schedules D, D-APS, D-CARE, DE, DM, DMS-1, DMS-2, DMS-3, DS, TOU-D-1, TOU-D-2, TOU-EV-1, TOU-EV-2, GS-1, TOU-GS-1, TOU-EV-3, and GS-1 customers taking service on GS-APS.'] PU Code Chapter [sic] 331(h) defines 'small commercial customer' as a customer that has a maximum peak demand of less than 20 kW. This definition corresponds to all customers served on rate schedules in Edison's GS-1 rate group. As defined in Edison's tariffs, these rate schedules are open to general service customers with maximum demands of less than or equal to 20 kW." (A.97-05-018, SCE "Proposed Ratemaking and Tariff Changes," May 6, 1997, p. II-2.)

The complainants contend that the above statement was false because it failed to include the GS-2 rate schedule as one of the schedules open to general service customers with a maximum demand of less than or equal to 20 kW. While Schedule GS-2 sets an upper limit on the customer's demand, it does not prevent customers with a demand of less than 20 kW from taking service under this schedule.

Although the Commission adopted SCE's small commercial customer definition in the financing order decision, the complainants contend that the

Commission thought it was approving a definition that was consistent with § 331(h), as evidenced by the following passage in D.97-09-056:

> "The Commission finds that the issuance of RRBs, coupled with a 10% rate reduction for residential and small commercial (a small commercial customer is defined by PU Code Section 331(h) as one whose maximum peak demand is less than 20 kilowatts) beginning on January 1, 1998, and continuing through the rate-freeze period, will lower rates residential and small commercial customers would have paid if this financing order were not adopted." (75 CPUC2d at 563.)

The complainants also point out that D.97-09-056 referenced that the rate reduction must be consistent with D.96-12-077 (70 CPUC2d 207), the decision regarding the utilities' cost recovery plans. Ordering paragraph 1 of D.96-12-077 stated that the approval of the cost recovery plans was "subject to the limitations discussed in this opinion." One of these limitations was expressed as follows:

> "For these reasons our approval of the plans is subject to the following principles:
>
> - To the extent that any element of the plans or of this decision is inconsistent with § 368 or any other provision of AB 1890, the language of the statute prevails." (70 CPUC2d at 218.)

In SCE's cost recovery plan application, SCE referred to small commercial customers as those customers in "Rate Schedule GS-1." By defining small commercial customers to mean only those customers on Schedule GS-1, the complainants assert that SCE's cost recovery plan was in conflict with § 331(h) because customers on a GS-2 rate schedule can also be small commercial customers. Although the Commission approved SCE's cost recovery plan application in D.96-12-077, the complainants contend that the Commission

thought it was approving a plan that was wholly consistent with AB 1890, as evidenced from the following footnote reference in D.96-12-077 regarding the 10% rate reduction: " 'Small commercial customer' is defined as a customer with a maximum peak demand of less than 20 kilowatts (§331(h))." (70 CPUC2d at 220, 234, fn. 2.)[10]

Thus, the complainants assert that D.97-09-056 can only be consistent with D.96-12-077 if the definition of small commercial customer in § 331(h) prevails over any contrary definition approved in D.97-09-056.

The complainants also assert in their opening brief at page 27 that all subsequent tariffs proposed by SCE had to comply with the cost recovery plan framework approved in D.96-12-077. Since SCE's Rule 1 is in conflict with § 331(h), the complainants assert that Rule 1 is in violation of D.96-12-077.

The complainants also argue that even if SCE filed a tariff that complied with the financing order decision, that tariff did not comply with the cost recovery plan decision and § 331(h), and that under the case of Pink Dot v. Teleport Communications Group (2002) 89 Cal.App.4th 407, SCE can be held liable, and the Commission has the authority to reject SCE's tariff because it does not comply with a prior order.

The complainants also contend that D.97-08-056 (74 CPUC2d 1) is another example of the Commission's pronouncements regarding small commercial customers. One of the parties that participated in that proceeding

[10] The complainants contend that the Commission was unaware in D.96-12-077 that SCE's definition of small commercial customer was in conflict with § 331(h). This lack of awareness was due to "SCE's false representation that *only* GS-1 customers – and not GS-2 customers – could have maximum peak demands of less than 20 kw." (Complainants' Opening Brief, p. 8.)

proposed that time-of-use customers should not be eligible for the 10% rate reduction. In rejecting that proposal, the complainants contend that the Commission made it clear that the statutory definition of a small commercial customer was paramount, as evidenced by the statement in D.97-08-056 that:

> "Notwithstanding any administrative difficulties which may result, AB 1890 requires that residential and small commercial customers receive the rate reduction. In so doing, it does not distinguish between time-of-use customers and others. We therefore require that the utilities offer the reduction to all residential and small commercial customers, including those who subscribe to time-of-use schedules." (74 CPUC2d at 29.)

The complainants contend that ordering paragraph 12.a. of D.97-08-056 reinforced this concern when the Commission stated:

> "PG&E, Edison, and SDG&E shall file tariffs within 15 days of the effective date of this order which incorporate the provisions of this order and which shall not include any changes to the tariffs not anticipated or required by this order. The tariffs shall reflect the revenue requirements for each utility set forth in Ordering Paragraphs herein and shall:
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> a. Provide the 10% discount mandated by AB 1890 to residential and small commercial customers on all types of rate schedules and recover the cost of paying off the rate reduction bonds from the same classes of customers." (74 CPUC2d at 43.)

The complainants contend that D.97-08-056 reflects the Commission's view that a customer's maximum peak demand, and not the rate schedule, should dictate whether the customer is a small commercial customer. The complainants acknowledge, however, that this view is impossible to reconcile with the Commission's subsequent approval of SCE's Rule 1 definition of a small commercial customer in D.97-09-056. SCE's Rule 1, which is based on a

customer's rate schedule, does not include customers who receive service on Schedule GS-2. The complainants assert that this inconsistency is due to the fact that SCE misrepresented its rate schedules to the Commission.

The complainants contend that the consequences of SCE's false representations are that SCE's Rule 1 definition of a small commercial customer, as adopted in D.97-10-087, and the adoption of SCE's small customer definition in D.97-09-056, must be voided to the extent it conflicts with the Code. The complainants assert that such a result should occur because the Commission is required to act in accordance with the statutory directives of the legislature. The rate schedules that the Commission adopted only gave the 10% rate reduction to GS-1 customers, which did not satisfy the criteria set forth in §§ 331(h) and 368(a). The complainants therefore seek a refund from SCE equivalent to the 10% rate reduction as called for in § 331(h), but which was denied to them because of SCE's Rule 1.

Even if SCE complied with the Rule 1 definition approved by the Commission, this is not a defense to the complainants' contention that SCE failed to provide the 10% rate reduction to small commercial customers as defined in § 331(h). The complainants contend that § 532 gives the Commission the discretion to allow exceptions to the prohibition against utilities deviating from their tariffs. (*See* D.98-11-063.) The complainants also point out other instances of when the Commission revisited an illegal tariff long after the effective date of the tariff. Since SCE's Rule 1 definition of a small commercial customer is contrary to § 331(h), the complainants argue that the Commission has the authority to grant relief in this situation. Furthermore, since SCE misled the Commission in approving the tariff, the Commission should take affirmative steps to remedy the fraudulent conduct by SCE. That is, the Commission should

require SCE to correct its defective tariff, and put the parties in the same position they would have been in if the tariff had not been defective, *i.e.*, pay a refund to the complainants.

B. SCE

SCE contends that the Commission did not authorize the 10% rate reduction for customers on rate schedules in the GS-2 rate group. Instead, D.97-09-056 only designated those customers on rate schedules in SCE's "Domestic and General Service (GS-1) rate group[s]" as eligible to receive the 10% rate reduction beginning January 1, 1998. (75 CPUC2d at 570, 580.)

In order to understand the issues in this complaint, SCE states that one must have an understanding of the terms and conditions of the GS-1 and GS-2 schedules. Schedule GS-2 is the default rate schedule within the GS-2 rate group, and Schedule GS-1 is the default rate schedule within the GS-1 rate group. These rate groups were established in D.96-04-050 (65 CPUC2d 362).

Schedule GS-2 is a demand-metered schedule with a customer charge and a two-tiered block energy charge. This schedule is mandatory for customers whose demand has exceeded 20 kW (but less than 500 kW) during three of the prior twelve months. Customers on Schedule GS-2, whose monthly demand registers 20 kW or less for twelve consecutive months or who permanently change their operations such that SCE believes the load will be less than 20 kW, may transfer to another applicable rate schedule such as Schedule GS-1. Such transfers are at the discretion of the customer. This provides a customer, with a consistent demand of less than 20 kW, the opportunity to switch to a GS-1 schedule to take advantage of the 10% rate reduction and the commensurate obligation to repay the revenue reduction bond (RRB) transaction. SCE contends that this flexibility meets the criteria of § 331(h). SCE states that some customers,

whose maximum peak demands are less than 20 kW, choose to remain on Schedule GS-2 instead of Schedule GS-1 because their bills are lower due to the rate structure.

Schedule GS-1 is not a demand-metered schedule. Instead, it has a customer charge and an energy charge. Customers on rate schedules in the GS-1 rate group are general service customers whose monthly peak demand must not exceed 20 kW. A customer served on Schedule GS-1 must transfer to Schedule GS-2 or other applicable tariff in the GS-2 rate group if, in SCE's opinion, the customer's maximum demand is expected to exceed 20 kW, or if the customer's maximum demand exceeds 20 kW in any three of the prior twelve months.

SCE states that it conducted an analysis of its Schedule GS-2 customers to identify which customers could benefit by switching to the GS-1 rate group. SCE notified those GS-2 customers about their ability to transfer and the possible impact of such a transfer.

Contrary to the complainants' assertion that "they have always had maximum peak demands of less than 20 kw," SCE states that its records show that Anchor has three accounts on Schedule GS-2, and other accounts on the GS-1 schedule which received the 10% rate reduction. The three GS-2 accounts have demands which exceed 20 kW, and have never been less than 20 kW for twelve consecutive months. Thus, if the complainants' interpretation of § 331(h) was applied to these three accounts, they would not have been eligible for the 10% rate reduction.

As for Tommy's account, SCE does not dispute that Tommy's demand has not exceeded 20 kW. SCE points out that Tommy's could have transferred from the GS-2 schedule to the GS-1 schedule, but failed to do so. By failing to

exercise its transfer right, and remaining on the GS-2 rate schedule, Tommy's waived its right to the 10% rate reduction.

SCE states that it complied with the financing order decision and the applicable tariffs when it denied the 10% rate reduction to the complainants because Schedule GS-2 customers are excluded from the 10% rate reduction.

SCE asserts that the Commission reasonably and properly construed §§ 331(h) and 368(a) when it adopted the eligibility criteria for the 10% rate reduction and Schedule RRB in D.97-09-056. Following the issuance of D.97-09-056, the Energy Division determined that Schedule RRB was in compliance with this financing order and approved SCE's tariff, which became effective on December 10, 1997.

SCE asserts that the Commission's interpretation of § 331(h), § 368(a), and the other provisions of AB 1890, took into consideration the legislative intent, practical limitations, and administrative concerns. These considerations included the following. Section 331(h) does not specify whether the maximum peak demand of a small commercial customer is to be measured on an hourly, daily, monthly, or annual basis, or whether it is to be measured only during the peak demand periods for each utility. Section 331(h) does not specify which rate schedules are eligible for the rate reduction, even though rate schedules are used for billing purposes. In addition, § 331(h) does not specify what constitutes a commercial customer, *i.e.*, whether it includes agricultural customers, churches, or other customers whose demands are less than 20 kW. Also, customers are not billed on whether or not in a particular month their maximum peak demand exceeded 20 kW. Due to customers' demands varying from day-to-day and month-to-month on different rate schedules, the Commission had to interpret §§ 331(h) and 368(a) in order to implement the 10% rate reduction.

SCE contends that the Commission used its expertise and understanding to determine which rate schedules are generally considered commercial, and which schedules are for customers whose demand may exceed or be less than 20 kW. The Commission correctly determined that for purposes of implementing the 10% rate reduction, only those commercial customers served in the GS-1 rate group were eligible, and commercial customers served on rate schedules in other rate groups were not eligible. D.97-09-056 complied with § 331(h) because SCE customers served on rate schedules in the GS-1 rate group must have demands of less than 20 kW for at least 9 months out of the prior 12-month period. Customers in the GS-2 rate group, however, can have any number of months of peak demand in excess of 20 kW. Had SCE provided the 10% rate reduction to customers on Schedule GS-2, SCE would have violated D.97-09-056.

Schedule RRB specifies that customers with demands of less than 20 kW who are served on rate schedules GS-1, TOU-GS-1, and TOU-EV-3, are eligible for the 10% bill credit. Schedule RRB was approved as in compliance with the financing order decision, and went into effect on December 10, 1997. SCE contends that Schedule RRB does not conflict with § 331(h) because the schedule ensures that any customer eligible for the 10% rate reduction must have a monthly peak demand of less than 20 kW, as required by that code section.

SCE asserts that the complainants' contention about the applicability of the Pink Dot case to SCE's Schedule RRB is distinguishable because SCE complied with D.97-09-056. The Commission adopted the proposed Schedule RRB that decision, and the Energy Division subsequently approved the same tariff. Schedule RRB fully complies with § 331(h) because it allows all general service commercial customers, whose demands are less than 20 kW, to

receive the rate reduction. The Pink Dot case is distinguishable because in that case the court determined that the utility had not complied with a Commission decision.

SCE contends that the complaint is an improper and untimely challenge to D.97-09-056 and the Commission's implementation of the 10% rate reduction. The complaint is based on the allegation that the Commission-adopted criteria for the implementation of the 10% rate reduction, as reflected in Schedule RRB, is inconsistent with § 331(h). SCE asserts that since the complainants did not file a timely application for rehearing of the decision, and no one else challenged the adopted eligibility criteria for the rate reduction, D.97-09-056 is final and binding.

Although the Commission can reconsider and modify a prior decision, SCE contends that the complainants failed to provide notice to the other parties that they are seeking to modify a prior Commission decision. In addition, since more than one year has elapsed from the effective date of D.97-09-054, the complainants' petition to modify must explain why the petition for modification was not filed within this time. SCE asserts that the complainants could have brought their complaint or a petition for modification long ago because the 10% rate reduction in 1998 was well publicized, and the complainants' bills did not reflect the 10% reduction.

The complainants' argument that the cost recovery plan decision and the approval of Schedule RRB in the financing order decision was based on SCE's false information is a complete fabrication and unsupported by the record in those proceedings. SCE contends that it never represented to the Commission in either of those proceedings that only GS-1 customers, and not GS-2 customers, could have maximum peak demands of less than 20 kW. The fact that SCE's

testimony did not state that customers served on Schedule GS-2 could have demands of less than 20 kW, does not mean that SCE misled the Commission.

SCE points out that its prepared testimony in the financing order proceeding clearly stated that for the "purposes of the rate reduction as well as the fire wall provisions of AB 1890, Edison's residential and small commercial customers are those served on rate schedules in the Domestic and General Service ('GS-1') rate groups. [Footnote]" ("Proposed Ratemaking and Tariff Changes," supra, p. II-2.) The footnote reference to this statement specifically enumerated the rate schedules that would receive the 10% rate reduction, and clearly excluded Schedule GS-2. SCE's proposal did not base the 10% rate reduction on whether a customer had a peak demand of less than 20 kW in any month. Instead, all of the customers served on rate schedules in SCE's GS-1 rate group must have monthly maximum peak demands of less than 20 kW.

SCE also points out that the Commission was aware that Schedule GS-2 customers could have demands of less than 20 kW, as discussed in D.97-09-054 (75 CPUC2d at 505-506), and D.97-09-056 (75 CPUC2d at 569-570). SCE asserts that the Commission never intended to implement § 331(h) in a manner that provides a 10% rate reduction to any customer's monthly bill, on any rate schedule, whenever that customer's peak demand does not exceed 20 kW.

SCE also contends that the complainants' argument that D.97-09-054 is "ambiguous and self-contradictory" is wrong. SCE asserts that the Commission unambiguously determined that the customers served in SCE's GS-2 rate group were not eligible for the 10% rate reduction.

The complainants also claim that SCE unilaterally decided to exclude all GS-2 customers from its definition of small commercial customer in Rule 1 and Schedule RRB, in violation of ordering paragraph 12(a) of D.97-08-056, the

unbundling decision. SCE contends that the approval of Rule 1 and Schedule RRB were not inconsistent with D.97-08-056. The complainants' interpretation of that ordering paragraph would mean that the 10% rate reduction must be provided to any customer whose demand is less than 20 kW without regard to which rate schedule they are on. Such an interpretation of D.97-08-056 and § 331(h) would require SCE to make all of its rate schedules eligible for the 10% rate reduction since customers on any schedule may, at times, have peak demands of less than 20 kW. SCE also asserts that it did not violate D.97-08-056 because the eligibility criteria for the 10% rate reduction was adopted in D.97-09-054, and not in D.97-08-056.

SCE also points out that the Rule 1 definition of a "small commercial customer" was developed in the direct access implementation proceeding, and not during the establishment of the eligibility criteria for the 10% rate reduction. The complainants' argument that the direct access implementation proceeding "described how each utility would implement the 20 kw threshold for purposes of determining eligibility for the 10% rate reduction"[11] is simply incorrect. The complainants' argument that SCE "falsely represented to the Commission that its GS-1 rate schedule was synonymous with 'small commercial customer' as defined in §331(h)"[12] is the same argument that the complainants raised with respect to Schedule RRB, which was mentioned earlier.

The complainants' assert that the advice letter for the approval of Rule 1 went into effect 40 days after it was filed. SCE points out that the approval of Rule 1 did not occur until February 26, 1999, with a tariff effective

[11] Complainants' Opening Brief, p. 13

date of January 4, 1999. Thus, the approval of SCE's Rule 1 did not occur until almost 14 months after SCE had commenced providing the 10% rate reduction.

SCE also contends that the Commission was aware, based on SCE's testimony in its financing order application, that customers taking service on Schedule GS-2 could have peak demands of less than 20 kW but would not be eligible for the 10% rate reduction, nor would they be responsible for paying the fixed transition amount (FTA) charges. (*See* "Proposed Ratemaking and Tariff Changes," supra, pp. III-6 to III-7.)

SCE points out that the use of the GS-1 and GS-2 rate groups for determining eligibility for the 10% rate reduction is also consistent with the divisions used for the "firewall" to segregate the recovery of competition transition charge exemptions granted to residential and small commercial customers from other customers. (*See* D.97-06-060 [72 CPUC2d 736, 779, 790]; A.96-08-001, Ex. 10, p. 11.)

The complainants contend that the cost recovery plan decision, D.96-12-077, requires SCE to provide the 10% rate reduction to any customer on any rate schedule whose demand is less than 20 kW. SCE asserts that this argument has no factual or legal merit and misconstrues the effect of the cost recovery plan decision. SCE points out that this decision only approved a general framework for the recovery of transition costs. The details of financing the 10% rate reduction and the eligibility of customers for the rate reduction was considered in the financing order application. To the extent there is any inconsistency between the financing order and the cost recovery plan decision,

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[12] Complainants' Opening Brief, p. 13.

SCE asserts that the more recent and specific decision on eligibility would prevail. In addition, the complainants' contention that they were improperly denied the 10% rate reduction is an improper collateral attack on the financing order, which is prohibited by § 1709.

SCE also contends that §§ 841(c) and 842(d)[13] limit the Commission's ability to alter or amend the financing order, despite the authority under § 1708 to alter or amend a prior decision following notice and the opportunity to be heard. SCE asserts that it relied upon the eligibility criteria adopted in the financing order decision when it sized the amount of RRBs it needed to provide the 10% rate reduction. In addition, the time period for the 10% rate reduction has ended, and there are no more savings to be provided by the RRBs. SCE contends that any change to the eligibility criteria would alter the financing order decision, which would violate §§ 841(c) and 842(d).

At the prehearing conference, the complainants requested that if the Commission decides to deny the complaint because of a procedural deficiency, the Commission should still find that SCE violated the law.[14] As set forth in the

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[13] Section 841(c) provides in part that "the financing orders and the fixed transition amounts shall be irrevocable and the commission shall not have authority either by rescinding, altering, or amending the financing order or otherwise, to revalue or revise for ratemaking purposes the transition costs, or the costs of providing, recovering, financing, or refinancing the transition costs, determine that the fixed transition amounts or rates are unjust or unreasonable, or in any way reduce or impair the value of transition property either directly or indirectly by taking fixed transition amounts into account when setting other rates for the electrical corporation…." Section 842(d) provides that Commission action "with respect to the subject matter of a financing order shall be binding upon the commission … and the commission shall have no authority to rescind, alter, or amend that requirement in a financing order."

[14] *See* Reporter's Transcript at pages 8 and 9.

preceding paragraphs, SCE contends that it did not violate the law. Instead, SCE complied with the financing order, other Commission decisions, and the applicable tariffs. Accordingly, SCE requests that the Commission deny the complaint and make the following findings:

> "1. By virtue of its knowledge and approval of SCE's rate schedules, of the provisions it adopted to prevent FTA charge bypass by GS-1 rate group customers who elect to transfer to other rate groups, and its own expertise, the Commission is aware that customers served on rate schedules outside SCE's GS-1 rate group can at times have peak demands of less than 20 kW.
>
> 2. In establishing the eligibility criteria for the 10% rate reduction in the Financing Order, the Commission interpreted Sections 331(h), 368(a), and other provisions of Assembly Bill (AB) 1890.
>
> 3. The Financing Order reasonably interpreted Sections 331(h), 368(a) and provided the 10% rate reduction to customers served in SCE's GS-1 rate group, but not to customers served on schedules in the GS-2 rate group, including customers served on Schedule GS-2.
>
> 4. Schedule RRB, which lists the rate schedules eligible for the 10 percent rate reduction in the GS-1 rate group, but none in the GS-2 rate group, was proposed by SCE and was adopted by the Commission in the Financing Order.
>
> 5. SCE filed Schedule RRB in Advice Letter 1253-E, and the Energy Division approved it in compliance with the Financing Order.
>
> 6. The Financing Order and Order Denying Rehearing held that the same customer groups who receive the 10 percent rate reduction must repay the rate reduction bonds.
>
> 7. Any Schedule GS-2 customer whose demand is below 20 kW for 12 months qualifies for service in SCE's GS-1 rate group, and could either choose to transfer to a rate schedule in the GS-1 rate group and receive the 10 percent

rate reduction on a rate schedule in the GS-1 rate group, or choose to remain on Schedule GS-2.

8. No party to the Financing Order proceeding asserted any legal error with regard to the eligibility criteria the Commission adopted during the 30-day statutory period in which legal errors in Commission decisions may be asserted pursuant to Sections 1731(b) and 1732.

9. The Financing Order is a final decision of the Commission, not subject to alteration pursuant to Section 1708 due to specific restrictions on such alterations imposed by Sections 841(c) and 842(d).

10. In accordance with Sections 702 and 532, SCE must comply with the Financing Order and Schedule RRB. Therefore, SCE was obligated to deny the 10 percent rate reduction to any SCE customer, such as Anchor, who is served on Schedule GS-2.

11. SCE did not violate Section 330(w), 331(h), or 368(a) in denying Anchor, or any other Schedule GS-2 customer, the 10 percent rate reduction." (SCE, Oct. 29, 2002 Opening Brief, pp. 20-21.)

Discussion

A. Introduction

The complainants' arguments center around the assertions that several Commission decisions and related tariffs are invalid because the decisions and tariffs adopt a definition of small commercial customer that is at odds with the statutory definition of "small commercial customer" contained in § 331(h). The decisions which the complainants assert are void are the cost recovery plan decision (D.96-12-077), the financing order decision (D.97-09-056), and the direct access implementation plan decision (D.97-10-087). In addition, the complainants assert that the approval of SCE's Rule 1 and Schedule RRB are invalid and violate § 331(h) and the cost recovery plan decision. (*See* October 29, 2002 Complainants' Opening Brief, pp. 18-19.)

Before we decide whether the complainants' allegations should be addressed, there is the procedural issue of whether the complaint should be allowed to proceed. As recognized in the ALJ's September 10, 2002 ruling and the May 8, 2003 scoping memo and ruling, we must first address whether the complainants' allegations regarding the conflict between § 331(h) and the decisions and tariffs implementing the 10% rate reduction were timely or not.

The complaint and the answer, and the briefs that the parties were allowed to file, suggest three theories for resolving this procedural issue. The first theory is whether the relief sought by the complaint was timely filed with the Commission. That is, should the complainants have raised their issues in timely applications for rehearing of the decisions or in petitions for modification of the decisions. The second theory is whether the decisions should be revisited due to possible misrepresentations made by SCE to the Commission. The third theory is whether sufficient grounds exist to allow the Commission to reexamine decisions after the time for rehearing has passed.

We address the three theories below.

B. Application for Rehearing and Petition for Modification

The complainants' challenge to the decisions and tariffs regarding the 10% rate reduction raises the legal issue of whether the complainants exercised a timely legal challenge to these decisions and tariff provisions. This timeliness issue is apparent from a review of the allegations in the complaint.

The complaint states:

> "COMPLAINANTS contend that DEFENDANT's failure to provide the 10% Rate Reduction to them is in violation of Public Utilities Code §§ 330(w), 331(h) and 368(a), the Commission's Orders and approved tariffs, as well as the Legislative intent of the Electric Restructuring Act (Public Utilities Code §330 *et seq.*)." (Complaint, p. 4.)

The complaint at page 6 referenced the cost recovery plan decision, D.96-12-077, wherein the Commission stated that its approval of the cost recovery plan was subject to the principle that:

> "To the extent that any element of the plans or of this decision is inconsistent with § 368 or any other provision of AB 1890, the language of the statute prevails." (*See* 70 CPUC2d at 218, 232.)

The complaint at page 7 also mentions in footnote 2 of D.96-12-077 (70 CPUC2d at 234) that the term "small commercial" was defined a follows:

> " 'Small commercial customer' is defined as a customer with a maximum peak demand of less than 20 kilowatts. (§ 331(h))"

In addition, the complainants contend that the statements in D.97-08-056 support their contention that the statutory definition of a small commercial customer is paramount.

The complaint also alleges that SCE's Rule 1 definition of a "small commercial customer" is in conflict with § 331(h), and that SCE had a lawful duty to alert the Commission that the Rule 1 definition was not in compliance with the statute. The complaint states:

> "The SCE Rule 1 definition … ignores the customer's actual kilowatt demand usage, and instead uses a customer's rate schedule as the criterion. This criterion has no basis in the Electric Deregulation Act or Commission decisions. Public Utilities Code §331(h) is clear that demand is the exclusive factor for 'small commercial customer' status. To find DEFENDANT's position persuasive, the Commission would have to accept that it knowingly (1) approved an inconsistent definition from the statute; (2) set up a direct conflict with its earlier decisions and orders; (3) violated its own principal that the statute would prevail where there were inconsistencies; (4) created arbitrary separate treatment for a class of utility consumers; (5) discriminated

> against other public utilities; and (6) ran counter to its expressed directives to conform its decisions to the statute." (Complaint, pp. 7-8.)

Thus, the complainants argue that the financing order decision can only be consistent with the cost recovery plan decision if the statutory provisions of AB 1890, including the definition of small commercial customer in § 331(h) prevails over any contrary definition approved in the financing order decision.

The complaint further states that SCE was informed about the rate reduction issue for GS-2 customers when it received a letter dated April 20, 2000 from one of its GS-2 customers asking why the customer was not receiving the rate reduction, even though AB 1890 requires that all small commercial customers be given the reduction. The complaint states that SCE "did nothing then and has done nothing since to correct it…," nor has SCE "brought the question or matter to the attention of the Commission. (Complaint, p. 14.)

Since the allegations listed above assert that SCE's Rule 1 and various decisions violate § 331(h) or prior Commission decisions, we address the issue of whether the complaint was timely filed.

We first note that the complaint refers to SCE's Rule 1 as being in violation of § 331(h), but does not specifically refer to Schedule RRB. One of the complainants' arguments is that SCE did not include the GS-2 rate schedules as part of the list of schedules eligible for the 10% rate reduction. The list of schedules that designated which group of customers were eligible for the 10% rate reduction, and which the complainants take issue with, is Schedule RRB. Proposed Schedule RRB was approved in D.97-05-056, and Schedule RRB was subsequently approved by the Energy Division as in compliance with that decision. (75 CPUC at pp. 570, 578, 580.) Rule 1 was approved by the Commission in D.97-10-087, and not in D.96-12-077 as stated by the complainants

at page 7 of their complaint. Thus, our decision addresses the timeliness of challenges to both Rule 1 and Schedule RRB.

Section 1731(b) provides that an application for rehearing of a Commission decision must usually be filed within 30 days of the date of issuance of the decision.[15] That subdivision also provides that "No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing…."

Section 1732 provides that:

> "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."

The complainants' contention that the 10% rate reduction should apply to anyone who has demand of less than 20 kW is a challenge to the Commission's interpretation of § 331(h) as developed in the cost recovery plan decision, the financing order decision, and the direct access implementation plan decision. It is undisputed, however, that the complainants did not file any applications for rehearing of these three decisions, or any other decision that addressed the "small commercial customer" definition in § 331(h).[16] Although applications for rehearing of those decisions were filed by other parties, no one raised the issue of whether the Commission's adoption of SCE's Rule 1 and

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[15] The exceptions to the 30 days are noted in subdivisions (b) and (c) of § 1731.

[16] In addition, the complainants did not file any protests to the advice letter filings which sought approval of SCE's Rule 1 or Schedule RRB.

Schedule RRB violated § 331(h) or other Commission decisions, nor did the Commission address that issue in its decisions regarding the applications for rehearing. Since no one raised in their applications for rehearing the issue about the conflict with § 331(h), or that the decisions were internally inconsistent, inconsistent with each other, or ambiguous, the decisions regarding SCE's Rule 1 and Schedule RRB are final and conclusive. (*See* Sale v. Railroad Commission of California (1940) 15 Cal.2d 612, 616.)

Section 1709 provides that: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." This code section is designed to prevent a party from making a collateral attack on a Commission decision. (D.92-12-023 [47 CPUC2d 51, 55].) A collateral attack is an attempt to impeach the judgment or order in a proceeding other than that in which the judgment was rendered. (Harley v. Superior Court (1964) 226 Cal.App.2d 432, 435; Clark v. Deschamps (1952) 109 Cal.App.2d 765, 769; Rico v. Nasser Brothers Realty Company (1943) 58 Cal.App.2d 878, 882.)

Based on the allegations in the complaint and the position of the complainants, as stated earlier in this decision, the complaint at issue in this proceeding amounts to a collateral attack on the underlying Commission decisions. The complainants' allegations that SCE's Rule 1 and Schedule RRB violate § 331(h) and certain Commission decisions is an untimely attempt to revisit the determinations that were made in the cost recovery plan decision, the financing order decision, and the direct access implementation plan decision.[17] (*See* Northern California Assn. To Preserve Bodega Head and Harbor, Inc. v.

[17] We also note that the complainants failed to timely protest the SCE advice letters seeking approval of Rule 1 and Schedule RRB.

Public Utilities Commission (1964) 61 Cal.2d 126, 133-135.) The complainants seek to change those decisions by having the Commission alter SCE's Rule 1 and Schedule RRB to extend the 10% rate reduction to GS-2 rate group customers with usage of less than 20 kW. Such collateral attacks on final Commission decisions are specifically precluded by § 1709. (*See* People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 630; D.97-08-072 [74 CPUC2d 613, 616]; D.92-12-023 [47 CPUC2d 51, 55]; D.90-08-031 [37 CPUC2d 130].) As noted in D.97-08-072, the failure to file a timely application for rehearing of a decision cannot be cured by a collateral complaint filing. (74 CPUC2d at 616.) Thus, the complaint should be dismissed with prejudice because the complainants failed to challenge the disputed decisions in a timely manner.

The next issue is whether the complaint should be viewed as a petition to modify the direct access implementation plan decision, in which we approved SCE's Rule 1, and a petition to modify the financing order decision, in which we approved Schedule RRB. We address this issue because the complainants' request for relief is essentially seeking to modify both of those decisions so that GS-2 customers who use less than 20 kW are included within the group of customers eligible for the rate reduction.

Rule 47 of the Commission's Rules of Practice and Procedure addresses the petition for modification of a Commission decision. Subdivision (a) of Rule 47 states in part that "A petition for modification asks the Commission to make changes to the text of an issued decision." Subdivision (b) of Rule 47 provides in part that "A petition for modification must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision."

The relief that the complainants are seeking is based on the alleged conflict of SCE's Rule 1 and Schedule RRB with § 331(h). The complainants request for relief would involve modifying the text of SCE's Rule 1 and Schedule RRB, as well as the text of the direct access implementation plan decision and the financing order decision. However, since the complainants allege that SCE's Rule 1 and Schedule RRB, as adopted in the direct access implementation plan decision and the financing order decision, are in conflict with § 331(h), a petition to modify those two decisions cannot be addressed unless the issue regarding the lawfulness of those two decisions has been litigated. As noted above, the complainants failed to challenge the legality of both of those decisions through the application for rehearing process. Since those decisions are final and conclusive, § 1709 prevents us from modifying the decisions in this complaint proceeding in the manner suggested by the complainants, and bars us from further considering the complaint. The complaint should therefore be dismissed with prejudice.

Normally, our analysis of the relief sought by the complainants would end here because the complainants failed to timely apply for rehearing of the decisions and to timely protest the relevant advice letter filings. However, the complainants have made several other arguments which, due to the allegations, should be addressed. These arguments include alleged misrepresentations by SCE to the Commission, and that SCE failed to comply with Commission decisions and with the Public Utilities Code. These issues are discussed in the succeeding sections.

C. Alleged Misrepresentation

The complaint alleges that the Commission was misled into approving SCE's Rule 1 because SCE failed to list all of the rate schedules that fit within the

definition of § 331(h). (Complaint, pp. 8-9, 11.)[18] The complaint states that SCE "presented false, incomplete and misleading written testimony to the Commission in order to get their Rule 1 definition approved." (Complaint, p. 10.) SCE's Rule 1 did not include any rate schedules in the GS-2 rate group, even though SCE admits that 27,877 GS-2 customers have never exceeded the 20 kW threshold. By omitting the GS-2 rate group from Rule 1, the complainants contend that SCE misled the Commission into believing that SCE's Rule 1 comports with the § 331(h) definition of a small commercial customer, and the 10% rate reduction was denied to the otherwise eligible GS-2 customers.[19]

One example of the alleged misrepresentation, which is cited in the complaint, is the following passage from SCE's testimony in support of its financing order application:

> "PU Code Chapter [sic] 331(h) defines 'small commercial customer' as a customer that has a maximum peak demand of less than 20 kW. This definition corresponds to all customers served on rate schedules in Edison's GS-1 rate group." (Complaint, p. 11, emphasis in complaint; *See* "Proposed Ratemaking and Tariff Changes," supra, p. II-2.)

[18] The complaint also alleges that SCE made the same misrepresentation in SCE's cost recovery plan that was submitted in October 1996. (Complaint, p. 11, fn. 2.) However, as mentioned earlier, SCE's Rule 1 was approved by the Commission in the direct access implementation plan decision, D.97-10-087, and not in the cost recovery plan decision, D.96-12-077.

[19] The complaint notes that the 27,877 number only includes the small commercial customers which SCE has conceded never exceeded the 20 kW threshold. The complainants assert that the "actual magnitude of aggrieved customers is likely to be much greater and the percentage of those who have been denied the benefits of the rate reduction will therefore be exceedingly higher." (Complaint, p. 13, fn. 4.)

The complainants' quote of the passage from SCE's financing order application suggests that only the GS-1 rate group qualifies under the § 331(h) definition.

The complaint also alleges that the commercial customers of PG&E and SDG&E, who use less than 20 kW, receive the 10% rate reduction. The complainants contend that unlike SCE, which made misrepresentations to the Commission, the other two utilities "plainly understood the governing law, the Commission's decisions and orders, and that they did not misrepresent their rate schedules to the Commission when applying for their Financing and Cost Recovery Orders." (Complaint, p. 12.)

The complainants' argument that the financing order decision should be revisited because of SCE's fraud on the Commission and the public relies on the language in Wise v. Pacific Gas and Electric Company (1999) 77 Cal.App.4th 287, 300 where the court stated: "It is inconceivable that the Legislature intended the PUC would be powerless to award reparations where a public utility obtained a tariff rate by fraudulent means."[20]

However, it is clear from a review of the record in the various proceedings that we were aware of the differences between the GS-1 and GS-2 rate groups, and the relationship of these rate groups to § 331(h). A brief recital of some of the materials that were presented to us, and the statements that we made in various decisions, support the inescapable conclusion that we were not misled by SCE into believing that only GS-1 customers had usage of less than 20 kW.

[20] *See* Complainants' Prehearing Conference Statement, pp. 9-10.

In D.96-04-050, which addressed SCE's general rate case for test year 1995, we described SCE's GS-1 and GS-2 rate groups as follows:

> "GS-1, general service lighting and power customers with less than 20 kW demand
> "GS-2, general service lighting and power customers with demand between 20 kW and 500 kW. (65 CPUC2d 362, 388.)

We also described the differences in charges for the GS-1 and GS-2 rate schedules in that decision, stating as follows:

> "GS-1 general service, non-demand metered rate intended for smaller sized customers whose demand does not exceed 20 kW.
>
> …
>
> "GS-2 is a general service demand-metered rate schedule intended for medium-size customers where the customer's demand is generally 500 kW or less." (65 CPUC2d at 442.)

Then in SCE's cost recovery plan, filed on October 15, 1996 or about six months after D.96-04-050 was issued, SCE described the proposed rate reduction as follows:

> "1.2. For Edison's residential and small commercial (Rate Schedule GS-1) bundled service customers, the rate levels as shown on Edison's electric rate schedules as of June 10, 1996, will be reduced by at least 10 percent and frozen during the period January 1, 1998 through the earlier of March 31, 2002 or the date on which the transition costs are fully recovered. [Footnote 8.][21] This rate reduction is expressly contingent upon issuance of Financing Orders and Rate Reduction Bonds." (SCE Cost

[21] Footnote 8 states in pertinent part: "The rate levels will be reduced so that these customers will realize a rate reduction of at least 10 percent after paying a surcharge to repay the principle and interest on the Rate Reduction Bonds."

> Recovery Plan, October 15, 1996, pp. 6-7, R.94-04-031 and I.94-04-032.)

Public Utilities Code § 368 provides that the Commission shall authorize the utility to recover its uneconomic costs if the cost recovery plan meets certain criteria. In discussing the mandatory language of meeting "certain criteria," we stated in the cost recovery plan decision that:

> "This mandatory language, however, does not entirely remove the Commission's discretion with regard to these plans. Our function in relation to these plans is not a merely ministerial one of checking the plans against the listed criteria and stamping our approval if all elements are in place. The criteria specified in § 368, with some exceptions, provide only the broad framework for cost recovery. The utilities' plans provide more detail, filling in some of the gaps in the statutory framework and adding desired elements. Our role includes, among other functions, coordinating the legislative requirements with our existing proceedings that are considering the issues implicated by § 368, and critically reviewing the utilities' additional proposals for consistency with the goals expressed in AB 1890 and in our Policy Decision. Our general role is to approve the overall framework for recovery of transition costs and to provide necessary guidance on some of the details of this cost recovery." (70 CPUC2d 207, 218.)

One of the criteria listed in § 368 is "that rates for residential and small commercial customers shall be reduced so that these customers shall receive rate reductions of no less than 10 percent for 1998 continuing through 2002." (Pub. Util. Code § 368(a).) SCE's cost recovery plan was approved in D.96-12-077,

"subject to the limitations discussed in this opinion." (70 CPUC2d at p. 232.)[22]

Two of these limitations are described as follows:

> "To the extent that any element of the plans or of this decision is inconsistent with § 368 or any other provision of AB 1890, the language of the statute prevails.
>
> …
>
> "The plans vary considerably in their level of detail. Our approval today covers only the general framework for cost recovery outlined in AB 1890 and the details necessary to launch the program for cost recovery. We will continue to address many of the implementation details for the plans in Rulemaking (R.) 94-04-031/Investigation (I.) 94-04-032, our primary restructuring docket, and related ongoing proceedings. In our discussion of the plans, we will refer to specific proceedings where these implementation details are being addressed. Our approval of the cost recovery plans does not dispose of or prejudge our resolution of issues still under consideration in those proceedings; our decision on those issues will, of course, conform to the statute." (70 CPUC2d at 218-219.)

We also described the 10% rate reduction in the cost recovery plan decision as follows:

> "Section 368(a) requires the utilities' plans to include a rate reduction of at least 10% for small commercial [Footnote 2][23] and residential customers. [Footnote 3 omitted]…

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[22] Any challenge by the complainants to the Commission's failure to properly apply the cost recovery criteria to SCE's cost recovery plan should have been raised in an application for rehearing of the cost recovery plan decision. The complainants failed to apply for rehearing of that decision.

[23] Footnote 2 of D.96-12-077 states: " 'Small commercial customer' is defined as a customer with a maximum peak demand of less than 20 kilowatts (§ 331(h))." (70 CPUC2d at 234.)

> "AB 1890 allows the utilities the option of accomplishing the required rate reduction by issuing rate reduction bonds, as described in §§ 840-847. The proceeds from the bonds will be used to 'provide, recover, finance, or refinance' transition costs (§ 840(e)) in order to lower rates for residential and small commercial customers (§ 841(a)). Revenues from these customers will then be used to pay off the bonds (§ 841(a)). The net effect is to defer collection of some of the transition costs allocated to residential and small commercial customers from the recovery period ending no later than March 31, 2002, to a period ending when the bonds are paid off. Issues concerning the relation between bond proceeds and transition cost recovery will be considered in our transition cost proceeding, A.96-08-001 *et al.*" (70 CPUC2d at 220-221.)

From the citations above, it is evident in the cost recovery plan decision that we knew that the utilities' plans contained more details, that SCE was planning to give the small commercial customers on the GS-1 rate schedules the 10% rate reduction, and that we were exercising some discretion with respect to the approval of the cost recovery plans because of gaps in the statutory framework. Although we stated that the language of the statute would prevail if any element of the plan or the cost recovery plan decision was inconsistent with § 368, we approved SCE's plan as meeting the criteria set forth in § 368 and left the implementation details of the 10% rate reduction to another proceeding. We also stated that the resolution of these other issues would conform to the statute. We also recognized in the cost recovery plan decision the interrelationship between those customers who receive the rate reduction and their obligation to pay the associated rate reduction bonds.

There is nothing in SCE's cost recovery plan filing which would lead us to conclude that SCE's description of the proposed rate reduction as applying to small commercial customers on Schedule GS-1 was misleading.

SCE's cost recovery plan was followed by SCE's application for a financing order filed on May 6, 1997 in A.97-05-018. In SCE's "Proposed Ratemaking and Tariff Changes," which was submitted as part of SCE's testimony in support of its financing order application, SCE described which rate schedules would be eligible for the 10% rate reduction:

> "For purposes of the rate reduction as well as the fire wall provisions of AB 1890, Edison's residential and small commercial customers are those served on rate schedules in the Domestic and General Service ('GS-1') rate groups. [Footnote 2.][24] PU Code Chapter [sic] 331(h) defines 'small commercial customer' as a customer that has a maximum peak demand of less than 20 kW. This definition corresponds to all customers served on rate schedules in Edison's GS-1 rate group. As defined in Edison's tariffs, these rate schedules are open to general service customers with maximum demands less than or equal to 20 kW. [Footnote 3.][25] While some customers with peak demands of less than 20 kW are served on agricultural and pumping, street lighting, and traffic control rate schedules, these customers are not considered to be part of the small commercial customer class." ("Proposed Ratemaking and Tariff Changes," supra, p. II-2.)

SCE also proposed that instead of a 10% rate reduction, that eligible customers be given a 10% bill credit. SCE's testimony described the bill credit

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[24] Footnote 2 from this quotation states: "These include all customers on Schedules D, D-APS, D-CARE, DE, DM, DMS-1, DMS-2, DMS-3, DS, TOU-D-1, TOU-D-2, TOU-EV-1, TOU-EV-2, GS-1, TOU-GS-1, TOU-EV-3, and GS-1 customers taking service on GS-APS."

[25] Footnote 3 from this quotation states: "Edison's tariffs define general service as service to any lighting or power installation except those eligible for service on single-family and multifamily domestic, street lighting, outdoor area lighting, traffic control, resale, or standby schedules."

proposal as "simple to administer because it does not require redesigning residential and small commercial rates…." ("Proposed Ratemaking and Tariff Changes," supra, p. II-3.)

SCE's testimony described the relationship between the customers eligible for the rate reduction and their obligation to repay the RRBs through the FTA charge. SCE proposed the establishment of "nonbypassable FTA charges for residential and small commercial customers to recover the Fixed Transition Amounts associated with the issuance of Rate Reduction Bonds." ("Proposed Ratemaking and Tariff Changes," supra, p. II-1.) SCE's testimony described how the FTA charges would be collected from customers who receive the benefit of the 10% rate reduction, but who might change rate schedules to avoid the FTA charges:

> "During the term of the Rate Reduction Bonds, customers may switch to and from any applicable rate schedule within the Domestic and GS-1 rate groups in accordance with existing tariff provisions. However, to ensure credit risks are minimized, it is necessary to take measures to prevent customers from taking advantage of the 10 percent rate reduction but avoiding the repayment period for the bonds by switching to a schedule outside the Domestic or GS-1 rate groups. For example, a customer might take service on a GS-1 rate schedule during the rate freeze period and then switch to an agricultural and pumping rate schedule (not eligible for the rate reduction) to avoid the FTA charge once the rate freeze period has ended. To address this concern, Edison proposes to not allow customers who were served on a rate schedule subject to the rate reduction to voluntarily switch to service on any rate schedule not subject to the FTA charge until the repayment obligations for the Rate Reduction Bonds have been discharged.

> "Customers who no longer meet the applicability for service criteria on a rate schedule that qualifies for the 10 percent discount will no longer receive the 10 percent bill credit nor will they be required to pay the FTA charge. [Footnote omitted] This provision would apply, for example, when a GS-1 customer grows beyond 20 kW and migrates to a rate schedule with a higher demand eligibility criterion such as Schedule GS-2. Edison does not expect this provision to encourage such migration because it is unlikely that customers would add load to grow beyond 20 kW solely for the purpose of avoiding the FTA charges. This provision is consistent with the treatment of the nonbypassable CTC for customers who change rate schedules. Residential customers cannot migrate to a schedule that will not require a FTA charge." ("Proposed Ratemaking and Tariff Changes," supra, pp. III-6 to III-7.)
>
> Proposed Schedule RRB was also attached to SCE's testimony.

Schedule RRB addressed the applicability of the RRBs bill credit of 10% and the FTA charge as follows:

> "Applicable to Domestic service customers served under Schedules D, D-APS, D-CARE, DE, DM, DMS-1, DMS-2, DMS-3, DS, TOU-D-1, TOU-D-2, TOU-EV-1, and TOU-EV-2; to General Service customers with demands of 20 kW or less served under Schedules GS-1 and TOU-GS-1 (including such customers additionally served under Schedule GS-APS) and TOU-EV-3." ("Proposed Ratemaking and Tariff Changes," supra, p. IV-5.)
>
> In the "Special Conditions" portion of proposed Schedule RRB, the obligation to pay for the FTA charge was described as follows:
>
> "1. Removal From Schedule: Once service is provided under this schedule, customers cannot elect to change to a rate schedule for which Schedule RRB is not applicable until the Rate Reduction Bond obligations are discharged. However, customers served under this schedule who subsequently no longer meet the eligibility criteria of their regular rate schedule shall be transferred to another rate

> schedule in accordance with such eligibility criteria and may not continue to be served under Schedule RRB. Such customers will no longer be responsible for paying the FTA charge (*e.g.*, a Schedule GS-1 customer whose monthly maximum demand consistently exceeds 20 kW is required to transfer to Schedule GS-2). ("Proposed Ratemaking and Tariff Changes," supra, p. IV-6.)

In the financing order decision, we recognized that "Edison has provided a general description of the [rate reduction bond] transaction structure in its application and prepared testimony." (75 CPUC2d at 564.)

In the "Eligibility" section of D.97-09-056, we stated the following:

> "The rate reduction applies to residential and small commercial customers as defined by AB 1890. For this purpose, Edison's eligible customers are those served on rate schedules in Edison's Domestic and General Service (GS-1) rate group. [Footnote 5][26] Edison's proposal to address this issue, reflected in its proposed Schedule RRB, and as modified below, is adopted. All other customers will neither receive the rate reduction nor be responsible for FTA charges.[27]
>
> "Subject to the bypass provisions discussed below, customers who no longer meet the applicability for service criteria on a rate schedule that qualifies for the 10% reduction will no longer receive the 10% bill credit, nor will they be required to continue to pay the FTA charge. [Footnote 6 omitted] This provision will apply, for example, when a GS-1 customer's load grows beyond

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[26] Footnote 5 of D.97-09-056 states as follows: "These include all customers on Schedules D, D-APS, D-CARE, DE, DM, DMS-1, DMS-2, DMS-3, DS, TOU-D-1, TOU-D-2, TOU-EV-1, GS-1, TOU-GS-1, TOU-EV-3, and GS-1 customers taking service on GS-APS." (75 CPUC2d at pp. 570, 590.)

[27] Conclusion of Law 32 and Ordering Paragraph 17 of D.97-09-056 summarize which customers are eligible for the 10% rate reduction. (75 CPUC2d at 578, 580.)

> 20 kilowatts and the customer migrates to a rate schedule with a higher demand eligibility criterion, such as schedule GS-2. Edison does not expect that this provision will encourage such migration, because it is unlikely that customers will add load to increase beyond 20 kilowatts, solely for the purpose of avoiding the FTA charges. [Footnote 7 omitted] This provision is consistent with the treatment of nonbypassable competition transition charges in other proceedings for customers who change rate schedules. Residential customers cannot migrate to a schedule which does not require an FTA charge."
> (75 CPUC2d at 570.)

We also stated the following in the financing order decision about how to prevent the bypass of the FTA charge:

> "To ensure credit risks are minimized, it is necessary to take measures to prevent customers from taking advantage of the 10% rate reduction but avoiding the repayment period afterwards by switching to a schedule outside the Domestic or GS-1 rate groups. For example, a customer might take service on a GS-1 rate schedule during the rate freeze period and then switch to an agricultural and pumping rate schedule (not eligible for the rate reduction) to avoid the FTA charge once the rate-freeze period has ended. To address this concern, Edison proposes that customers who were served on a rate schedule in the GS-1 rate group as of January 1, 1998 who voluntarily switch to service on any agricultural and pumping, GS-2, or TOU-GS-2 rate schedule will continue to pay the applicable FTA charge for GS-1 customers until the RRBs have been retired.[28] Edison is authorized to file tariff modifications to

[28] In the decision addressing the financing orders for all three electric utilities, we noted that: "Edison requests that its small commercial customers who no longer meet the service criteria (because, for example, usage grows beyond 20kW) be permitted to migrate to an Edison schedule that includes neither a bill credit (to implement the 10%

Footnote continued on next page

> achieve this result. If a customer migrates from GS-1 to GS-2 due to load growth, which makes the customer no longer eligible for GS-1, the customer should not be required to continue to pay FTA charges." (75 CPUC2d at 570.)[29]

Contrary to the complainants' misrepresentation arguments, both of the above quotations from the financing order decision, and SCE's testimony in support of its financing order, demonstrate that we were fully aware that SCE was not including any GS-2 customers the group of small commercial customers eligible for the 10% rate reduction, and that we were aware of the usage cutoff for GS-1 and GS-2 customers. We were also cognizant of the fact that "[f]or this purpose," SCE's eligible customers were those in the GS-1 rate group, even though § 331(h) did not define a small commercial customer by rate group. (75 CPUC2d at 570, emphasis added.) The quotations also demonstrate that we were aware that the small commercial customers in the GS-1 rate group, who receive the benefit of the rate reduction, would be liable for the FTA charge, whereas the small commercial customers in the GS-2 rate group, who are not eligible for the rate reduction, would not have to pay the FTA charge. All of the citations to the record in A.97-09-018, as summarized above, do not support complainants' contention that SCE misled the Commission about which schedules should be eligible for the 10% rate reduction.

On July 1, 1997, SCE, PG&E, and SDG&E jointly filed the "Direct Access Implementation Plan" in R.94-04-031 and I.94-04-032. Among other things, the

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rate reduction) nor the related fixed transition amounts charge." (D.97-09-054 [75 CPUC2d 494, 505].)

[29] The FTA bypass issue is also summarized in Conclusion of Law 11 and in Ordering Paragraph 13 of D.97-09-056. (75 CPUC2d at 576, 579.)

plan described how the 20 kW threshold would be used to determine eligibility for load profiling, third-party metering services, and the 10% rate reduction. The plan specifically stated that: "The criteria for determining customer eligibility in each case will differ between UDCs because of their different rate schedule eligibility criteria." (R.94-04-031, I.94-04-032, Direct Access Implementation Plan, p. 13.) The plan then described which rate schedules each of the three utilities would use. For SCE, the plan stated:

> "Edison's residential and small commercial customers are those served on rate schedules in the Domestic and GS-1 rate groups. PU Code Section 331(h) defines 'small commercial customer' as a customer that has a maximum peak demand of less than 20 kW, which is consistent with Edison's GS-1 rate schedule. Thus, Edison will use the same criteria for having an hourly meter as is currently used for transitions between GS-1 and GS-2 rates." (R.94-04-031, I.94-04-032, Direct Access Implementation Plan, p. 14.)

The pro forma tariffs, including SCE's Rule 1, and the primary direct access tariff, were approved in D.97-10-087. In the decision, we recognized that each utility's definition of the term "small commercial customer" or "small customer" "affects how it categorizes small customers." (76 CPUC2d at 303.) As part of the definitions in the approved direct access tariff, we stated that:

> "Unless otherwise stated, all references to 'small commercial customers' in this rule will be defined in Rule 1." (76 CPUC2d at 337, 377, fn. 8.) In addition, the direct access tariff also stated that: "All Small Customers, as defined in Rule 1, Definitions, except for agricultural and lighting customers, are eligible for a 10% reduction in rates effective January 1, 1998." (76 CPUC2d at 338.)

SCE's proposed Rule 1 included the definition of "Small Commercial Customer" as follows: "For purposes of Rate Reduction Bonds, customers served

under Schedules GS-1, TOU-GS-1, and TOU-EV-3. (See R.94-04-031, I.94-04-032, "Revised Direct Access Tariff," Sept. 16, 1997.)

It is apparent from the direct access implementation plan and D.97-10-087, that there were differences between the rate schedules of SCE, SDG&E and PG&E. These differences affected the eligibility of small commercial customers for the 10% rate reduction from one utility to the other. The complainants' arguments that SCE misled the Commission about which rate schedules should be eligible for the 10% rate reduction, while SDG&E and PG&E did not, is without merit.

Based on the above discussion, the decisions and tariffs which the complainants allege are in violation of § 331(h) due to SCE's misrepresentations, should not be revisited because the record and decisions demonstrate that no misrepresentation occurred.

D. Independent Liability Theory

The complainants contend at page 1 of the complainants' prehearing conference statement that even if the financing order decision is final, and even if SCE complied with those determinations, SCE has independent liability based on its failure to comply with other Commission orders and with the Public Utilities Code.

We do not agree with the complainants that under the circumstances they should be allowed to pursue their request for relief under an independent liability theory. The complainants' independent liability theory is premised on the complainants' arguments that the financing order decision and other decisions are inconsistent with § 331(h), or are inconsistent with each other or ambiguous. As discussed above, the complainants failed to timely challenge all of the decisions which addressed which customers would be eligible for the 10%

rate reduction. Since the underlying dispute concerns the interpretation of § 331(h) by the Commission and SCE in prior Commission decisions, it is too late for the complainants to challenge the outcome of prior Commission decisions through the means of a complaint proceeding.[30] (*See* 74 CPUC2d at 616.)

Another reason why we should not revisit our prior Commission decisions regarding the 10% rate reduction is because of § 841(c). That subdivision provides in part that "the financing orders and the fixed transition amounts shall be irrevocable and the commission shall not have authority either by rescinding, altering, or amending the financing order or otherwise, to revalue or revise for ratemaking purposes the transition costs, or the costs of providing, recovering, financing, or refinancing the transition costs…."

The complainants' request for relief seeks to expand the 10% rate reduction to include the complainants. However, § 841(c) provides that the financing order is irrevocable, and that the Commission shall not have the authority to revalue or revise the costs of providing the transition costs. Since the time for the complainants to challenge the financing order decision has passed, § 841(c) prevents us from revisiting the financing order decision for the

[30] We note that a complaint may be pursued when the complaint sets "forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission." (Rule 9 of Rules of Practice and Procedure.) However, the situation before us is distinguishable. The underlying premise of the complainants is that the Commission and SCE wrongly interpreted the definition of a small commercial customer in the Commission decisions discussed above. A challenge to the interpretations contained in these decisions should have been raised through an application for rehearing.

purpose of revising the costs of providing the 10% rate reduction to additional customers.[31]

Conclusion

Since the complainants are challenging the interpretation of § 331(h), as contained in various Commission decisions and approved tariffs, the complainants should have filed timely applications for rehearing of the decisions alleged to have violated § 331(h). The complainants' failure to timely apply for rehearing of these decisions, and the provisions of § 841(c), prevent us from revisiting our determination of which small commercial customers of SCE should be eligible for the 10% rate reduction. In addition, the record in the various proceedings and our decisions clearly demonstrate that no misrepresentations occurred as alleged by the complainants. Accordingly, the complaint should be dismissed with prejudice.

Procedural Matters

This complaint was categorized as adjudicatory in the instructions to answer that was issued on April 23, 2002, and evidentiary hearings were originally expected. However, in the scoping memo and ruling, the assigned Commissioner and ALJ recognized that no evidentiary hearings would be needed if the Commission decides that the complainants' challenges to the decisions and tariffs implementing the rate reduction were not timely. Since today's decision concludes that the complainants' challenges to the decisions and tariffs are untimely, and there are no compelling reasons for us to reexamine

[31] We also note that if we were to grant the complainants' request for relief, the complainants would be obligated to pay the associated FTA charge. However, § 841(c) prevents us from revaluing or revising the financing of the transition costs, such as the FTA charge.

these decisions, no evidentiary hearings are needed to resolve this complaint proceeding.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments on the draft decision were filed on _____ and reply comments were filed on _____.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and John S. Wong is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. AB 1890 authorized a rate reduction of no less than 10% for residential and small commercial ratepayers.

2. SCE's cost recovery plan was filed in R.94-04-031 and I.94-04-032 on October 15, 1996, and addressed by the Commission in D.96-12-077.

3. D.97-09-056 approved SCE's financing order, and concluded that those eligible for the 10% rate reduction and who are to pay the FTA charges should be as described in SCE's prepared testimony.

4. Anchor filed a civil action against SCE in Los Angeles Superior Court on April 10, 2001, and the causes of action for a violation of the Unfair Competition Act and fraud were stayed pending a determination by the Commission on whether SCE violated any statute or tariff.

5. Four days before the expiration of the 10% rate reduction, the complainants filed their complaint at the Commission.

6. At the September 24, 2002 prehearing conference, the parties were directed to file briefs on whether the complainants' allegations regarding the lawfulness of the decisions and tariffs were timely filed or not.

7. The complainants' arguments center around the assertions that several Commission decisions and related tariffs are invalid because the decisions and tariffs adopt a definition of small commercial customer that is at odds with the statutory definition of small commercial customer contained in § 331(h).

8. The decisions which the complainants allege are void are the cost recovery plan decision (D.96-12-077), the financing order decision (D.97-09-056), and the direct access implementation plan decision (D.97-10-087).

9. The complainants also assert that the Commission's approval of SCE's Rule 1 and Schedule RRB are invalid and violate § 331(h) and the cost recovery plan decision.

10. Although the complaint did not reference Schedule RRB, one of the complainants' arguments is that SCE did not include the GS-2 rate schedules as part of the list of schedules eligible for the 10% rate reduction as contained in Schedule RRB.

11. Proposed Schedule RRB was approved by the Commission in D.97-09-056, and Schedule RRB was subsequently approved by the Energy Division as in compliance with that decision.

12. SCE's Rule 1 was approved by the Commission in D.97-10-087.

13. Section 1731(b) provides that an application for rehearing of a Commission decision must be filed within 30 days of the date of issuance of the decision, and § 1732 provides that the application for rehearing shall set forth the grounds on which the applicant considers the decision or order to be unlawful.

14. The complainants did not file any applications for rehearing of the cost recovery plan decision, the financing order decision, the direct access implementation decision, or any other decision that addressed the small

commercial customer definition in § 331(h), nor did they file any protests to the advice letter filings which sought approval of SCE's Rule 1 or Schedule RRB.

15. The allegations that SCE's Rule 1 and Schedule RRB violate § 331(h) and certain Commission decisions is an untimely attempt to revisit the determinations that were made in the cost recovery plan decision, the financing order decision, and the direct access implementation plan decision.

16. Rule 47 of the Rules of Practice and Procedure provides that a petitioner may ask the Commission to make changes to the text of an issued decision.

17. Since the relief that the complainants are seeking is based on an alleged conflict of SCE's Rule 1 and Schedule RRB with § 331(h), the relief, if granted, would involve modifying the text of SCE's Rule 1 and Schedule RRB, as well as the text of the direct access implementation plan decision and the financing order decision.

18. It is clear from a review of the record in the various proceedings that we were aware of the differences between the GS-1 and GS-2 rate groups, and the relationship of these rate groups to § 331(h).

19. In D.96-04-050, we described the differences between SCE's GS-1 and GS-2 rate groups, and the differences in charges for the GS-1 and GS-2 rate schedules.

20. From the utilities' cost recovery plans, we knew that each utilities' plan contained more details, that SCE was planning to give the small commercial customers on the GS-1 rate schedules the 10% rate reduction, and that we were exercising some discretion with respect to the approval of the cost recovery plans because of gaps in the statutory framework.

21. In D.96-12-077, we approved SCE's cost recovery plan as meeting the criteria set forth in § 368, left the implementation details of the 10% rate reduction to another proceeding, stated that the resolution of these other issues

would conform to the statute, and recognized the interrelationship between those customers who receive the rate reduction and their obligation to pay the associated rate reduction bonds.

22. SCE's application for a financing order was filed on May 6, 1997 in A.97-05-018.

23. The financing order decision, and SCE's testimony in support of its financing order, demonstrate that we were fully aware that SCE was not including any GS-2 customers in the group of small commercial customers eligible for the 10% rate reduction, that we were aware of the usage cutoff for GS-1 and GS-2 customers, and that for the purposes of the rate reduction the eligible SCE customers are those in the GS-1 rate group even though § 331(h) did not define a small commercial customer by rate group.

24. The financing order decision, and SCE's testimony in support of its financing order, also demonstrate that we were aware that the small commercial customers in the GS-1 rate group, who receive the benefit of the rate reduction, would be liable for the FTA charge, whereas the small commercial customers in the GS-2 rate group, who are not eligible for the rate reduction, would not have to pay the FTA charge.

25. The utilities jointly filed the direct access implementation plan in R.94-04-031 and I.94-04-032 on July 1, 1997.

26. The direct access implementation plan stated that the criteria for determining customer eligibility in each case will differ among the utilities because of their different rate schedule eligibility criteria.

27. SCE's proposed Rule 1 and the primary direct access tariff were approved in D.97-10-087.

28. We recognized in D.97-10-087 that each utilities' definition of "small commercial customer" or "small customer" would affect how it categorizes small customers.

29. The complainants' request for relief seeks to expand the 10% rate reduction to include the complainants.

30. Since today's decision concludes that the complainants' challenges to the decisions and tariffs are untimely, and there are no compelling reasons for us to reexamine these decisions, no evidentiary hearings are needed.

Conclusions of Law

1. The complainants' challenge to the decisions and tariffs regarding the 10% rate reduction raises the legal issue of whether the complainants exercised a timely legal challenge to these decisions and tariff provisions.

2. The complainants' contention that the 10% rate reduction should apply to anyone who has demand of less than 20 kW is a challenge to the Commission's interpretation § 331(h) as developed in the cost recovery plan decision, the financing order decision, and the direct access implementation plan decision.

3. Since no one raised in any application for rehearing the issue about the conflict with § 331(h), or that the decisions were internally inconsistent, inconsistent with each other, or ambiguous, the decisions regarding SCE's Rule 1 and Schedule RRB are final and conclusive.

4. Section 1709 prevents a party from making a collateral attack on a Commission decision.

5. A collateral attack is an attempt to impeach the judgment or order in a proceeding other than that in which the judgment was rendered.

6. The complaint, by seeking to alter SCE's Rule 1 and Schedule RRB to extend the 10% rate reduction to GS-2 rate group customers with usage of less

than 20 kW, amounts to a collateral attack on the underlying Commission decisions, specifically precluded by § 1709.

7. The failure to file a timely application for rehearing of a decision cannot be cured by a collateral complaint filing.

8. The complaint should be dismissed with prejudice because the complainants failed to challenge the disputed decisions in a timely manner.

9. Since the complaint alleges that SCE's Rule 1 and Schedule RRB, as adopted in the direct access implementation plan decision and the financing order decision, are in conflict with § 331(h), a petition to modify those decisions cannot be addressed unless the issue regarding the lawfulness of those two decisions has been litigated.

10. Section 1709 prevents us from modifying the decisions in this complaint proceeding because the direct access implementation plan decision and the financing order decision are final decisions.

11. There is nothing in SCE's cost recovery plan filing which would lead us to conclude that SCE's description of the proposed rate reduction as applying to small commercial customers on Schedule GS-1 was misleading.

12. The citations to the record concerning SCE's financing order in A.97-09-018 do not support the complainants' contention that SCE misled the Commission about which schedules should be eligible for the 10% rate reduction.

13. The citations to the record concerning the direct access implementation plan in R.94-04-031 and I.94-04-032 do not support the complainants' contention that SCE misled the Commission about which schedules should be eligible for the 10% rate reduction.

14. The decisions and tariffs which the complainants allege are in violation of § 331(h) due to SCE's misrepresentations, should not be revisited because the record and decisions demonstrate that no misrepresentation occurred.

15. Since the complainants' independent liability theory is premised on the arguments that the financing order decision and other decisions are inconsistent with § 331(h), or are inconsistent with each other or ambiguous, and because no timely challenges to these decisions were filed, it is too late to challenge the outcome of these prior decisions through the means of a complaint proceeding.

16. Section 841(c) prevents us from revisiting D.97-09-056 for the purpose of revising the costs of providing the 10% rate reduction to additional customers, and from revaluing or revising the financing of the FTA charge.

O R D E R

IT IS ORDERED that:

1. The complaint filed on March 27, 2002 by Anchor Lighting, and Thomas H. Simcox against Southern California Edison Company is dismissed with prejudice.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.