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

October 19, 2004 Agenda ID #3984
Ratesetting

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

**RE:** NOTICE OF AVAILABILITY OF PROPOSED DECISION REGARDING MUNICIPAL DEPARTING LOAD REHEARING AND RELATED ISSUES

Consistent with Rule 2.3(b) of the Commission's Rules of Practice and Procedure, I am issuing this Notice of Availability of the above-referenced proposed decision. The proposed decision was issued by Administrative Law Judge (ALJ) Thomas R. Pulsifer on October 19, 2004. An Internet link to this document was sent via e-mail to all the parties on the service list who provided an e-mail address to the Commission. An electronic copy of this document can be viewed and downloaded at the Commission's Website (www.cpuc.ca.gov).

Any recipient of this Notice of Availability who is not receiving service by electronic mail in this proceeding may request a paper copy of this document from the Commission's Central Files Office, at (415) 703-2045; e-mail cen@cpuc.ca.gov.

This is the proposed decision of ALJ Pulsifer, previously designated as the principal hearing officer in this proceeding. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Pursuant to Resolution ALJ-180, a Ratesetting Deliberative Meeting (RDM) to consider this matter may be held upon the request of any Commissioner. If that occurs, the Commission will prepare and mail an agenda for the RDM 10 days before hand. When an RDM is held, there is a related ex parte communications prohibition period.

When the Commission acts on the proposed 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 proposed 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 25 pages.

Consistent with the service procedures in this proceeding, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Pulsifer at trp@cpuc.ca.gov. Service by U.S. mail is optional, except that hard copies should be served separately on ALJ Pulsifer, and for that purpose I suggest hand delivery, overnight mail or other expeditious methods of service. In addition, if there is no electronic address available, the electronic mail is returned to the sender, or the recipient informs the sender of an inability to open the document, the sender shall immediately arrange for alternate service (regular U.S. mail shall be the default, unless another means – such as overnight delivery is mutually agreed upon). The current service list for this proceeding is available on the Commission's web page, www.cpuc.ca.gov.

/s/ STEVEN KOTZ for
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

Decision **PROPOSED DECISION OF ALJ PULSIFER (Mailed 10/19/2004)**

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

| | |
|---|---|
| Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060. | Rulemaking 02-01-011 (Filed January 9, 2002) |

(See Attachment A for List of Appearances.)

# OPINION REGARDING MUNICIPAL DEPARTING LOAD REHEARING AND RELATED ISSUES

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## OPINION REGARDING MUNICIPAL DEPARTING LOAD REHEARING AND RELATED ISSUES

### I. Introduction

This order addresses the limited rehearing ordered by Decision (D.) 03-08-076 (The Rehearing Decision), and related matters, as described below. The rehearing addresses a limited issue decided in D.03-07-028 (the Municipal Departing Load Decision or MDL Decision) which set forth the requirements for a Municipal Departing Load (MDL)[1] "cost responsibility surcharge" (CRS) within the service territories of California's three major electric utilities: Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E). The CRS was assessed on MDL customers to provide recovery of a fair share of costs incurred by the California Department of Water Resources (DWR) pursuant to legislative directive, as set forth in Assembly Bill No. 1 from the First Extraordinary Session (AB 1X ). (See Stats. 2001, Ch. 4.)

In the MDL Decision, although we imposed a CRS provision on MDL customers, we also granted a limited CRS exception to new municipal load attributable to publicly-owned utilities "formed and delivering electricity to retail end-use customers before February 1, 2001," which was defined as existing

[1] As used in D.03-07-028 and in the instant order, the term "Municipal Departing Load" refers to departing load served by a "publicly-owned utility" as that term is defined in Pub. Util. Code § 9604(d).

publicly-owned utilities. (D.03-07-028, p. p. 76 [Conclusion of Law 11] (*slip op.*).)[2]

For purposes of applying the CRS exception, "new load" was defined as load that had never been served by a California investor owned utility (IOU), but that was located in territory that had previously been IOU territory and had been annexed or otherwise expanded into by a publicly-owned utility.

The Rehearing Decision, issued in August 2003 stated, however, that, "the record for extending this [CRS exception] to existing publicly-owned utilities and not to newly formed ones appears to be inadequate on this allocation issue." Thus, a rehearing was granted "concerning whether, or to what extent, there is sufficient factual basis for a CRS allocation based on whether the publicly-owned utility was formed before or after February 1, 2001."

In this order, we also address a related issue that was left unresolved in the MDL Decision, having to do with the identification of the specific publicly-owned utilities that would be subject to any exceptions from the CRS. In this regard, the Municipal Departing Load Decision further states:

> "It is not clear from the record exactly which existing publicly-owned utilities would be entitled to exceptions from the CRS from this decision. It is our intent that only those publicly-owned utilities with substantial operations in place as of February 1, 2001 gain such benefit. Conversely, if there are any publicly-owned utilities serving minimal numbers of customers

[2] On February 18, 2004, the California Supreme Court summarily denied the petitions for writs of review challenging the lawfulness of D.03-07-028 and D.03-08-076. (Modesto Irrigation District v. Public Utilities Commission, et al., Case Nos. S119310, S119365, S119368, S119376. The petitions included challenges to the Commission's authority to impose CRS on new MDL and sufficiency of the evidence to impose the CRS on such load.

> (*e.g.*, under 100) which would technically qualify for CRS exceptions, we would choose to close such loopholes because there is too much chance for disproportionate expansion by such entities, expansion which could not reasonably have been considered by DWR." (*Id.* at pp. 61-62.)

The MDL Decision anticipated further inquiry in this proceeding to clarify the definition of "existing publicly-owned utility" for these purposes." On July 23, 2004, the assigned ALJ solicited comments from the parties to develop applicable criteria for identifying publicly-owned utilities whose MDL departing load customers would qualify for exclusion from the CRS. The ruling anticipated the Commission would subsequently identify publicly-owned utilities whose customers qualify for the "new load" exception from the CRS.

We also address herein the California Municipal Utilities Association's (CMUA) related Petition for Modification of D.03-07-028 (The Municipal Departing Load Decision) filed on February 17, 2004, regarding the effects of certain new disclosures concerning the point in time that DWR received delivery of PG&E's load forecast.

Upon review of the record developed on rehearing issues, as addressed in parties' comments, we reach two major findings. First, in the case of PG&E, an explicit adjustment was made in its load forecast provided to DWR to recognize future bypass due to anticipated transfers of existing IOU load to irrigation districts and municipalities. We conclude that a corresponding CRS exclusion is warranted to recognize the effects of this MDL "transferred load" component, as discussed below. Second, there is no evidence of any measurable adjustments made to the load forecasts for any of the three IOUs that subtracted any specific provision for bypass by new municipal load. We find no evidence that any distinction was made in the load forecasts utilized by DWR with respect to new

municipal load attributable to various publicly-owned utilities based upon the date that they were formed or started serving these DL customers. In particular, no distinction was made in the DWR forecasts recognizing new load bypass based upon whether a publicly-owned utility (POU) was formed before or after February 1, 2001. Thus, all "new load" should pay a CRS.

As to the eligibility criteria for applying for any available CRS exceptions, we conclude that in order to qualify as an "existing publicly-owned utility" for the limited CRS exception provided in the Municipal Departing Load Decision, the publicly-owned utility must have been providing electricity to retail customers as of February 1, 2001 and serving 100 or more customers.

## II. Procedural Background

In compliance with the directive in the Rehearing Decision, an ALJ ruling was issued on October 20, 2003. The Ruling solicited comments from parties concerning the resolution of the rehearing issues, as described above. Attached to the ruling was a memorandum from DWR, describing the sequence of events relating to DWR's receipt of various IOU load forecasts that were utilized in its power procurement pursuant to AB1X. Opening comments in response to the ALJ ruling were filed on December 2, 2003, and reply comments were filed on December 16, 2003. Comments were filed by PG&E, SCE, and SDGE, as well as various parties representing MDL interests: California Municipal Utilities Association (CMUA), City of Industry (Industry), Merced Irrigation District (Merced ID), Modesto Irrigation District (Modesto ID), Northern California Power Agency (NCPA), and South San Joaquin Irrigation District (SSJID).

Parties' filed comments in response to the October 20, 2003 form a sufficient basis to resolve the issues identified for rehearing, with the exception of certain factual issues identified by CMUA as described below. In its reply

comments in response to the ALJ ruling, CMUA argued that evidentiary hearings may be necessary to address certain "new factual representations" specifically by PG&E and DWR regarding the load forecast that was utilized in procuring DWR power.

By ruling dated August 10, 2004, the ALJ scheduled further evidentiary hearings on the factual issues raised by CMUA. Pursuant to the schedule set by the ALJ, an evidentiary hearing was held on September 8 and 13, 2004. PG&E presented two witnesses, Dennis Keane and Roy Kuga, and DWR presented one witness, Craig McDonald. Active parties conducting cross examination were CMUA, Merced and Modesto Irrigation Districts, and NCPA.

Opening briefs were filed on September 27, 2004, and reply briefs were filed on October 4, 2004. This phase of the proceeding was submitted on October 4, 2004.

## III. Positions of Parties Concerning New Load CRS Allocation Exception

All of the IOUs, as well as CMUA, Industry, and SSJID take issue with the method for apportioning a CRS exception between "existing" and "new" POUs, as adopted in D.03-07-028.[3] Each of these groups of parties disagree, however, as to how any apportionment adopted in D.03-07-028 should be revised. Each of the IOUs argue that neither they nor DWR reduced their load forecasts in anticipation that "new load" would be served by publicly-owned utilities (either existing or new). Consequently, the IOUs argue that no "new load" CRS exception should apply at all. SSJID and Industry argue that there *should* be a

[3] *See* PG&E Comments, pp. 4–5; SDG&E Comments, pp. 5–6; SCE Comments, pp. 4–5; CMUA Comments, pp. 7–8; Industry Comments, p. 1; SSJID Comments, p. 3.

"new load" exception, but disagree that a February 1, 2001, cut-off date should be used for allocating the exception. CMUA argues that *all* new load should simply be exempt from the CRS, rather than being subject to any allocation.

Irvine believes a CRS exception may only be assessed against a municipal utility's customers on the basis of whether such customers ever purchased DWR power from an IOU. Irvine argues that the Commission should not apportion any CRS exception based on whether a publicly-owned utility was formed before or after February 1, 2001 because (a) DWR did not consider load growth of publicly-owned utilities; (b) the February 1 date is arbitrary; and (c) picking one single cut-off date by which a publicly-owned utility must be formed and providing retail service ignores the realities of forming a publicly-owned utility.

If the Commission maintains the February 1, 2001 date as a basis to define existing publicly-owned utilities that qualify for the CRS exception, SSJID proposes that a certain level of megawatts be set aside for which publicly-owned utilities that commence providing retail service after that date could apply (on a first come, first served basis) in order to receive an exception for new load. SSJID argues that such allocation would be consistent with the fact that the earlier in time in which a publicly-owned utility starts providing retail service after February 1, 2001, the more likely the utility considered or should have considered that this publicly-owned utility would serve new load.

City of Industry recommends that the Commission eliminate the distinction between existing and newly formed publicly-owned utilities but that the Commission provide an exception for Industry's new loads from CRS because Edison knew that Industry would be serving new loads soon after February 1, 2001. Industry supports a CRS exception for all new load of any publicly-owned utility that was either providing electric service or that can

document that it had made substantial investments in preparing to provide electric service as of the date of issuance of the Municipal Departing Load Decision, July 10, 2003. Alternatively, Industry asks either that the Commission grant an exception to publicly-owned utilities serving customers as of July 10, 2003 or to any publicly-owned utility serving customers as of either May 1, 2001 or July 10, 2003 (under the rationale that the choice of date depends on whether the focus is on DWR's updated forecast or, for parties who had no notice of the MDL decision on July 10, 2003.

Both Modesto ID and Merced ID support use of the February 1, 2001, cut-off date for deciding whether a POU should qualifying as an "existing" POU, [4] and believe that they would qualify for the "existing" new load exemption.[5]

Modesto states that municipal departing load which the utilities explicitly or implicitly accounted for in their forecasts should not be subject to the CRS. According to Modesto, new municipal departing load should not be subject to the CRS if such load is (a) served by an existing publicly-owned utility as defined in the MDL Decision or (b) located within the service area of a publicly-owned utility as that service area existed as of February 1, 2001.

NCPA argues that it is premature for the Commission to address allocation issues, because the parties need more information from PG&E about the load forecasts PG&E provided to DWR, and the methodologies behind such forecasts

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[4] *See* Merced ID Comments, pp. 5–6; Modesto ID Comments, pp. 2–3.

[5] *But see* Comments of Pacific Gas and Electric Company Regarding Criteria For New Load Exception (filed Aug. 15, 2003) arguing that, while Merced ID may meet certain of the criteria for qualifying as an "existing POU," PG&E believes that, consistent with the principles adopted in D.03-07-028, Merced ID should not qualify for any "new load" exception.

before parties can provide an intelligible scheme for allocation of exceptions. NCPA believes that the fact that an IOU provided a forecast to DWR and DWR relied upon such forecast should not be the end of the inquiry. NCPA argues that the IOUs' forecasts should be reviewed for accuracy, and if the IOUs provided inaccurate information, then the IOUs' shareholders should bear the burden for this amount.

Rancho Cucamonga believes that the February 1, 2001 cut-off date is arbitrary and urges the Commission to adopt the July 10, 2003 date of issuance of the Municipal Departing Load Decision as a cut-off date. Rancho Cucamonga believes that the July 10 date is preferable because it does not require review of what the IOUs or DWR knew or should have known, and deals with any residual concern regarding loopholes.

## IV. Resolution of Limited Rehearing Issues Granted in D.03-08-076

### A. Framework for Determination of Cost Responsibility for MDL "New Load"

As a basis for resolving the disputes at issue in the rehearing phase of this proceeding, we first clarify the conceptual framework within which any evidence should be evaluated as a basis for assigning cost responsibility. In D.03-07-028, we concluded that the MDL CRS should be imposed, and that the CRS should extend to "new municipal load" attributable to publicly-owned utilities that formed after February 1, 2001. We granted a limited exception to the CRS, however, applicable to new municipal load attributable to publicly-owned utilities providing "substantial operations" as of February 1, 2001.

The date of February 1, 2001 represents the point in time that DWR officially took over responsibility for procuring the net short position of the IOUs pursuant to AB1X. By adopting that date in D.03-07-028 as a cutoff for

establishing eligibility for a CRS exception, we were implicitly assuming that the load forecasts relied on by DWR incorporated recognition of bypass due to new load at least for POUs that were already in existence at that time. We did not extend the exception, however, to "new" publicly-owned utilities (i.e., those formed after February 1, 2001). Our stated reason for this distinction between existing and "new" publicly-owned utilities was "to ensure that a loophole is not created that encourages new publicly-owned utilities to develop solely to take advantage of a disparity in rates associated with DWR and historical utility costs—to the detriment of remaining ratepayers. . . ." (D.03-07-028, p. 61 (*slip op.*).)

In the Rehearing Decision, however, we concluded that the record appeared inadequate to determine eligibility for the new load exemption adopted in D.03-07-028 based on whether a publicly-owned utility POU was formed before or after February 1, 2001. Accordingly, the Rehearing Decision directed that further proceedings be conducted concerning "whether, or to what extent, there is sufficient factual basis for a CRS allocation based on whether the publicly-owned utility was formed before or after February 1, 2001." Our further scrutiny of the record pursuant to the rehearing, however, has revealed that such an assumption is not supported by the evidence.

### 1. Avoidance of Cost Shifting

In assessing the relevance and adequacy of the evidentiary record in resolving outstanding issues concerning the MDL CRS, we are guided by the statutory provisions of Assembly Bill No. 117 ("AB 117") which clarified the Legislature's intent concerning the implementation of AB 1X, and the recovery of

DWR-related costs from retail end-use customers. (AB 117, Stats. 2002, ch. 838).[6] Through AB 117, which was signed into law September 24, 2002, the Legislature enacted Pub. Util. Code § 366.2(d)(1) which makes all end-use customers who took bundled service on or after February 1, 2001 responsible for a fair share of costs incurred by DWR. This statutory provision provides:

> "It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the [DWR's] electricity purchase costs, as well as electricity purchase contract obligations incurred. . . that are recoverable from electrical corporation customers in commission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers." (Pub. Util. Code § 366.2, subd.(d)(1).)

Thus, AB 117 authorizes the Commission to impose a "fair share" of cost responsibility on applicable categories of customer load on whose behalf DWR procured power, including Municipal Departing Load. The determination of the "fair share" amount is left to the Commission's discretion in its exercise of this authority. In determining the "fair share" applicable to the "new load" component of MDL, we are guided by the legislative intent to avoid cost shifting among customers.

Cost shifting refers to the situation where one group of customer load bears DWR costs that were incurred on behalf of a different group of customer

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[6] Commission authority to adopt and allocate CRS to Municipal Departing Load is also found in AB 1X concerning the obligations to retail end-use customers for DWR costs, and our broad authority to regulate "to do all things…which are necessary and convenient in the exercise of such power and jurisdiction," under Pub. Util. Code § 701. (See discussion, D.02-11-022, pp. 11-13 (*slip op.*).)

load. The relevant criteria relate to underlying load categories rather than to individual customers. Thus, even if an individual customer resided outside of California during the period that DWR was entering into long-term power contracts. If that individual subsequently moves into the service territory of a California IOU as it existed on February 1, 2001, that customer assumes responsibility for a DWR power charge applicable to the load on whose behalf DWR procured power.

A similar principle holds true for future customers that take service from a publicly-owned utility in the form of "new load." A provision to serve both current and future load within the utilities' service territory was incorporated within DWR's sales forecast. DWR entered into long term power commitments to serve future growth due, in part, to what could ultimately become new load of publicly-owned utility. (*See*, Tr. 2640-41/DWR McDonald.)

To the extent that DWR procured power relying on forecasts on behalf of service territory that included such "new load," customers taking power as part of such "new load" remain responsible for paying a CRS provision to DWR. If such "new load" is not assessed a "fair share" of costs corresponding its responsibility, its share of costs would be shifted to another group of customers. Correspondingly, if the load forecast relied upon by DWR excluded a particular category of MDL customer load, then DWR did not procure power on behalf of the excluded load. If no costs were incurred to serve a particular load category in first place, then there are no costs to be shifted.

As a basis for determining whether, or to what extent, a CRS exception should apply to new load, therefore, the relevant factual question is whether DWR procured costs on behalf of such new load. The answer to that question, in

turn, depends on whether, or to what extent, the load forecast utilized by DWR excluded the new load from the forecast.

Thus, the question before us in the context of the rehearing is whether, or to what extent, the load forecasts utilized by DWR (a) distinguished in any way between new load attributable to POUs formed before versus after February 1, 2001, or (b) distinguished based on any other criteria between new load of POUs.

### 2. Prudence of Forecast Forms No Basis for CRS Exception

Certain parties argue that even if new load was ignored in DWR's procurement, the IOUs *should have* accounted for new municipal load for both existing and newly formed publicly-owned utilities. These parties argue that that the deciding factor warranting a CRS exception should be whether the IOU had *knowledge* that the publicly-owned utility was or would be providing retail service during the period covered by the forecast provided to DWR.

These parties call for Commission review of the reasonableness of the load forecasts utilized by DWR as a basis for assigning cost responsibility based on what the IOUs "should have factored" into the load forecasts (SSJID Comments, pp. 1, 6–7). Various parties allege that the IOUs' load forecasts are "disingenuous" or "blunders" (Merced ID Comments, pp. 2, 5). Merced ID cites to a May 11, 2001 letter from DWR to CMUA where DWR states that it would attempt to procure resources for publicly-owned utilities if requested to do so as indicating that DWR took into account publicly-owned utility load by omission. Merced ID believes that neither the IOUs nor DWR reasonably should have ignored new publicly-owned utility load when preparing the 2001 forecasts.

Proponents of the prudence standard argue that if IOUs provided incorrect forecasts, or failed to take into account certain factors they were aware of prior to providing those forecasts, a portion of the DWR burden corresponding to those forecast errors should be borne by utility shareholders.[7] NCPA argues that specific time periods need to be ascertained where the utility was aware that a certain amount of load that it previously supplied would soon be supplied by a publicly-owned utility. NCPA uses, as an example, the City of Redding's annexation. In October and November 2000, Redding signed three separate letter agreements provided by PG&E for the preparation of Sales Agreements. Although the Sales Agreements were not complete when DWR began procuring power for the IOUs, NCAP argues that PG&E was aware of both the size and load within that area, as well as the impeding departure of that load form PG&E and should not have included it in its long term forecasting. NCPA refers to a similar example concerning Turlock Irrigation District.

In seeking a Commission review of the managerial prudence of forecasting methodologies underlying the load forecasts provided to DWR as a basis to disallow a portion of the MDL cost responsibility as a "fair share" allocation to utility investors, parties ignore the legal obligations associated with DWR cost recovery. A key component of the MDL CRS is comprised of DWR costs. Under the obligations outlined in AB1X, it is DWR, not the utility, that is the principal seller of power. AB1X assigns roles to the Commission and DWR respectively in establishing the relationship between DWR as power seller and the customers within the service territories of the investor-owned utilities. A key

[7] See NCPA Comments, pp. 4–5; *see also* Industry Comments, p. 8.

provision of the statute governing DWR cost recovery is Water Code Section 80110, which provides in relevant part:

> "The department shall retain title to all power sold by it to the retail end use customers. The department shall be entitled to recover, as a revenue requirement, amounts and at the times necessary to enable it to comply with Section 80134, and shall advise the commission as the department determines to be appropriate."

Water Code Section 80104 further states: "Payment for any sale [of power by DWR] shall be a direct obligation of the retail end use customer to the department."

Thus, the funds for payment of DWR power belong to DWR, and must be collected from retail customers as a direct obligation payable to DWR. The funds to be collected through the MDL CRS are a subset of the total pool of funds attributable to the payment of power purchased by DWR. By law, MDL CRS funds attributable to DWR costs are the property of DWR. The right of DWR to collect those funds is not dependent on findings by this Commission concerning whether the forecasts underlying the DWR procurement were "reasonable." Thus, the DWR payment obligations, including the portion thereof collected through the MDL CRS, cannot be allocated partially to utility investors, or "disallowed" from utility revenues on the basis of an alleged forecasting imprudency. The utility merely collects DWR costs as an intermediary and remits such funds to DWR.

With no legal basis to disallow recovery of DWR costs by seeking to impose a share of such costs on utility investors, any "fair share" associated with procuring power to serve MDL that is not paid for by MDL would be made up from the remaining pool of funds collected from all other customers that are bearing the burden of DWR costs. Failure to allocate a "fair share" of DWR costs

to MDL customers would cause a shifting of that share of DWR costs to other retail customers in violation of the statutory provisions of Pub. Util. Code § 366.2(d)(1) prohibiting cost shifting among customers in connection with the recovery of DWR costs.

The reasonableness of the IOUs' or DWR's forecasts and purchasing decisions thus were not a factor in determining the allocation of costs to be collected from MDL, and was not identified in the rehearing order as an issue to be litigated. Rather, the relevant criteria involve what was incorporated in the forecasts upon which DWR relied, upon assuming responsibility for power procurement under AB1X. To the extent that the load forecast relied upon by DWR excluded MDL attributable to any particular criteria, that load did not contribute to burden assumed by DWR in procuring power. Thus, no cost shifting would result by excluding such load from the CRS obligation.

To the extent that any adjustments were made excluding or exempting MDL customers from paying for DWR costs on the basis of what "should have" been the forecast load contracted by DWR, those costs would merely be shifted to other customers. It would not be equitable for those other customers to be charged for costs for which they were not responsible. Thus, failure to impose DWR cost responsibility on MDL would result in impermissible cost shifting in violation of AB 117.

## B. Conclusions Relating to "New Load" Exception

### 1. Overview

For purposes of analyzing the manner in which load forecasts provided to DWR took into account MDL, it is useful to distinguish between categories of publicly-owned utilities, namely those formed before and after February 1, 2001.

It is also useful to delineate between two categories of municipal departing load, namely : (1) preexisting or "transferred load" and (2) "new load."

The record shows that neither DWR nor the IOUs incorporated quantifiable adjustments into the load forecasts relied upon by DWR to recognize any bypass attributable to new load for publicly-owned utilities, whether they were existing as of February 1, 2001, or yet to be formed. In comments filed by parties representing Municipalities and Irrigation Districts, we find nothing showing or suggesting that DWR forecasts actually took into account forecasts of new load, or distinguished new load forecasts for existing POUs in contrast to any allowance of new load for POUs that had not yet been formed. Likewise, we find no evidence that the IOUs made quantifiable adjustments to recognize the effects of future new municipal load. Modesto ID argues that the Commission previously found the record sufficient to allocate new load "in keeping with historic trends." (Modesto ID Comments, p. 6.) We disagree. The Commission in its rehearing decision found that the record was *not* adequate to determine how a new load exemption, if any, should be allocated. The development of such an evidentiary record is the purpose of this rehearing phase.

The only "historic trend" regarding new load locating within the service territory of an IOU but taking service from a publicly-owned utility was essentially zero, since up to that point, virtually all load served by publicly-owned utilities was *transferred* load. Modesto ID moreover does not provide any methodology for allocating a new load exemption based on "historic trends."

Thus, in view of the lack of record basis showing that load forecasts utilized by DWR incorporated any recognition of bypass due to new load, either for existing or yet-to-be-formed publicly-owned utilities, we find no basis to exempt existing publicly-owned utilities' new load from the MDL CRS, or to

utilize the date of formation of the publicly-owned utilities for determining whether or not a CRS exemption should apply. Absent adjustments either by DWR or the IOUs, there is no factual basis to treat new load of existing POUs differently from new load of yet-to-be-formed publicly-owned utilities in assigning a CRS. The rationale for applying the CRS to new load of yet-to-be-formed publicly-owned utilities applies equally to the new load of pre-existing publicly-owned utilities. We likewise find that the record does not support any alternative allocation basis for an exemption of some portion of new municipal load. As previously stated, the our determinations is based on what was contained in the forecasts utilized by DWR in procuring power.

Accordingly, we conclude that the MDL CRS should apply on a uniform basis to new load. D.03-07-028 thus shall be modified to remove the CRS exception for new load attributable to publicly-owned utilities that were formed as of February 1, 2001.

On the other hand, we find that in the case of PG&E, the load forecasts relied upon by DWR *did* in fact incorporate assumptions concerning the forecasted future bypass of certain *existing* load to municipalities and irrigation districts that were formed and serving customers as of February 1, 2001. Thus, we conclude that a modification in D.03-07-028 is warranted to grant an exclusion from the MDL CRS for a portion of existing load as of February 1, 2001 attributable to that portion that was identified by PG&E in its Bypass Report as "transferred load," as explained in further detail in Section V below. Granting this exclusion for transferred load is consistent, in principle, with the approach we adopted with respect to the adoption of a CRS exclusion for Customer Generation Departing Load based on adoption of a 3000 MW cap.

### 2. DWR Did Not Account for Distinctions in New Load Attributable to Either Newly Formed or Existing Publicly-Owned Utilities

As a preliminary basis to develop the record in the rehearing phase, DWR provided a memorandum dated September 26, 2003, describing the sequence of events relating to the sources of the load forecast data upon which it relied in determining the contractual commitments to meet the IOU net short requirements under AB1X. The DWR memorandum was attached to the ALJ ruling dated November 20, 2003, as a framework for parties to file comments on the rehearing issues.

As explained in its memorandum, DWR did not independently consider any form of MDL, including new load growth either for existing or yet-to-be-formed publicly-owned utilities, as a basis for making contractual commitments. DWR did rely on the load forecasts provided by the three IOUs in making its contractual commitments for power.

DWR began procuring power for the PG&E and SCE on January 17, 2001 and for SDG&E on February 7, 2001. As a basis for determining procurement requirements, DWR initially used 10-year forecasts obtained from the California Independent Systems Operator (CAISO) up through February 12, 2001. On February 14, 2001, DWR started to use load forecasts provided by PG&E and Edison. SDG&E provided a forecast about March 4, 2001. DWR states that these forecasts had been prepared by the IOUs during the year 2000.

DWR states that the forecast received from PG&E on February 14, 2001 consisted of three years of data (for 2001-03). DWR independently extended the PG&E forecast to cover a 10-year period by applying data from PG&E's Federal Energy Regulatory Commission (FERC) Report Form 714.

On April 1, 2001, DWR reduced the utility forecasts to reflect anticipated response to higher rates, crisis conservation, and other conservation actions. On May 1, 2001, DWR adopted a new forecast that included adjustments for additional conservation programs, a reduction for forecasted distributed generation, updated direct access estimates, and new load management programs. DWR used these forecasts to develop the estimates of the IOUs' net short in California.

DWR did not know at that time whether any departing load assumptions associated with municipalization, municipal annexation, or customer migration from IOU to municipal service areas were incorporated into the load forecasts supplied by the IOUs. DWR did not observe any adjustment in the IOUs' forecasts to account for municipalization.

### 3. The IOUs Did Not Adjust for "New Municipal Load" in Forecasts Sent to DWR

#### a) Load Forecasts Applicable to SCE Service Territory

SCE submitted to DWR forecasts of its net short position covering the periods of two to five years forward, beginning in 2001.[8] SCE received no information from DWR suggesting that DWR did not rely on these forecasts in entering into its contractual commitments. DWR did not inform SCE that it was discounting any of the forecasts on its own, or that it had obtained alternative forecasts of future SCE load from other sources.

[8] SCE's forecast transmittal e-mails to DWR were subsequently lost in a computer problem.

The first load forecast that SCE provided to DWR was prepared in about March 2000 and submitted in January 2001. At that time, no new publicly-owned utility had been formed in SCE's service territory since the City of Vernon did so in 1936. Growth of existing publicly-owned utilities through annexation (by cities served by their own publicly-owned electric utilities) of unincorporated areas served by SCE since that time was slow,[9] even prior to the enactment of AB 1890 and its declaration of the nonbypassability of the Competition Transition Charge ("CTC"). Because the reduction of SCE load growth due to growth of existing municipal utilities had been negligible up to 2001, SCE did not reduce its own load forecasts to account for any subsequent growth of new municipal load occurring within its service territory.[10]

SCE's load modeling program allows for activities by what are deemed Public Power Utilities ("PPUs"), but that term refers only to what were, prior to industry restructuring, the seven so-called SCE "resale" cities. SCE transmitted power and, in the pre-restructuring years, also sold power in these cities' capacity as "partial requirements customers" of SCE. The term PPU does not include other municipal utilities, such as the City of Los Angeles Department of Water & Power. SCE's econometric load forecast model factors historical SCE trends of retail sales, and would to that extent necessarily include the *de minimis* annexation of its service territory noted above, but not as a separate "line item"

[9] SCE notes that annexation and electric service are different activities, and that growth through annexation, by a city having its own publicly-owned electric utility, of incorporated county land on which are located existing customers served by SCE does not automatically trigger a service cut-over.

[10] See SCE Comments on Rehearing Issues, filed December 2, 2003, p. 3.

input. In contrast, SCE expressly allowed for customer self-generation. SCE's forecasts submitted to DWR were for utility bundled-customer load only.[11]

Concurrently with the filing of its opening brief in this matter, CMUA filed a motion to "update Exhibit 80," received into evidence in the original MDL phase of this proceeding, and also requested to amend its Petition to Modify to seek a CRS exclusion applicable to the SCE service territory. Exhibit 80 is a document entitled "History of Condemnations within the SCE Territory by Municipal Utilities." CMUA argues that an updated version of Exhibit 80 will allow the Commission to make a determination that a small amount of annexation-related MDL was excluded from the forecast that SCE provided to DWR, and on that basis, ought to be exempted from the CRS. The information used by CMUA to produce its "updated" version of Exhibit 80 was provided to CMUA by SCE through discovery. CMUA argues that there is no factual dispute concerning the proposed update to Exhibit 80 and that the Commission only needs to consider arguments as to the legal significance to accord this evidence.

As part of the same pleading, CMUA requested to amend its previously filed Petition for Modification to propose that a 10-year total of 1,341,817 kWh of annexation-related MDL in SCE's service territory be exempted from ongoing DWR power charges.

In its reply brief, SCE expressed opposition to CMUA's motion. SCE objects procedurally on the basis that the Motion is untimely, and seeks to introduce materials that are beyond the scope of the current proceeding. SCE also disputes the conceptual merits of CMUA's claim that incorporation of the

[11] *Id.*, p. 4.

additional updated data on annexations would justify imposing a CRS exclusion in the SCE territory.

We deny CMUA's motion to admit into the document it has characterized as an "Update to Exhibit 80." Likewise, we deny CMUA's request to amend its Petition for Modification. The motion is procedurally defective in that it seeks to introduce information beyond the defined scope of the proceeding, and to do so after hearings had already concluded. Moreover, no foundation has been laid to indicate what, if any, relevance the historical annexation data in the update had to do with the load forecast that SCE provided to DWR. Even assuming a connection could have been proven between the historic data and SCE's load forecast, SCE calculates that the resulting amount of exemption would only be 28 kW (utilizing SCE's 55% load factor), an amount that SCE argues wouldn't even be enough to cover the costs of administering the exception.

### b) Load Forecasts in SDG&E Territory

SDG&E states that during the January-February 2001 timeframe, it provided DWR with a three-year forecast of hourly load for the period 2001 through 2003. Also included with the forecast was hourly historical load data for 1999 and 2000. The forecast was provided to DWR in February 2001 in response to a DWR data request. In late January 2001, SDG&E also provided a ten-year annual forecast of its URG supply, load and net short for the period 2001 through 2010. Both forecasts are derived from the same area forecast performed in the second half of 2000. According to the DWR Memorandum attached to the Ruling, the DWR based its purchasing decisions on SDG&E's forecast after making its own adjustments to the data SDG&E provided.

SDG&E affirms that its forecasts did not attribute **any** future load growth in its service territory to municipalization because there was no history of any municipal utility serving load. SDG&E argues that it had no basis for including any such growth in its load forecasts. SDG&E has one very small (0.145 MW), longstanding (at least several decades) municipal customer, Escondido Mutual Water Company, SDG&E did not amend its forecast for this load because of its nil effect on SDG&E's load forecast.[12]

Since 2001, no municipal annexation of existing utility customer load has occurred in the SDG&E service territory. Since 2001, there has been no municipal installation of new facilities in previously undeveloped areas within the SDG&E service territory. SDG&E's load forecasts provided to DWR were based on the assumption that SDG&E would provide for 100% of the bundled load within its service territory. This assumption, to date, continues to be correct.[13]

SDG&E is aware of no economic or other basis to apportion CRS between existing and newly formed publicly-owned utilities.

### c) Load Forecasts for the PG&E Service Territory

In contrast to the forecasts applicable to SCE and SDG&E, the PG&E load forecast provided to DWR did, in fact, include specific and quantifiable amounts of MDL based on PG&E's August 2000 "Bypass Report" (Bypass

[12] SDG&E Comments on Rehearing Issues, filed December 2, 2003, p. 4.

[13] See Tr. 15 at 1841 where Mr. Hansen states: "I can tell you that to the extent that DWR relied upon a forecast made by SDG&E, our forecast would show no departing load to municipal service."

Report). In its December 2, 2003 comments, PG&E agreed that the 2001-03 sales forecast reflected "a bypass forecast prepared by PG&E Witness Keane in August 2000." The August 2000 Bypass Report included a forecasted loss of MDL through 2004 .

Although the Bypass Report identified Municipal Departing Load bypass, PG&E argues that this involved only "transferred load" not loss of "new load." As such, PG&E claims the bypass forecast would have no effect on the "new load" exemption, because PG&E's forecast assumed all new load within its service territory would be served by PG&E.

PG&E did not include any forecast of new municipal departing load within its sales forecasts, and states that those individuals preparing the forecasts during the time frame in question were generally unaware of efforts by local publicly-owned utilities to serve new load (Tr. 2558, 2560/PG&E Keane). DWR did not make any adjustment to the sales forecasts to account for new MDL. (Tr. 2598/DWR McDonald.)

We separately address issues relating to the treatment of PG&E's "transferred load" in Section V below.

## V. Resolution of CMUA Petition for Modification

### A. Overview of Issues

Although the scope of the rehearing focuses on the CRS allocation applicable to "new load," we also address as a related issue in this order the implications of new disclosures provided by PG&E and DWR relating to PG&E's "transferred load" forecast associated with MDL bypass. This issue was brought to the Commission's attention by CMUA.

In its reply comments on rehearing issues, however, CMUA took note of new disclosures contained in the comments of PG&E and DWR concerning the point in time that PG&E delivered its load forecasts to DWR. CMUA cited DWR statements in its memorandum attached to the October 20, 2003 ALJ ruling on rehearing issues, indicating that on February 14, 2001, DWR started to use a multi-year forecast that had been provided by PG&E.

These comments indicated that PG&E's forecast was delivered to DWR earlier than PG&E had previously claimed, and conflicted with certain assumptions underlying D.03-07-028 concerning the timing of the load forecasts relative to DWR's procurement of power, including procurement associated with MDL. Specifically, in D.03-07-028, we relied on assertions made by PG&E that it did not provide a sales forecast to DWR until June 2001. Based on the fact that DWR had completed the contracting of the bulk of its power purchases by that date, we concluded in D.03-07-028 that even though PG&E's load forecast incorporated specific adjustments to exclude MDL bypass, the load data was delivered too late to be utilized by DWR in determining its power procurement requirements. In view of the lack of record of any specific exclusions of MDL bypass in load forecasts relied upon by DWR, therefore, we did not adopt a CRS exclusion for MDL customers in D.03-07-028, except for the limited "new load" exception attributable to existing POUs discussed above.

If DWR received PG&E's forecast as early as February 2001, CMUA argued, the Commission's findings in D.03-07-028 were based on wrong information that required correction. CMUA asked that this issue be considered in the rehearing phase of this proceeding, or in the alternative, sought leave to file a Petition for Modification of D.03-07-028 to address the issue. In its Petition for Modification, CMUA argued that hearings may be necessary to address the

veracity and implications of these "new factual representations" regarding PG&E load forecasts provided to DWR.

In view of the implications arising from apparent discrepancies as to when PG&E delivered its forecast to DWR, we scheduled evidentiary hearings related to the limited scope of factual disputes as to the nature and timing of load data provided by PG&E to DWR. By ALJ ruling dated August 10, 2004, the following issues were identified and set for further evidentiary hearings:

> How many years' worth of forecast data were provided in the initial load forecast that PG&E delivered to DWR? When was the forecast first delivered to DWR?
>
> What was the amount of "transferred load" that PG&E incorporated from its Bypass Report into the initial load forecast provided to DWR?
>
> How does the "transferred load" impact the power requirements that DWR procured for (1) existing IOU customers as of February 1, 2001 that subsequently became MDL and (2) new load, if any, added by municipalities or irrigation districts after February 1, 2001 that were in areas covered by the "transferred load" forecasts.
>
> To the extent that DWR independently extrapolated additional years of forecast data beyond those provided by PG&E, what, if any, data relating to municipal load bypass incorporated in DWR's calculations?
>
> Do the currently adopted requirements for MDL CRS obligations appropriately take into account the effects of PG&E "transferred load" incorporated into forecasts utilized by DWR? If not, what adjustments to the MDL CRS obligation need to be adopted in order to recognize the effects of PG&E's "transferred load"?

PG&E and DWR produced witnesses to testify concerning their assertions set forth in their previously filed pleadings as to the load forecast submissions provided to DWR between January 1, 2001, and June 30, 2001, and the extent to which such submissions contained assumptions concerning MDL. PG&E sponsored two witnesses, Roy M. Kuga, PG&E Vice President in charge of oversight of daily gas and electric procurement functions, and Dennis M. Keane, PG&E Manager responsible for analysts supporting various PG&E regulatory filings and customer retention efforts. DWR sponsored one witness, Craig McDonald, managing director of Navigant Consulting, Inc.

### B. Implications of Assumptions Concerning Delivery Date of PG&E Load Forecast Data to DWR

At the start of the rehearing proceeding, parties were initially in dispute concerning when PG&E delivered its three-year load forecast data to DWR. In its data response (attached to PG&E's rehearing comments), DWR stated that the forecast received from PG&E on February 14, 2001 consisted of three years of data (for 2001-03). DWR independently extended the forecast to cover a 10-year period by taking PG&E's three-year forecast (2001-03) using PG&E FERC filing data.

In its opposition to CMUA's Petition to Modify, filed March 18, 2004, PG&E denied that its August 2000 Bypass Report was provided to DWR in February 2001. PG&E claimed that it has no record of sending DWR *any* forecast in February of 2001. In its March 18, 2004, response, PG&E did attach an email printout indicating that it provided at least a one-year 2001 forecast to DWR at the end of March 2001. PG&E acknowledged receipt of a DWR email dated March 30, 2001 from DWR to PG&E, indicating that DWR "had requested a breakdown of PG&E's monthly 2001 sales (January through December). PG&E

also attached an email dated March 30, 2001 from PG&E confirming transmittal of PG&E's "standard test year 2001 sales forecast" to Navigant, (DWR's consultant).

There remained a dispute over whether two additional years' worth of forecast data (for 2002-03) were concurrently provided to DWR, and thus whether the associated municipal bypassed or transferred load incorporated in such data was known by DWR at the time it made its power purchases. At the start of evidentiary hearings, PG&E announced that it had just become aware of an email record sent by PG&E employee Claudia Greif confirming, in fact, that PG&E's three-year forecast had, in fact, been sent to DWR as of February 12, 2001.[14] Accordingly, it is now undisputed that a three-year forecast (2001-03), incorporating MDL bypass data from the August 2000 Bypass Report, was provided by PG&E to DWR on February 12, 2001.

As discussed below, we conclude that in light of this now undisputed confirmation of an earlier delivery date of information regarding PG&E's load, modification is required to D.03-07-028. In that decision, we relied on PG&E's erroneous assertion that its sales forecast was not provided to DWR until June 2001—after DWR had contracted for the bulk of its power purchases as a basis to conclude that DWR could not have taken into account the data concerning MDL bypass in its procurement of power. The fact that we now know that DWR received load data from PG&E containing MDL assumptions on February 12, 2001 is relevant to our previous findings in D.03-07-028 concerning the effects of MDL bypass assumptions on DWR procurement. In view of our revised factual

[14] See Ex. 5.

findings, we no longer draw the conclusion that PG&E's forecast was received too late to be relevant in DWR's procurement of power. DWR executed a material number of contracts during the period between April 2001 and September 13, 2001. (McDonald Testimony, Tr. 1474.)

PG&E argues that even assuming the "new facts" concerning the Bypass Report are proven to be true and had not been known by the Commission at the time D.03-07-028 was issued, such facts are not inconsistent with the decision. As such, PG&E claims there would be no effect on the "new load" exemption, and all new load within its service territory would be served by PG&E and thus still subject to a CRS.

CMUA challenges PG&E's claim that none of the "transferred load" involved loss of "new load," arguing that the affected geographic areas that are annexed will no longer be served at all by PG&E, and that all "new load" in such areas will be served by the municipal utility.

We conclude that the "transferred load" does not include any "*new* load." As such, the transferred load does not warrant a new load exception as authorized in D.03-07-028. "Transferred load" still has relevance, however, with respect to the CRS obligation for *existing* utility load as of February 1, 2001 that departs to municipalities or irrigation districts. Load assumptions exclusion of "transferred load" has a bearing on the total MW load as of February 1, 2001 for which DWR was required to procure power. If data from the Bypass Report was supplied to DWR as early as February 12, 2001, identifying "transferred load" that *was* expected to depart, then DWR procurement requirements did not incorporate this load. Thus, the issue arises as to whether D.03-07-028 should be modified to adjust the MDL obligation for CRS to reflect transferred municipal load for which DWR did not procure power.

To the extent that the "transferred load" does not strictly relate to the rehearing phase (which addresses "new load" issues), but only to transfer of existing utility load as of February 1, 2001, its disposition remains relevant within the context of CMUA's Petition for Modification.

### C. Quantification of PG&E "transferred load" Reflected in DWR Forecast

In order to determine the extent of any CRS exclusion for PG&E's transferred load bypass adjustments, we must quantify the amount of the transferred load incorporated in the bypass report, and, in turn, ascertain how it was reflected in the load forecasts utilized by DWR. While the specific figures in the Bypass Report relating to irrigation district and municipalization are not in dispute, parties expressed differing views concerning how the bypass figures should be translated into a CRS exclusion.

CMUA expressed the applicable exclusion in terms of MW capacity which it calculated as about 260 MW assumed to depart over the full 10-year forecast period. As a basis for the 260 MW calculation, CMUA applies a 40% load factor to the MWh sales forecast in the Bypass Report. PG&E argues that any exclusion should not be translated into megawatts using CMUA's assumed load factor calculation. PG&E claims that CMUA's use of a 40% load factor to derive the MW equivalent grossly inflates the load bypass estimate.

PG&E Witness Kuga provided a summary description of the derivation of the numerical values incorporated in the Bypass Report for "transferred load."[15] The Bypass Report depicted figures for cumulative bypass per year fro 2000-2004 in annual megawatt-hours (MWH). The two categories in the Bypass Report that

[15] Ex. 3 (Kuga) at DMK-2-3

relate to MDL were those that identify bypass due to irrigation districts and to municipalization. The reported bypass due to irrigation districts consist of forecasts of bypass to Modesto and Merced IDs, as well as bypass to SSJID and Laguna ID. The forecast of bypass to Modesto and Merced ID was based on a time-trend linear regression using historical data on PG&E's existing customers that had departed to date. The forecast bypass to SSJID and Laguna ID is associated with efforts by the two IDs to condemn PG&E's facilities and to serve existing customers. Accordingly, all of the bypass attributable to IDs is composed of transferred load rather than forecasts of new load.

The forecast bypass due to municipalization is composed of two elements: The first element is based upon PG&E's account services representative's expectations of lost sales of existing PG&E customers associated with future annexations by three existing municipal utilities (i.e., Redding, Roseville, and Lodi). The second element is an "expected value" calculation whereby a probability of 10% is applied to a forecast of lost sales of existing PG&E customers associated with possible condemnation efforts by two potential municipalities (Davis and Brentwood). Accordingly, the Bypass Report forecast due to municipalization is likewise composed entirely of transferred load, and does not include any forecasts attributable to future new load.

The total MDL is broken into two components: (1) transferred load associated with irrigation districts for 2001,2002, and 2003, respectively, and (2) transferred load associated with municipalizations for 2001,2002, and 2003, respectively. (Keane RT 2551) This level of bypass for the 2001 through 2003 period was incorporated into the sale forecast provided DWR, as relied upon by DWR in it power purchase activities.

PG&E argues that any exemption should be limited by the amount of MDL for 2003 contained in the Bypass Report. As set forth in the table on Exhibit 9 (attached as Appendix 1), the 2003 bypass amounts attributable to irrigation districts were 588 GWh/yr and the amounts attributable to municipalization were 152 GWh/yr. PG&E argues any CRS exemption should be further limited by the difference between these amounts and the actual bypass load that had already departed prior to February 1, 2001 (and would thus not be responsible for DWR power charges in any event). In its opening brief, PG&E claims that based on year 2000 actual data, 352 GWh/yr of bypass attributable to irrigation districts had occurred, and 101 GWh/yr of municipalization bypass had occurred.

Based on PG&E's calculations, summarized below, the resulting subtraction leaves only 237 GWh/yr exemption applicable to irrigation districts and 51 GWh/yr applicable to municipalization.

**PG&E-Proposed Method of Computing Amount of Any CRS Exemption:**

| Source of Bypass | Forecast Sales From Bypass Report (in GWh) | | |
|---|---|---|---|
| | 2003 Forecast | 2000 Actuals | Exemption |
| To Irrigation Districts | 588 | 352 | 237 |
| Municipalization | 152 | 101 | 51 |

PG&E presented its above-described proposal concerning the netting of the 2003 forecast amount against year 2000 actual amounts for the first time in its reply brief. Since PG&E did not present this proposal in its witnesses' testimony or even in its opening brief, there was no opportunity for opposing parties to be heard concerning the merits of PG&E's proposed netting methodology. Particularly in the absence of opportunity to be heard by other parties, we are not

persuaded that it is appropriate to reduce the value of the CRS exemption by netting the 2003 forecast bypass figures by year 2000 actual figures.

The record evidence indicates that DWR relied upon PG&E's forecast data for each of the years presented in the forecast independently of how the forecasts may have deviated from actual load fluctuations prior to 2001. There is no record evidence indicating that DWR manipulated the amounts forecast by PG&E for any category of load for any given year to adjust for the effects of backward-looking actual data concerning what occurred in the year 2000. In the interests of consistency, therefore, we find no reason to conclude that DWR treated forecasts of MDL bypass any differently than forecasts attributable to any other load category. Thus, even assuming PG&E's claims concerning the actual year 2000 load are numerically accurate, we do not conclude that the actual figures should be applied as a reduction to the otherwise available CRS exemption. The exception should be determined based upon the forecast amounts relied upon by DWR, rather than upon actual load fluctuations that were not considered by DWR.

PG&E further states that the transferred load that was subtracted from its load forecast provided to DWR was based only on the 2003 forecast amounts. For the forecast period 2004 through 2010, DWR merely carried forward the absolute MWh amount from 2003 without increasing it by the trended amount from PG&E's regression analysis that was applied to other categories of load.

DWR extended PG&E's forecast to cover the 2004-2010 period by applying annual growth rates based on data in PG&E's FERC Form 714 filing which was independent of PG&E's Bypass Report. Thus, DWR did not incorporate the "trend line" growth rate to MDL included in the Bypass Report. Thus, DWR's extension of PG&E's forecast for the 2004-2010 period merely retained the

absolute MWh amount from 2003 without increasing it by the trended amount from PG&E's regression analysis. Thus, we conclude that the CRS exception should likewise carry forward the absolute MWh amount from the 2003 forecast through 2010 without applying any escalation factor.

Merced and Modesto ID, by contrast, calculated the applicable MW exception by applying an annual growth factor through 2010. For the forecast years 2001 through 2005, Merced simply used the bypass figures contained in the Bypass Report. For each year from 2006 through 2010, Merced applied an annual growth increment of 72,871 MWh which equals the growth increment that PG&E assumed in its forecasts covering the 2001-2005 period.

### D. Allocation of Transferred Load Exception Among MDL Customers

Parties expressed various proposals concerning how any exception granted for the transferred load should be applied and allocated among the various entities subject to the MDL CRS. Certain parties proposed that any CRS exemption should be applied to the specific irrigation districts and municipalities that were identified in the Bypass Report. CMUA generally agrees with such an approach, but only to the extent that it does not foreclose MDL served by publicly-owned utilities not specifically mentioned in the Bypass Report from obtaining MDL exemptions that otherwise would not be used by those entities specifically identified in the Bypass Report.

Merced and Modesto point out that the Bypass Report identifies a single aggregate of bypass applicable to both irrigation districts, but does not delineate how much applies to each entity. Merced and Modesto, in their opening briefs, offered a proposed allocation between the two that is mutually agreeable

between them. We find this proposed division of load reasonable and shall adopt it.

If the Commission decides to provide a limited CRS exception based on the MDL bypass forecast of transferred load, PG&E indicates it would not object to allowing new as well as transferred load to come under the limited CRS exemption. Even so, PG&E denies in principle that its transferred load bypass forecast had any effect on DWR forecasts relating to new load. PG&E also believes that further proceedings would be needed to determine appropriate tools to grant, track, and otherwise administer the application of any limited CRS exemption among the publicly-owned utilities and irrigation districts that would be eligible for the exception.

We direct that the CRS exception for PG&E's transferred load be allocated in the following manner. As a first priority, the CRS exclusion shall be made available for use by those municipalities and irrigation districts that were specifically identified in the Bypass Report. In the case of Merced and Modesto IDs, we shall divide the aggregate amount allocated to them in the Bypass Report in accordance with proportionate shares to which they have mutually agreed, as indicated in their briefs. To the extent that one of those specifically identified entities does not utilize their allotted exception, the exception shall be made available to other MDL entities on a first-come, first-served basis. The MDL entities eligible to apply for the exception also must have been in existence as of February 1, 2001, and included on the list of eligible MDL entities as discussed in Section VI below. To the extent further details require resolution to implement the exclusion, those details shall be addressed in the billing and collection implementation phase of this proceeding.

### E. Extent to Which DWR Procurement was Influenced by Forecast Data

Parties dispute whether, or to what extent, DWR was influenced in its procurement actions by PG&E load forecast data, including the MDL bypass assumptions incorporated therein. PG&E argues that even assuming DWR received its forecast as early as February 2004, DWR's purchasing behavior was not materially impacted by the MDL bypass data. PG&E challenges the premise that commitments DWR made in the spring and summer of 2001 were closely tied to the forecasts that DWR received from the utilities. DWR witness McDonald testified that the "net short" forecasts DWR was working with were accurate to within no more than 10 percent. (Tr. 2676-79/DWR McDonald.) PG&E thus argues that this uncertainty "already swamps" any estimate of MDL bypass that was implicitly contained in the forecast PG&E provided to DWR. Further, DWR was continually adjusting its forecasts during this time frame. (Tr. 2593/DWR McDonald.)

PG&E further argues that DWR's primary focus was on obtaining commitments for power for the summer of 2001, and that longer-term commitments arose out of that focus, as suppliers were unwilling to provide power at an acceptable price to DWR unless DWR was willing to make longer-term commitments. (Tr. 2610-12/DWR McDonald.) PG&E claims that the longer-term commitments were apparently an unavoidable consequence of signing up power for the summer of 2001 irrespective of the MDL bypass assumptions.

PG&E thus argues that there was no "careful correlation" between the multi-year forecasts DWR received in early 2001 and the long-term commitments DWR ultimately made. As such, PG&E claims it is not reasonable to use those forecasts to excuse a portion of MDL customers from paying the CRS.

Regardless of the fact that there was an estimate of transferred MDL implicit in its forecast given to DWR, PG&E argues that these customers should be obligated to pay the CRS.

We acknowledge the lack of a precise matching of the load forecasts utilized by DWR with the specific quantities of power procured for various categories of customers. Such lack of precision, however, does not justify completely disregarding the MDL bypass assumptions in considering the applicability of CRS. Our factual inquiry has to do with what categories of load were included or excluded from the forecast. Once we determine that a category was excluded, that means that DWR was not procuring power on behalf of the excluded category. Thus, irrespective of how imprecise the forecasts were or how well the supplies matched the demand forecasts, that matching exercise only had relevance with respect to those categories of load for which DWR was procuring power, as defined by the forecast provided to DWR. No matter how imprecise the load forecasts were, the imprecision had no bearing that the transferred load was never included in the first place as a load category for which DWR was procuring power.

We applied a similar principle earlier in this proceeding in determining the applicability of a CRS for the other major category of departing load, namely customer generation. In that instance, there was a similar lack of precision in matching forecasts and procurement in the context of our considering whether to grant a CRS exclusion of any portion of Customer Generation Departing Load. (DWR/McDonald RT 2688: 22-28). Yet, that lack of precision did not prevent us from determining a reasonable approximation of affected load and adopting a CRS exclusion for Customer Generation Departing Load. On that basis, in D.03-04-030, we determined that the first 3000 MW of customer generation

departing load to leave the IOUs' systems would not be required to pay the DWR ongoing power charge portion of the CRS. As we stated therein:

> "It is clear that DWR, when negotiating long-term power contracts, assumed that a certain amount of customer generation departing load would occur every year and therefore did not procure long-term power for that portion of the load. In fact, such an assumption is based on common sense, since utilities have always faced departing load in various forms, including that caused by an economic downturn, improvements in energy efficiency and building codes, as well as installation of self-generation systems."[16]

Thus, while we concluded in D.03-04-030 that the Navigant model assumptions were not precise enough to set a year-by-year cap for purposes of excluding a portion of Customer Generation from the CRS, the overall rationale behind setting some form of cap still made sense as a way to avoid cost shifting. Thus, given the lack of precision to support a year-by-year cap, we adopted one overall cap for Customer Generation of 3,000 MW, representing an approximate cumulative forecast assumption over a 10-year period. (D.03-04-030 at 53.)

In similar fashion to Customer Generation, the lack of precision in the matching of forecasts and procurement is not a valid reason simply to ignore altogether the fact that the MDL bypass was never included in the load forecasts relied upon by DWR. Thus, whatever imprecision is present in power quantities that were procured, DWR was not acting to procure power for MDL load that was explicitly subtracted from the PG&E forecasts provided for use by DWR.

[16] D.03-04-030, *mimeo.* at p. 54.

### F. Timing of DWR Procurement Relative to Date of Receipt of Forecast

PG&E argues that even if the forecast was received as early as February 2001, DWR had already begun to enter into contractual commitments by then. PG&E argues that DWR had made a significant number of contractual commitments by the middle of March 2001, through negotiations that could not happen instantaneously. (*See*, Tr. 2608/DWR McDonald.) Therefore, PG&E minimizes the weight that its forecasts could have had on DWR's commitments, arguing that no strong cause-and-effect has been shown between the receipt of the forecast in February 2001 and consequent actions limiting procurement in response to MDL bypass. PG&E proposes that any CRS exception that might be granted be adjusted to account for contractual commitments made by DWR prior to receiving and relying upon the sales forecast from PG&E.

We find that although DWR had made certain limited contract commitments prior to February 12, 2001, the vast majority of commitments were finalized after that date. In Exhibit 18, in reference to the PG&E forecast, DWR stated that it "did rely on the information contained within this sales forecast in making decisions regarding power purchases."[17] DWR Witness McDonald testified that "DWR started using this forecast in the mid-February timeframe."[18] The forecast was used by DWR in "the development of forecasts of net short…"[19]

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[17] Exh. 18, pg. 3, Response 1(g). As clarified by PG&E witness Keane, the forecast in question was a sales forecast (i.e., stated in MWh), not a load forecast (stated in MW capacity). 21 Tr/ 2497:7-9 (Keane).

[18] 22 Tr. 2588:24-25 (McDonald)

[19] 22 Tr. 2631:9-12 (McDonald)

The net short was used "to help the contracting team inform themselves about how much contract they should be entering into."[20]

The fact that DWR had already executed a minimal number of power purchase agreements prior to receipt of the sales forecast data from PG&E (and possibly letter agreements with respect to others) does not negate the fact the DWR executed the vast bulk of its contractual commitments after February 12, 2001. Thus, we find nothing to convince us that the delivery of the load forecast on February 12, 2001 was too late to form the basis for the bulk of DWR procurement. Thus, we find nothing to preclude an exception from the ongoing power charge component of the CRS for transferred MDL reflected in those sales forecasts based on a claim that February 12, 2001 was too late in the procurement process.

An indicated by Exhibit 73 from the October 2002 hearings, only four contracts were executed before February 12, 2001, with a total capacity of 2150 MW. Three of the four contracts have already expired. Thus, the evidence indicates that very little, if any, long term DWR power purchases occurred prior to receipt of the PG&E load forecast on February 12, 2001.

Moreover, we made similar observations concerning the timing of contract purchases in the context of Customer (or Distributed) Generation in an earlier departing load phase of this proceeding. For example, preparation of the document entitled "Forecast for Distributed Generation in California,"[21] which DWR utilized to adjust the sales forecasts upon which its power purchase

[20] 22 Tr. 26321:13-23 (McDonald)

[21] Exh. 72 ("Forecast for Distributed Generation in California").

activities were based, was started in March 2001 and finalized in April 2001.[22] Although the forecast of how much load would depart the IOUs' systems for self generation was not finalized until April 2001, the Commission nevertheless provided an exception for this forecasted amount because DWR had not yet entered into the bulk of its power purchase contracts as of April 2001.[23] The Commission determined that "granting exceptions to certain portions of the CRS for customer generation up to 3,000 MW will not result in any cost shifting among customers, since costs for those MW were not incurred by DWR."[24] Thus, a similar finding applies in the context of MDL. Accordingly, we conclude that receipt of the forecast in February 2001 was early enough to have a material influence on DWR in terms of its procurement. Thus, granting CRS exceptions in recognition of the PG&E transferred load will not result in cost shifting among customers, since costs for that load were not incurred by DWR

### G. Significance of Whether DWR, Itself, Makes the Adjustment

PG&E also argues that the granting of a CRS exceptions for MDL would be inconsistent with the Commission's treatment of customer generation departing load (CGDL). PG&E argues that the Commission granted exceptions to CGDL based on the forecasts of such load made by DWR, and not the utilities. Since DWR made no corresponding MDL forecast, PG&E argues that consistent treatment would disqualify MDL from an exemption.

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[22] Tr. Vol. 12 (DWR-McDonald), p. 1473, line 10 to p. 1474, line 10 (testifying to the time frame over which the forecast for customer generation was prepared).

[23] Tr. Vol. 12 (DWR-McDonald), p. 1484 (testifying to the fact that DWR negotiated and executed a material number of contracts between April 2001 and September 13, 2001).

[24] *See* D.03-04-030, p. 64 (*slip op.*).

PG&E argues that the basis for the exclusion granted to CG DL in the form of a 3,000 MW cap is not analogous to the proposed basis for the CRS exclusion involving MDL transferred load. PG&E argues that in granting CG DL certain exemptions from the DWR power charge in D.03-04-030, the Commission was relying on "the DWR/Navigant model assumptions to set one overall cap of 3,000 MW (the approximate cumulative total (rounded) of DWR's annual assumptions over ten years)." (D.03-04-030, p. 54.) PG&E emphasizes that this 3,000 MW exemption was based on DWR's separate, explicit specific reduction to its load forecasts to reflect anticipated load loss due to increased CGDL, above and beyond what might have been embedded in the utilities own forecasts.

PG&E quotes the MDL Decision where we stated: "While DWR actually forecasted a specific amount of departing load associated with new customer generation, it made no corresponding MDL forecast. The amount of customer generation departing load proposed to be exempt from the [power charge], by contrast, is directly tied to this DWR forecast." (D.03-07-028, pp. 36–37 (*slip op.*).)

Thus, to the extent that any analogy is to be drawn with the Commission's decision on CGDL, PG&E claims the relevant inquiry in this case is whether DWR itself explicitly reduced the load forecasts it was using to as it made its power purchases for anticipated load loss to publicly- owned utilities.

We disagree with PG&E's claim that the only relevant inquiry is whether DWR, itself, (as opposed to PG&E) performed the forecast of a specific amount of MDL bypass. In the context of whether cost shifting is involved, the relevant inquiry is what the forecast, itself, includes or excludes. The particular entity (e.g., DWR or PG&E) that instigated the exception is merely incidental. The particular identity of the entity that makes the MDL bypass adjustment makes no

difference in determining whether an adjustment exists, its magnitude, or how the resulting load forecast was utilized by DWR in procuring power.

In our earlier statement from D.03-07-028, quoted above by PG&E, we had already drawn the conclusion that there was no separate forecast of MDL bypass that had been specifically forecast by PG&E and provided to DWR. It was in that context that we focused on the separate forecasting actions performed by DWR as the only remaining relevant inquiry as to whether MDL had been taken into account in the load forecasts. Yet, since the subsequent additional evidence produced in this phase of the proceeding has proven that PG&E did, in fact, independently incorporate MDL bypass assumptions as part of the load forecast upon which DWR relied in making procurement decisions. In view of this additional evidence, therefore, our focus is not merely on the actions of DWR directly, but also on the actions of the IOU in preparing the forecast.

In terms of determining whether there is any cost shifting, the relevant issue is whether a particular component of load was included or excluded from the total load forecast relied upon by DWR in procuring power. The question of who made the adjustment to exclude such load--whether it was made by the IOU initially, or by DWR subsequent to receiving the IOU forecast-- is an incidental detail that has no bearing on the essential question of whether DWR procured power on behalf of such load.

Thus, we conclude that the load forecast provided to DWR by PG&E did, in fact, incorporate explicit assumptions concerning the bypass of MDL. Although we acknowledge that DWR did not make any separate subsequent adjustments to the forecast to reflect MDL bypass, it likewise did not add back any of the MDL bypass that had already been taken out of the load forecast by

PG&E. Thus, the load forecasts utilized by DWR did not include the MDL bypass that had been incorporated from the PG&E 2000 Bypass Report.

While DWR did not make a specific adjustment to PG&E's sales forecast to account for municipal departing load as it had done with respect to customer generation, the adjustment that had already been made by PG&E carried through to the figures relied upon by DWR. Thus, in terms of the cause-and-effect relationship between load forecast assumptions and procurement decisions, DWR's procurement behavior with respect to MDL bypass assumptions was similar in effect as for Customer Generation bypass assumptions.

### H. Analogies to the U.S. Navy Load CRS Requirement

PG&E also cites the Commission's action imposing a CRS requirement on U.S. Navy load as adopted in D.03-05-036, as providing an analogous situation to the MDL CRS issue before us here. In D.03-05-036, the Commission addressed whether the United States Navy should be granted an exemption from the DA CRS for 80 MW of load that it obtained through a special contract with the Western Area Power administration (WAPA). In that decision, the Commission rejected the Navy's contention that it should receive a CRS exception, even though SDG&E's witness "testified that DWR did not buy contract power to serve the 80 MW of Navy Load…and was expressly excluded from the SDG&E load requirements provided to DWR." (D.03-05-036, p. 4 (*slip op.*).) The Commission justified its holding as follows:

> "SDG&E points out that [Navy] was on bundled service as of February 1, 2001. Under the provisions of D.02-11-022, the Navy thus is obligated to pay the DA CRS on the same basis as other customers that meet that criterion…. Although the Navy procured power under the 80 MW independently of DWR, the power did not begin to flow under the special contract until

> after February 1, 2001….For at least some period on and after February 1, 2001 up until it began to be served under the special contract, the Navy would have been subject to bundled procurement for meeting its load demand. To the extent that DWR procured the net short for SDG&E bundled load during the period prior to April 1, 2001, some bundled power would have flowed to the Navy." (D.03-05-036, p. 7.)

PG&E focuses on the fact that we applied the February 1, 2001 cut-off date for DWR cost responsibility, as mandated in AB 117, even though that the IOU forecast obtained by DWR reflected the loss of Navy load. PG&E claims that the manner in which SDG&E's and DWR's forecasts treated the Navy load are identical to the how PG&E's and DWR's forecasts treated the transferred MDL reflected in PG&E's August 2000 bypass report: PG&E argues that in both situations, the utility netted out some "transferred" load prior to providing its forecast to DWR, and in both situations DWR made no further explicit adjustments to the utility's forecast. PG&E thus argues that it would be consistent for the Commission to conclude that transferred MDL customers departing after February 1, 2001, owe the CRS, irrespective of the MDL "transferred" load that was subtracted from the load forecast provided to DWR.

We disagree that the U.S. Navy load treatment is analogous to the situation involved with the MDL transferred load. There are a number of differences between the two situations. For example, as explained in D.03-05-036, DWR/Navigant *included* the 80 MW in its modeling of SDG&E net short requirements, despite the fact that SDG&E had informed DWR/Navigant that this load should not be included because the Navy was procuring the load through its own separate contract. By contrast, DWR/Navigant expressly did *not* include any of the MDL transferred load in its forecasts or modeling thereof. Likewise, neither did it procure power on behalf of such PG&E load. Thus, DWR

treated the load differently between the two situations with respect to whether it was included or excluded in forecasts and modeling calculations.

Moreover, the considerations involved here are based upon the principles we established in D.03-07-028 for the applicability of a CRS to MDL, where we expressly distinguished departing load from direct access, stating: "The dispute over the treatment of "new load" in the context of municipal customers raises issues different from those facing us in the DA phase of this proceeding." (D.03-07-028, p. 57 (*slip op.*).) We expressly considered the issue of whether the DWR load forecast incorporated a provision for MDL in concluding that a CRS exception should apply to new load. Thus, in D.03-07-028, we established a conceptual cause-and-effect link between the load forecast and the applicability of the MDL CRS to particular subcategories of MDL. While the rehearing order directed that a further factual record be developed, it did not disturb that underlying principle of cause-and-effect established in D.03-07-028, especially in the context of cost-shifting. We expressly stated that whether or not DWR procured on behalf of a segment of departing load was a relevant consideration in whether a CRS exception provision should apply.

## VI. Determination of List of MDL Entities Eligible for Applying for Any CRS Exemption

### A. Background

As stated above, the MDL Decision adopted a CRS for MDL customers, with specified exceptions for new load of existing publicly-owned utilities. That decision defined "new load," for purposes of applying the CRS exception, as load that had never been interconnected with a California IOU, but that was located in territory that had previously been IOU territory and had been annexed or otherwise expanded into by a publicly-owned utility. That decision also

defined qualifying publicly-owned utilities eligible for the CRS exception as "publicly-owned utilities formed and delivering electricity to retail end-use customers before February 1, 2001." (D.03-07-028, p. 76 [Conclusion of Law 11] (*slip op.*).)

The MDL Decision further states:

> "It is not clear from the record exactly which existing publicly-owned utilities would be entitled to exceptions from the CRS from this decision. It is our intent that only those publicly-owned utilities with substantial operations in place as of February 1, 2001 gain such benefit. Conversely, if there are any publicly-owned utilities serving minimal numbers of customers (*e.g.*, under 100) which would technically qualify for CRS exceptions, we would choose to close such loopholes because there is too much chance for disproportionate expansion by such entities, expansion which could not reasonably have been considered by DWR." (*Id.* at pp. 61-62 (*slip op.*).)

The MDL Decision anticipated the issuance of an ALJ ruling in this proceeding to clarify the definition of "existing publicly-owned utility" for these purposes." On July 23, 2004, the assigned ALJ solicited comments from the parties to develop comprehensive and final criteria for identifying publicly-owned utilities whose MDL departing load customers would qualify for exception from the CRS. The ruling identified the issues discussed below. The ruling anticipated the Commission would subsequently identify publicly-owned utilities whose customers qualify for the "new load" exception from the CRS.

As discussed above, we have concluded that no "new load" exemption is justified pursuant to the rehearing on this issue. We also have concluded, however, that a limited exemption for transferred load in the PG&E service territory is warranted. Therefore, instead of using the identified list of qualifying publicly-owned utilities as eligible for the new load exemption, we shall use the

list to identify any MDL entities that are eligible to apply for the PG&E transferred load exception on a first-come, first-served basis, as discussed above.

To the extent that any CRS exception that remains available that is not otherwise utilized by the entities identified in PG&E's Bypass Report, other MDL entities may seek to apply for such exception if they are among those entities that meet the criteria identified below.

### B. Defining Existing Publicly-Owned Utility for Purposes of Exceptions to CRS

In response to the ALJ's ruling regarding the identification of publicly-owned utilities eligible for a CRS exclusion as referenced above, the Commission received comments from PG&E, SCE, SDG&E, CMUA, Industry, Modesto, Merced ID, Rancho Cucamonga, SSJID.

The ALJ ruling asked parties to comment as to whether there should be a specific size cut-off criterion (e.g., number of customers, load, etc.) in order for an existing publicly-owned utility to qualify for CRS exceptions, or whether other criteria besides size should determine which existing publicly-owned utilities qualify for "new load" CRS exceptions.

### C. Parties' Positions

PG&E believes that only publicly-owned utilities that fit the following criteria should be eligible for the MDL CRS exception: (1) the publicly-owned utility was providing retail service prior to February 1, 2001 (2) the publicly-owned utility was serving more than a minimal number of customers and (3) service to new customers within an IOU's service territory would not cause disproportionate expansion by the publicly-owned utility which could not reasonably have been considered by DWR. According to PG&E, compliance with the first and second criteria is straightforward. PG&E believes that the

publicly-owned utilities should have the burden to establish whether they satisfy the third criteria before they are eligible to receive the exception.

SCE agrees with the Commission's intent to limit CRS exceptions to those utilities that were in existence prior to February 1, 2001. SCE would define publicly-owned utilities according to operational criteria, however, suggesting "size does not matter in this regard." SCE suggests that the Commission instead apply the definitions in Pub. Util. Code §§ 9604(d), 217 and 10001. SCE is specifically concerned that the definition of utility for purposes of the CRS exception exclude an entity that merely provides retail service by way of portable generators, because such generators are temporary in operation and also pollute.

SDG&E suggests that any size criteria (i.e., the 100 customers criteria) be a benchmark rather than a hard and fast rule and suggests the Commission also consider the following factors concerning the publicly-owned utility: (a) the number of customers served relative to the total number of electric consumers in the utility's geographic area; (b) the extent of ownership of the electric infrastructure; (c) whether substantial billing and customer service capabilities exist; and (d) the degree of integration of electric service with other services provided.

CMUA states that there should not be a specific size criterion in order for an existing publicly-owned utility to qualify for CRS exceptions, if the definition of existing publicly-owned utility remains as stated in the MDL Decision. If the Commission changes the definition of existing publicly-owned utility, the CMUA believes the following two factors should be considered: (a) the reasonable expectation of DWR and the IOUs in forecasting new municipal load of new publicly-owned utilities; and (b) the costs incurred by the new publicly-owned utilities with the reasonable expectation of serving new municipal load.

CMUA believes that DWR's underlying forecasts should have accounted for the historical trend in the creation and operation of spot municipal utilities. CMUA also states that new publicly-owned utilities have invested millions of dollars in developing spot municipal utilities.

SSJID objects strongly to the proposal presented in the ALJ's ruling as it applies to SSJID. SSJID has provided agricultural water supplies since 1909. Adopting the proposed criteria, according to SSJID, would be unreasonable in its case because SSJID has pursued status as a retail electricity provider openly and publicly since 1997. It lists the actions it has taken in that regard, among them, the publication of a business plan in 1998 that addressed providing retail power from the Tri-Dam project and entering into an interconnection agreement with PG&E in 2000. SSJID argues that, in light of those public actions, DWR would have been unreasonable to have purchased power supplies assuming SSJID's continued reliance on PG&E power after an existing power contract with PG&E expires at the end of 2004. SSJID states PG&E has known for years of SSJID's plan to provide power to its constituents after that contract expires and even began negotiations for the purchase of PG&E distribution facilities. It argues that PG&E's load forecasts should have recognized that fact.

SSJID also proposes that the Commission use other milestones for determining eligibility for the publicly-owned utility exception from the CRS. For example, it would have the Commission consider evidence of "substantial progress" toward implementation of retail service using "developmental milestones" rather than size.

SSJID believes its proposal is consistent with Senate Concurrent Resolution (SCR) 39, which refers to municipal utilities and states that:

> "...the Legislature intends that any municipal utility serving customers in newly developed areas shall be exempt from any exit fees, as long as the municipal utility was formed before June 1, 2003, and demonstrates that it has expended in good faith significant amounts of money and resources toward the creation of a municipal utility that will serve customers in newly developed areas."

Although SSJID states it is an irrigation district, it believes the principles set forth in SCR 39 should also apply to irrigation districts.

SSJID and Merced comment that the ALJ's proposed definition of "new load" departs significantly and inappropriately from that proposed in the MDL Decision. Specifically, Merced ID argues that the ALJ's definition contravenes the express language of the MDL Decision which applies the CRS exception to publicly-owned utilities with both exclusive and non-exclusive service areas. (D.03-07-028, p. 61 (*slip op.*) ["A reasonable way to make a distinction is to assume that historical trends will continue with current publicly-owned utilities and to not impose a CRS on new MDL associated with existing publicly-owned utilities (including publicly-owned utilities with non-exclusive service areas.)"])

### D. Discussion

In D.03-07-028, we set limits on the publicly-owned utilities that could seek to apply for a CRS exception. As stated in that decision, our intent was to avoid creating a loophole that would encourage new publicly-owned utilities to develop solely to take advantage of a disparity in rates associated with DWR and historical utility cost responsibility costs – to the detriment of remaining IOU ratepayers. We established the cut-off date of February 1, 2001 to determine whether the publicly-owned utility qualified for the limited CRS exemption. We further stated that it was our intent that only those publicly-owned utilities with substantial operations in place as of February 1, 2001, be eligible for the

exception, and proposed that such utilities serving a minimal number of customers (e.g., under 100) not qualify for the exception, because there is too much chance for disproportionate expansion by such entities, which expansion could not have been considered by DWR. We asked the assigned ALJ to develop a record to clarify the definition of "existing publicly-owned utility". (D.03-07-028, pp. 61-62 (*slip op.*).)

In this order, we determine eligibility criteria for "existing publicly-owned utilities" who qualify for the limited CRS exception for transferred load, as adopted in this order. Specifically, "existing publicly-owned utilities" are those publicly-owned utilities who were (1) providing electricity to retail end-use customers on or before February 1, 2001; and (2) serving 100 or more customers.

We define "substantial operations" in terms of number of customers, and decline to add other criteria to this definition. For example, PG&E suggests that the publicly-owned utility should establish that service to new customers within the IOU's service territory would not cause disproportionate expansion by the publicly-owned utility which could not reasonably have been considered by DWR, and SDG&E suggests adding other multiple criteria to the definition. However, an inquiry as to the number of customers strikes the balance as the best and most efficient way to insure against disproportionate expansion, because it is an objective test that does not require a mini-hearing for each publicly-owned utility claiming the exception.

We similarly decline to create a definition that relies on the type of technology (such as portable generators) a publicly-owned utility uses to serve its customers, because the number of customers a utility served as of February 1, 2001 is a more reasonable manner to address the issue of the possibility of disproportionate expansion. Finally, we do not create a definition that considers

evidence of "substantial progress" toward implementation of retail service as of February 1, 2001, using "developmental milestones" rather than size, as suggested by SSJID, because as of February 1, 2001, there was no certainty as to when, if at all, such publicly-owned utilities would have begun to provide electricity to retail end-use customers.

PG&E lists the entities that, based on the Department of Energy table, appear to meet PG&E's first two suggested criteria (i.e., were formed and delivering electricity to retail end-use customers before February 1, 2001 and were serving more than 100 customers before February 1, 2001). PG&E believes that the burden should reset on the publicly-owned utilities to demonstrate that they satisfy the third criteria PG&E advocates be adopted before they qualify for the exception.

SCE states all municipal utilities in its territory that would qualify for the CRS exception are included in the ALJ's ruling. SDG&E states there are no qualifying publicly-owned utilities in its territory.

Modesto and Merced ID describe how they each meet all of the criteria proposed by D.03-07-028 and the ALJ's ruling. Modesto and Merced ID are included on the list of exempt publicly-owned utilities attached to the ALJ ruling.

Based on the lists provided by the IOUs in response to the ALJ ruling,[25] and the criteria adopted above, we conclude that the following publicly-owned utilities qualify as being eligible to apply for any unused portion of the CRS exception for transferred load that is not utilized by MDL of the irrigation

[25] The ALJ ruling attached a list of California public owned utility entities as of 2001 extracted from publicly available data on the Department of Energy website.

districts and municipalities that are given first priority to utilize the CRS exception..

The eligible Municipal Utilities are: Alameda, Anaheim, Azusa, Banning, Biggs, Burbank, Colton, Glendale, Gridley, Healdsburg, Lodi, Lompoc, Los Angeles, Needles, Palo Alto, Pasadena, Redding, Riverside, Roseville, Santa Clara, Shasta Lake, Ukiah, Vernon.

The eligible Municipal Utility Districts are: Lassen and Sacramento.

The eligible Public Utility Districts: Plumas-Sierra, Trinity, and Truckee-Donner.

The eligible Irrigation Districts: Imperial, Merced, and Modesto.

PG&E argues that Merced ID should not qualify for a CRS exception because its service to new customers within an IOU's service territory would cause disproportionate expansion by the publicly-owned utility which could not reasonably have been considered by DWR. All of the electric service that Merced ID provides is within the area in which PG&E has an obligation to serve existing and new load. PG&E estimates that as of February 1, 2001, Merced ID was serving about 333 customers, about 328 of which were former PG&E customers and 5 of which were new customers. PG&E states that Merced ID tripled the number of customers it served between February 1 and the end of 2001, and almost all of the customer increase was represented by new load. PG&E also argues that, according to Merced ID's summer newsletter, the utility expects to serve about 4,300 residences by the end of 2004, and DWR could not have reasonably considered this expansion. Merced ID states that it qualifies for the CRS exception under the criteria set forth in the MDL Decision.

Merced ID states that it should qualify for the CRS exception, and that even applying PG&E's criteria, Merced ID's service to new load in recent years

does not constitute a "disproportionate expansion" which could not have reasonably been considered by DWR. Merced ID states that its witness testified that between the time it began providing retail electric distribution service in 1996, and the beginning of 2001 when the DWR forecasts were prepared, its customer count had grown to over 200 and it was serving connected peak load in the range of 40 to 60 megawatts. Merced ID then refers to PG&E's witness Keane, who testified that PG&E included a detailed combined forecast of departing load for Merced ID and Modesto including 351,173 megawatt hours (MWh) for 2000; 385,321 MWh for 2001; 458,192 MWh for 2002; 531,064 MWh for 2003; 603,936 MWh for 2004; and 676,808 MWh for 2005.

Merced ID agrees with PG&E that Merced ID was serving approximately 881 customers in 2001, and that it expects to serve 4,300 residences by the end of 2004. Merced ID also agrees that most of this is new load. However, Merced ID explains that the 4,300 residences comprise only about 2.5 to 3 MW, and that this new load, combined with existing load that departs PG&E service in 2003 and 2004, is well within the forecast of departing load prepared by PG&E.

We conclude that the MDL of Merced ID qualifies under the criteria adopted above, because it had over 100 customers as of February 1, 2001. Moreover, since we have limited the extent of any CRS exception to the amount of transferred load contained in the 2000 Bypass Report, the concerns raised by PG&E concerning disproportionate expansion by Merced would not expand the amount of any CRS exemption to which it would otherwise be entitled.

SCE believes that new publicly-owned utilities serving load with portable generators should not qualify for a CRS exception. In its reply comments, CMUA states that, contrary to PG&E's earlier comments, Needles is an existing publicly-owned utility since 1983, and is listed in the Department of Energy table

attached to the ALJ ruling as having retail sales in 2001. CMUA also states that Edison failed to include the city of Banning within its list of existing publicly-owned utilities providing retail electric service as of February 1, 2001, and clarifies that Banning first began providing electric service in 1913, as is also listed on the Department of Energy table cited above.[26]

For the reasons set forth above, we adopt the list of excepted entities set forth above, and decline to eliminate any of the listed entities from being eligible to apply for the exception.

## VII. Rehearing and Judicial Review

This decision construes, applies, implements, and interprets the provisions of AB 1X (Chapter 4 of the Statutes of 2001-02 First Extraordinary Session). Therefore, Pub. Util. Code § 1731(c) (applications for rehearing are due within 10 days after the date issuance of the order or decision) and Pub. Util. Code § 1768 (procedures applicable to judicial review) are applicable.

We note that Senate Bill (SB) 772 links the disposition of the rehearing of D.03-08-076 with the refinancing of the bankruptcy Regulatory Asset by the issuance of Energy Recovery Bonds (Bonds) in terms of the allocation of costs from new municipal load of the "fixed recovery amounts and any associated fixed recovery tax amounts." (See Pub. Util. Code § 848.1(c). Pursuant to SB 772, new MDL cost responsibility applicable to the Bonds must be consistent with the disposition of the rehearing of D.03-08-076 as determined in this proceeding.

[26] The CMUA also states that SCE is wrong that only one new publicly-owned utility has been formed in its service area before February 1, 2001, because Victorville and Industry had both formed publicly-owned utilities on January 9 and January 25, 2001 respectively. CMUA also states that SCE is in error by including Downey on its list, because to CMUA's knowledge, Downey has not formed a publicly-owned utility.

(See Pub. Util. Code, § 848.1(c ).) This is another reason for expedited review of any application for rehearing of today's decision. However, because this is not a financing order, we note that the provisions of Pub. Util. Code § 1769 set forth in SB 722 do not apply. The provisions of Pub. Util. Code § 1769 would require the filing of any court challenge within ten days of the issuance of the instant decision. Rather, judicial review procedures set forth in Pub. Util. Code § 1768 apply.

## VIII. Comments on Proposed Decision

The Proposed Decision of Administrative Law Judge Thomas R. Pulsifer was filed and served on parties on October 19, 2004 in accordance with § 311(d) of the Pub. Util. Code and Rule 77.1 of the Rules of Practice and Procedure. Comments on the Proposed Decision were filed on _____ and reply comments on _____.

## IX. Assignment of Proceeding

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

## Findings of Fact

1. Neither DWR nor the IOUs incorporated quantifiable adjustments into the load forecasts relied upon by DWR to recognize bypass attributable to new load for publicly-owned utilities, irrespective of whether they were existing as of February 1, 2001, or yet to be formed.

2. DWR forecasts did not incorporate reductions for anticipated bypass due to new load, or distinguish new load forecasts for existing publicly-owned utilities in contrast to any allowance of new load for publicly-owned utilities that had not yet been formed.

3. SCE's forecast model incorporated historic trends, and to that extent, necessarily included a *de minimus* level of municipal annexation, but not as a quantified separate line item in its forecast to form the basis for a CRS exception.

4. No party provided evidence of a quantifiable amount of MDL bypass as a separate line item in the SCE forecast that would warrant establishment of a separate CRS exception for a MDL new load component.

5. SDG&E did not forecast any future MDL new load growth in its service territory because there was no history of any municipal utility serving load.

6. PG&E did not forecast any specific provision for MDL new load, but did forecast a provision for transferred load attributable to municipalization and irrigation district bypass in its forecast provided to DWR, based upon data from its August 2000 Bypass Report.

7. Since neither the investor-owned utilities nor DWR forecast a provision for new load in connection with MDL bypass, no evidentiary basis has been established to support a CRS exception for a new load component.

8. Although PG&E did not forecast new load, its forecast of transferred load raises issues concerning whether a CRS exception is warranted to recognize the effects of the amount of transferred load that was excluded from the forecasts given to DWR.

9. In the MDL Decision, however, the Commission relied on PG&E's representation that it did not deliver forecast data to DWR incorporating its 2000 Bypass Report until June 2001, as a basis for concluding that no MDL bypass was explicitly incorporated into the load data utilized by DWR in procuring power.

10. Based on disclosures developed in the evidentiary record in this phase of the proceeding, PG&E has confirmed that--instead of June 2001--it actually

delivered forecast data to DWR on February 12, 2001, that incorporated MDL estimates for the period 2001-2003 from the 2000 Bypass Report.

11. PG&E's February 12, 2001 transmittal to DWR incorporated specific energy sales forecasts of municipal departing load bypass for 2001-2003.

12. The MDL bypass incorporated in the 2000 Bypass Report reflect "transferred load", but not "new load."

13. The amount of load from the 2000 Bypass Report that was subtracted out of the PG&E forecast utilized by DWR was based upon the cumulative bypass totals forecasted for the year 2003.

14. In extending the PG&E 2003 load forecast from 2004 to 2010, DWR applied a year-to-year growth trend line to escalate the load forecast applicable to bundled load, but did not apply any growth trend to the 2003 forecast municipal departing load shown in the Bypass Report.

15. The forecast developed by DWR for the PG&E service territory for 2004 to 2010 period retained the fixed amount of 2003 cumulative municipal departing load from the Bypass Report, without any growth trend applied.

16. The fixed amount of municipal departing load estimated for 2003 as set forth in PG&E's 2000 Bypass Report attributable to irrigation district bypass was 588,252 MWh and for municipalization bypass was 151,506 MWh.

17. Merced ID and Modesto ID have mutually agreed to an allocation between themselves of the 2003 bypass estimate of 531,065 MWh attributed to them in the following manner: 340,844 MWh for Merced ID and 190,220 MWh for Modesto ID, and this allocation is reasonable.

18. Since DWR did not procure power on behalf of the MDL Bypass "transferred" load that was subtracted out of the 2000 Bypass Report, no cost

shifting would result from the adoption of a MDL CRS exception applicable to that "transferred" load in the PG&E service territory.

19. As of February 12, 2001—the date on which the MDL estimate incorporated in the 2000 Bypass Report was provided to DWR by PG&E--, DWR had only executed two of its fifty-three power contracts.

20. The currently adopted requirements for MDL as adopted in D.03-07-028 do not take into account any effects of the 2000 Bypass Report as they relate to DWR power purchases.

21. For purposes of identifying publicly-owned utilities that would be eligible to apply for any unused portion of the CRS exception adopted for transferred load (not otherwise utilized by the entities identified in the PG&E Bypass Report), it is appropriate to limit eligibility to those entities listed in the ordering paragraphs below based upon the eligibility criteria adopted in this order.

22. As a basis for determining the eligibility of publicly-owned utilities that would be eligible to apply for any unused portion of the CRS exception adopted for transferred load, it is reasonable to adopt the criteria that the publicly-owned utility be formed as of February 1, 2001 and be providing service to at least 100 customers.

23. Excluding publicly-owned utilities that do not meet the above-defined criteria will help to assure that any CRS exception is applied only to entities that were actually in existence at the time that the bypass forecasts were made.

## Conclusions of Law

1. The record developed pursuant to the rehearing ordered in this proceeding does not provide a proper basis for a CRS exception for new load attributable to particular publicly-owned utilities based on their date of formation or operation.

2. The relevance and adequacy of the evidentiary record in resolving outstanding issues concerning the MDL CRS is governed by Assembly Bill 117 ("AB 117") which clarified the Legislature's intent concerning the implementation of AB 1X, and the recovery of DWR-related costs from retail end-use customers.

3. The determination of whether a CRS exception applies to new load is appropriately determined by whether DWR forecasts relied upon to procure long term power in the investor-owned utility service territory excluded a provision for new load.

4. Under AB 117, a relevant consideration in determining CRS applicability for MDL new load is whether cost shifting would occur absent a CRS provision for that load component.

5. Cost shifting is at issue where costs incurred on behalf of one group of customers are improperly burden a different group of customers.

6. Since the record developed on rehearing does not indicate that a quantifiable provision was excluded for new load from the DWR forecasts in any of the three investor-owned utility service territories, there is no basis for a CRS exception for new load. D.03-07-028 should be amended accordingly to remove such CRS exception.

7. Inquiry into the prudence of the investor-owned utilities' forecasting methodologies or what they should have provided to DWR is not a relevant basis upon which to exclude MDL from the CRS requirement. Instead, the relevant consideration under AB 117 is what costs were actually incurred by DWR.

8. Since the record indicates that PG&E did exclude a provision for transferred load attributable to irrigation district and municipalization bypass

from its load forecast provided to DWR, it is appropriate to amend the MDL CRS obligation to exempt a provision for transferred load corresponding to the amounts excluded in PG&E forecast and relied upon by DWR.

9. Although it was PG&E—rather than DWR—that made the adjustment for MDL transferred load, the relevant issue in the context of cost responsibility is that the forecast, itself, incorporated the adjustment for MDL bypass.

10. Granting an MDL CRS exception for the effects of the MDL transferred load is not inconsistent with the Commission's treatment of the U.S. Navy Load in D.03-05-036 due to the differences in the respective circumstances involved, as specified in today's decision.

11. The MDL CRS decision should be amended to adopt the exception amounts set forth in the ordering paragraphs below for purposes of a MDL CRS exception for transferred load.

12. The MDL CRS exemption should be applied first to those irrigation districts and/or municipalities that were identified in the Bypass Report. Any exception that is not claimed of the exemption should be available to other MDL entities on a first-come, first-served basis, but limited to the MDL of those publicly-owned utilities that were formed as of February 1, 2001 as identified in the ordering paragraphs below.

## O R D E R

**IT IS ORDERED** that:

1. The Municipal Departing Load Decision (MDL) cost responsibility surcharge (CRS) exemption for new load applicable to publicly-owned utilities formed on or before February 1, 2001, as established in Decision (D.) 03-07-028 is

hereby eliminated pursuant to the rehearing ordered in this proceeding. MDL CRS requirements shall be applied uniformly to new municipal load.

2. D.03-07-028 is hereby modified to create a CRS exception applicable to transferred load within the PG&E service territory corresponding to the estimates set forth in PG&E's August 2000 Bypass Report that were relied upon by Department of Water Resources in its power procurement process.

3. In accordance with the PG&E Bypass Report, the CRS exception for MDL attributable to irrigation districts shall apply to the following: Modesto and Merced IDs, SSJID and Laguna ID.

4. In accordance with the Bypass Report, the exclusion attributable to municipalization as identified in the Bypass Report shall apply to MDL of the following three existing municipalities: Redding, Roseville, and Lodi and two potential municipalities: Davis and Brentwood.

5. The amounts of CRS exception shall be allocated to each qualifying entity in accordance with the amounts shown on a megawatt-hour basis for each entity as set forth in Appendix 2.

6. To the extent that any of those specifically identified entities, MDL does not utilize their allotted CRS exception, the exception shall be made available to MDL of other eligible publicly-owned utilities on a first-come, first-served basis.

7. The MDL eligible for applying for any unused CRS exception on a first-come, first-served basis shall be limited to the MDL served by those entities set forth in the decision herein.

8. The publicly-owned utilities eligible to apply for the CRS exception on behalf of their MDL also must have been in existence as of February 1, 2001, and serving at least 100 customers. The list of eligible publicly-owned utilities

meeting the criteria for eligibility to apply for any available CRS exception on behalf of their qualifying MDL are identified as follows:

a. The eligible Municipal Utilities are: Alameda, Anaheim, Azusa, Banning, Biggs, Burbank, Colton, Glendale, Gridley, Healdsburg, Lodi, Lompoc, Los Angeles, Needles, Palo Alto, Pasadena, Redding, Riverside, Roseville, Santa Clara, Shasta Lake, Ukiah, and Vernon.

b. The eligible Municipal Utility Districts are: Lassen and Sacramento.

c. The eligible Public Utility Districts: Plumas-Sierra, Trinity, and Truckee-Donner.

d. The eligible Irrigation Districts: Imperial, Merced, and Modesto.

9. The eligibility criteria for "existing publicly-owned utilities" who qualify for the limited CRS exception for transferred load, require that the publicly-owned utility (1) be providing electricity to retail end-use customers on or before February 1, 2001; and (2) serving 100 or more customers.

10. Any necessary administrative measures required to implement the MDL CRS exceptions adopted in this order shall be addressed as part of the MDL billing and collection phase of this proceeding.

11. The motion of California Municipal Utilities Association to update Exhibit 80 and to amend its Petition to Modify is denied.

12. The modifications to D.03-07-028 necessary to conform to the instant order are adopted as set forth in Appendix 4, herein.

This order is effective today.

Dated _____, at San Francisco, California.

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