Decision 10-10-036 October 28, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Calaveras Telephone Company (U1004C), Cal-Ore Telephone Co. (U1006C), Ducor Telephone Company (U1007C), Happy Valley Telephone Company (U1010C), Hornitos Telephone Company (U1011C), Kerman Telephone Co. (U1012C), The Ponderosa Telephone Co. (U1014C), Sierra Telephone Company, Inc. (U1016C), The Siskiyou Telephone Company (U1017C), Volcano Telephone Company (U1019C), and Winterhaven Telephone Company (U1021C) for Ratemaking Determination regarding Dissolution of Rural Telephone Bank.	Application 07-12-026 (Filed December 20, 2007)

ORDER MODIFYING DECISION (D.) 10-06-029, AND DENYING REHEARING OF DECISION, AS MODIFIED

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 10-06-029 (or "Decision"), filed by Calaveras Telephone Company, et al. ("Rehearing Applicants").[1] In D.10-06-029, issued on June 28, 2010, we ordered Rehearing Applicants to credit approximately $31.3 million from Rural Telephone Bank stock dividends and redemption to ratepayers. We further ordered Rehearing Applicants to show cause why they should not be subject to a fine of up to $20,000 each for violating D.91-09-042,[2] and Rule 1 of the Commission's Rules of Practice and Procedure, which

[1] The Rehearing Applicants include: Calaveras Telephone Company; Cal-Ore Telephone Company; Ducor Telephone Company; Happy Valley Telephone Company; Hornitos Telephone Company; Kerman Telephone Company; The Ponderosa Telephone Company; Sierra Telephone Company; The Siskiyou Telephone Company; Volcano Telephone Company; and Winterhaven Telephone Company.

[2] *Re Alternative Regulatory Frameworks for Local Exchange Carriers – Order Modifying Decision 91-05-016 and Denying Rehearing* D.91-09-042] (1991) 41 Cal.P.U.C.2d 329.

requires all persons who transact business with the Commission "never to mislead the Commission or its staff by an artifice or false statement of fact or law." (Cal. Code of Regs., tit. 20, §1.)

Each of the Rehearing Applicants owned stock in a federal government entity known as the Rural Telephone Bank ("RTB"). The RTB was created by Congress in 1971 to make capital available to rural telephone providers at reasonable costs for investment in infrastructure to serve their customers. (D.10-06-029, p. 3.) Rehearing Applicants obtained substantial loans from the RTB prior to its dissolution in 2006. They also acquired stock in the RTB in three ways: (1) stock purchased using shareholder funds; (2) patronage refunds, which were refunds issued to Rehearing Applicants by the RTB when the RTB's interest income exceeded its expenses, reserve requirements and obligatory shareholder payments, issued in the form of Class B stock with a par value of $1 per share; and (3) mandatory stock purchases with loan proceeds, due to the fact that the RTB required all borrowers to use 5% of their loan proceeds to purchase RTB stock. (D.10-06-029, p. 5.) In August 2005, the Board of Directors of the RTB authorized its dissolution and initiated the stock redemption process. Redemption payments began in April 2006. (D.10-06-029, p. 9.)

On December 20, 2007, Rehearing Applicants initiated this proceeding by filing an application (Application (A.) 07-12-026) seeking our authorization to distribute a total of $3,037 to their customers from the RTB stock redemption. Only after two years of repeated inquiries by Commission staff did Rehearing Applicants disclose that they had received approximately $31.3 million in proceeds from the RTB stock redemption. (D.10-06-029, p. 10.)

In D.10-06-029, we found that Rehearing Applicants "were not forthcoming in disclosing the substantial proceeds from the sale" of the RTB stock. (D.10-06-029, p. 52 [Finding of Fact 14].) We ordered Rehearing Applicants to show cause why they should not be held liable and/or fined for their failure to disclose, in a timely and voluntary manner, the actual amounts they received in the RTB stock redemption process. (D.10-06-029, p. 56 [Conclusion of Law 28].) We further

determined that Rehearing Applicants' proposal for shareholders to retain over $31 million in RTB stock proceeds, and allocate only $3,000 to ratepayers, was not justified by the record and would not result in just and reasonable allocation of the proceeds as between ratepayers and shareholders. (D.10-06-029, p. 54 [Conclusion of Law 14].) We ordered each Rehearing Applicant to file an advice letter with the Commission within 90 days of the issuance of the Decision, demonstrating how it planned to issue credits to allocate properly the RTB stock redemption proceeds. (D.10-06-029, pp. 56-57 [Ordering Paragraph 1].)

On July 28, 2010, Rehearing Applicants filed an application for rehearing of D.10-06-029. They seek rehearing and allege error on the following grounds: (1) the Decision effectuates an unlawful taking of utility property; (2) the Decision violates well-established law prohibiting retroactive ratemaking; (3) the Decision contradicts the Commission's own "Gain on Sale" Decision; (4) the determinations are not supported by the record and are contradicted by undisputed evidence presented by Rehearing Applicants; (5) the process by which the Decision was adopted violates Rehearing Applicants' due process rights; and (6) the Commission acted in excess of its authority and contrary to law in failing to make adequate findings and in failing to make findings on all issues material to the Decision. Rehearing Applicants also request oral argument on their rehearing application.

On July 28, 2010, Rehearing Applicants filed a motion for stay of D.10-06-029.[3] In their stay motion, Rehearing Applicants allege that they will suffer serious and irreparable harm if a stay of the Decision is not granted while their rehearing application

[3] That same day, Rehearing Applicants filed a response to the order to show cause. In their response to our order to show cause, Rehearing Applicants allege that they were not obligated to include the RTB stock redemption proceeds in their 2006 California High Cost Fund A filings with the Commission, and further claim a good faith difference of opinion with the Commission as to whether these amounts should have been voluntarily brought to the Commission's attention prior to the initiation of this proceeding. Because the proceeding on the order to show cause is an adjudicatory matter pending before the Commission, we do not intend to address the merits of the issues raised by the order to show cause in order to avoid any prejudgment.

is pending, and further argue that they are likely to prevail on the merits of the claims asserted in their rehearing application.

Finally, on July 28, 2010, after filing their application for rehearing, Rehearing Applicants sought to file with the Commission a request for official notice of certain documents. This request was rejected for filing by the Commission's Docket Office under Rule 13.9 of the Commission's Rules of Practice and Procedure because the record in the proceeding was already closed. On August 18, 2010, Rehearing Applicants filed with the Commission a motion for an order directing the Commission's Docket Office to accept the July 28, 2010 request for official notice for filing. We dispose of this motion in this Order.

We have carefully considered the arguments raised in the application for rehearing, and are of the opinion that good cause has not been established to grant rehearing. However, we do determine that D.10-06-029 should be modified to correct a mathematical error. As modified, we deny the application for rehearing of D.10-06-029. Further, we deny the motion for stay of the Decision as moot. In addition, we deny the request for official notice for the reasons stated below.

II. DISCUSSION

A. The Decision Does Not Effectuate An Unlawful Taking.

Rehearing Applicants assert that the Decision effectuates an unlawful taking of utility property. (Reh. App., pp. 10-29.) Specifically, they claim that the Decision violates both the federal and state constitutions by unlawfully giving shareholder funds to ratepayers. (Reh. App., pp. 10-11.) Rehearing Applicants further allege that assets held by investor-owned utilities are presumed to belong to shareholders, absent evidence to the contrary. (Reh. App., p. 11.) Rehearing Applicants argue that the credits and refunds to ratepayers ordered by the Decision constitute a government taking of private property without just compensation, in violation of state and federal law. (Reh. App., pp. 15-29.) These allegations of error lack merit.

In the leading cases of *Federal Power Co. v. Hope Natural Gas Co.* (1944) 320 U.S. 591 ("*Hope*") and *Duquesne Light Co. v. Barasch* ("*Duquesne*") (1989) 488 U.S. 299, the United States Supreme Court outlined several factors to consider in determining whether utility decisions or regulations effect an unconstitutional taking.[4] Generally, an unlawful taking or confiscation does not occur unless a regulation or rate is unjust and unreasonable, and whether a regulation or a rate is just and reasonable depends on a balancing of the interests of the regulated entity providing the services and the interests of the consumers of such services. (*See Duquesne*, 488 U.S. at p. 307; *Hope*, 320 U.S. at p. 603.) Merely asserting in general language that regulation is confiscatory is insufficient; the facts relied on must specifically demonstrate that the rates or cost allocation necessarily deny plaintiff just compensation and deprive it of its property. (*See Public Serv. Com. of Montana v. Great Northern Util. Co.* (1933) 289 U.S. 130, 136-137.)

As the Supreme Court noted in *Duquesne*, the "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment." (*Duquesne*, 488 U.S. at p. 307.) The Court has repeatedly recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred. (*See, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 488; *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 413-14.) "[F]rom the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates." (*Washington Gas Light Co. v. Baker* (D.C. Cir. 1950) 188 F.2d 11, 15 (fn. omitted); *see also In re Permian Basin Area Rate Cases* (1968) 390 U.S. 747, 794-95 (consumers must rely upon the Commission to provide complete, permanent and effective protection from excessive

[4] Whether the takings claim is under federal or state law, the analysis for an unlawful takings claim is similar. (*See* Cal Const., art. 1, § 19; *see also 20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 292-297.)

rates).) Thus, the state's interest in protecting consumers from unreasonable and usurious charges is of paramount importance in a takings analysis.

In addressing a takings claim, the regulatory scheme *must* be viewed in its entirety in order to determine whether rates or charges are just and reasonable. (*See Hope*, 320 U.S. at p. 602.) Whether a particular rate or cost allocation "is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and on the amount of capital upon which the investors are entitled to earn that return." (*Duquesne*, 488 U.S. at p. 310.) In deciding whether a particular governmental action effectuates a taking, courts focus on both the character of the action and the nature of the interference with ownership rights. (*See Keystone Bituminous Coal Assn.*, 480 U.S. at p. 497; *see also Andrus v. Allard* (1979) 444 U.S. 51, 65-66 (where an owner possesses a "bundle" of ownership rights, interference with one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety).)

Under *Hope*, so long as our determinations fall within a "zone of reasonableness," courts must defer to the balancing of consumer and investor interests arrived at by the Commission. (*See*, *e.g.*, *In re Permian Basin Area Rate Cases*, 390 U.S. at pp. 797-798 (if the Commission reasonably balances consumer and investor interests, then the resulting rate is not confiscatory).)[5] This "zone of reasonableness" has been described as "bounded at the one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates." (*Washington Gas Light Co.*, 188 F.2d at p. 15.) The limits set by the Supreme Court in analyzing utility ratemaking in the context of Fifth Amendment takings are deliberately broad, "resulting both from

[5] Indeed, a just and reasonable rate which results from balancing consumer and investor interests might not provide "enough revenue not only for operating expenses but also for the capital costs of the business . . . includ[ing] service on the debt and dividends on the stock." (*Hope*, *supra*, 320 U.S. at p. 603; *see also Pan American World Airways, Inc. v. Civil Aeronautics Bd.* (D.C. Cir. 1958) 256 F.2d 711, 712 (regulated entity "may be required to charge for a particular service a rate that is not fully compensatory, in the sense that it does not cover fully allocated costs and return").)

notions of special competence and the conception of rate-making as a primarily legislative process. So long as the public interest – i.e., that of investors and consumers – is safeguarded, it seems that the Commission may formulate its own standards." (*Id.*; *see also Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission* (D.C. Cir. 1987) 810 F.2d 1168, 1176-77.)

An actionable takings claim must, by definition, involve the taking of *private property*. In the present case, in the exercise of our police power in regulating public utilities and determining what is "just and reasonable," there has been no taking of shareholder private property. Rehearing Applicants' shareholders have not been deprived of an opportunity to earn a fair and reasonable return. As both a matter of state law and as a factual matter, the RTB redemption proceeds do not constitute "private property" belonging to the Rehearing Applicants' shareholders.

Sections 817 and 818 of the Public Utilities Code[6] provide guidance in determining, as a matter of state law, whether the proceeds from the RTB stock redemption properly belong to Rehearing Applicants' shareholders or to ratepayers. Section 817 provides that we may only authorize public utilities (like Rehearing Applicants) to encumber utility property for public utility purposes. We did, in fact, authorize Rehearing Applicants to encumber their public utility property to secure these RTB loans because the purpose of the loans was to provide public utility service. (Pub. Util. Code, § 817.) Section 818 further states that any such encumbrance of public utility property (such as to guarantee the RTB loans at issue in this proceeding) must be approved by the Commission. (Pub. Util. Code, § 818.) In other words, sections 817 and 818, taken together, prohibit Rehearing Applicants from mortgaging their public utility property for the private interests of shareholders, and we would not be permitted to authorize loans for such purposes. Consequently, all proceeds from encumbrances on public utility property also should be returned to the ratepayers, rather than the

[6] Unless otherwise noted, all statutory references herein are to the Public Utilities Code.

shareholders. Thus, as a matter of California statutory law, the stock that arose from Rehearing Applicants' Commission-approved, secured RTB loans, or refunds of interest paid on the loans, is public utility property subject to our ratemaking and cost allocation jurisdiction, not shareholders' private property. Exercise of this jurisdiction does not constitute an unlawful taking; rather, utility shareholders are only permitted a reasonable opportunity to earn a fair and reasonable return on their investment, and are not in any way guaranteed any particular rate of return. (*Duquesne*, *supra*, 488 U.S. at pp. 307-310.) Here, the stock at issue is an investment of the ratepayers, not the shareholders, as discussed below.

Rehearing Applicants seem to misunderstand the nature of our determinations with respect to the refunds and credits owed to ratepayers. Rehearing Applicants repeatedly assert that shareholder property is being taken unlawfully by the Commission without just compensation and reallocated to ratepayers. (Reh. App., pp. 15, 17, 22, 25.) This argument begs the central question at issue in this proceeding, namely, who did the RTB stock properly belong to, and who is entitled to the redemption proceeds? Rehearing Applicants argue that virtually all of the RTB stock and the redemption proceeds belonged to Rehearing Applicants' shareholders, whereas the Decision found precisely the contrary, determining that ratepayers in fact were the proper recipients of most of the RTB redemption proceeds. (See D.10-06-029, pp. 21-36.) Because the Decision properly and reasonably found that ratepayers were entitled to the RTB stock redemption proceeds, the Decision does not effectuate any impermissible taking of shareholder property.

In the Decision, we evaluated each of the three types of RTB stock held by Rehearing Applicants, as well as the proceeds from the sale of such stock, to determine how the stock was originally acquired and whether it should properly be considered shareholder private property or allocated to ratepayers. As noted above, the stock itself falls into three categories: (1) stock purchased with shareholder funds, amounting to approximately $18,000 worth of stock; (2) patronage refunds, which were refunds issued to Rehearing Applicants by the RTB when the RTB's interest income exceeded

its expenses, reserve requirements and obligatory shareholder payments, issued in the form of Class B stock with a par value of $1 per share; and (3) mandatory stock purchases with loan proceeds, due to the fact that the RTB required all borrowers to use 5% of their loan proceeds to purchase RTB stock. The Decision determined that the first category of stock, which was purchased with shareholder funds, properly belonged to Rehearing Applicants and their shareholders, and as such no refunds or credits of these amounts were owed to ratepayers. (D.10-06-029, pp. 20-21.) Rehearing Applicants do not dispute this determination in their rehearing application.

As to the second category of stock, which totals approximately $24 million and was received as patronage refunds in the form of Class B stock with each borrower's allocation based on the amount of interest paid on RTB loans approved by the Commission (D.10-06-029, p. 21-22), we determined that the patronage refund stock was a regulated asset funded by regulated revenue requirement because each Rehearing Applicant's regulated revenue included the cost of debt.[7] Since the patronage refund stock was a Commission-regulated asset, upon redemption its proper allocation is determined according to the standards articulated by the Commission in D.06-05-041.[8] In analyzing the patronage stock refunds, we found that Rehearing Applicants are all small local exchange carriers subject to our cost-of-service ratemaking and recipients of substantial ratepayer subsidies from the California High Cost Fund A. (D.10-06-029, p. 22.) As such, all of the proceeds from the redemption of these assets are subject to our jurisdiction, especially where, as here, the RTB loans that are the source of the patronage refunds were secured by mortgaging public utility property for public utility purposes.

[7] As noted in the Decision, Rehearing Applicants did not dispute that their regulated revenue requirement included the cost of debt. (D.10-06-029, p. 21.)

[8] *See Order Instituting Rulemaking on the Commission's Own Motion for the Purpose of Considering Policies and Guidelines Regarding the Allocation of Gains from Sales of Energy, Telecommunications, and Water Utility Assets* ("*Gain on Sale Decision*") [D.06-05-041] (2006) ___ Cal.P.U.C.3d ___, as modified by *Order Modifying Decision (D.) 06-05-041 and Denying Rehearing of Decision, as Modified* [D.06-12-043] (2006) ___ Cal.P.U.C.3d ____.)

(D.10-06-029, pp. 22.) According to the standards articulated in D.06-05-041, when public utility assets are sold, the capital or original cost is returned to those who paid for the asset. (D.10-06-029, p. 23; *see also Gain on Sale Decision*, D.06-05-041, *supra*, at pp. 27-28 (slip op.).) In the present case, the patronage refund stock was received as a distribution from the RTB in proportion to the interest paid by borrowers. (D.10-06-029, p. 23.) Interest payments on the RTB loans were paid by ratepayers through the regulated revenue requirement, meaning that ratepayers furnished the funds that led to the acquisition of the patronage refund stock. (D.10-06-029, p. 23.) Because the RTB redeemed this stock at par value (or the original price), the redemption proceeds properly belong to ratepayers, whose interest payments constitute the true source of the patronage refunds. (D.10-06-029, p. 24.)

In the RTB stock redemption process, Rehearing Applicants also received an extra 4.4 cents per share of RTB patronage stock, and these funds are referred to in the Decision as the "2007 residual amounts." (D.10-06-029, p. 24.) The Decision determined that these residual amounts were also properly allocated to ratepayers, and not subject to sharing with Rehearing Applicants' shareholders, because shareholders did not provide the capital at risk in acquiring the asset, since the RTB patronage stock resulted from interest payments by ratepayers on the RTB loans. (D.10-06-029, p. 24.) In addition, the Decision found that there was no incentive for shareholders to prudently manage the RTB stock because they received it by operation of law due to the interest payments on RTB loans made by ratepayers. (D.10-06-029, pp. 24-25.) As such, no sharing of the 2007 residual amounts between ratepayers and shareholders was required under D.06-12-043, *supra*.

Thus, the Decision concluded that all of the redemption proceeds from the patronage stock were properly allocated to ratepayers, and not to Rehearing Applicants' shareholders. (D.10-06-029, p. 25.) This stock was distributed to Rehearing Applicants based on annual interest paid by each of them, and since Rehearing Applicants recovered the cost of these interest payments from ratepayers, the Decision determined that ratepayers "should

receive the benefit of the stock, including the par value redemption proceeds, the above par residual, and the dividend payments." (D.10-06-029, pp. 25-26.)

As to the third type of RTB stock acquired by Rehearing Applicants, which was the stock acquired by mandatory purchase with 5% of RTB loan proceeds, we concluded that Rehearing Applicants failed to demonstrate that their shareholders separately funded the acquisition of this stock as an unregulated investment. (D.10-06-029, p. 36.) The funds used to purchase this stock came directly from the RTB loans, which were approved by the Commission and guaranteed with public utility property. Indeed, as noted above, section 817 would expressly prohibit us from authorizing Rehearing Applicants to encumber public utility property for the private pecuniary interests of shareholders. (Pub. Util. Code, § 817.) Thus, we concluded that the par value of this stock should also be allocated to ratepayers, as well as the residual payments and dividends which were by-products of the stock itself. (D.10-06-029, p. 36.)

Given the complexity of the ratemaking, allocation of proceeds, and related accounting issues associated with these three types of stock, we reasonably determined in D.10-06-029 that Rehearing Applicants failed to meet their burden of proof to demonstrate that the stock redemption proceeds from the patronage stock and the 5% mandatory purchase stock should be properly allocated to their shareholders. (D.10-06-029, pp. 18-19.) Rehearing Applicants' insistence that they are being deprived of their private property without just compensation misses the point entirely. The Decision methodically addresses the manner of acquisition of each type of stock and demonstrates, both as a factual and legal matter (*see* sections 817 and 818), that all proceeds related to the patronage stock and the 5% mandatory purchase stock properly belong to ratepayers. Therefore, since the stock cannot be properly characterized as shareholder property, Rehearing Applicants' unlawful takings argument lacks merit.

B. The Decision Does Not Engage In Or Constitute Retroactive Ratemaking.

Rehearing Applicants next allege that we engaged in prohibited retroactive ratemaking in ordering them to issue credits and refunds to ratepayers from the proceeds

of the RTB stock redemption. (Reh. App., pp. 29-34.) Specifically, Rehearing Applicants claim that California law prohibits retroactive ratemaking, that the Decision embodies an act of ratemaking that triggers the rule against retroactive ratemaking, and that the Decision constitutes retroactive ratemaking. (Reh. App., pp. 29-34.) These allegations of error lack merit.

The California Constitution gives the Commission ratemaking authority over non-transportation utilities to the extent specified by the Legislature. The Legislature granted the Commission ratemaking authority in section 728, which provides that when the Commission, after a hearing, finds that the rates charged by any public utility are unreasonable, the Commission shall determine and fix reasonable rates to be thereafter observed and in force. (Pub. Util. Code, § 728.) As a general proposition, the California Supreme Court has interpreted section 728 to prohibit "retroactive ratemaking," meaning that the Commission may not roll back general rates which have already been approved by a final order of the Commission. (*See Pacific Telephone & Telegraph Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, 649-656.) More recently, the Court clarified its interpretation of the rule against retroactive ratemaking, stating that the rule does "not require that each and every act of the commission operate solely in futuro," and clarified that the Court's decision in *Pacific Telephone* was limited to the act of promulgating "general rates." (*Southern California Edison Co. v. Public Utilities Commission* ("*Edison*") (1978) 20 Cal.3d 813, 816.) Allocating moneys as between ratepayers and shareholders does not constitute promulgating general rates. (*See id.* at pp. 816-818.) As discussed in the Decision, the rule against retroactive ratemaking is implicated only when the Commission is engaged in general ratemaking, and only applies to decisions in which "many variables are taken into account and broad policies are formulated." (*Id.* at p. 828; *see also* D.10-06-029, p. 47.) It does not apply to a "narrowly restricted" decision. (*Edison*, *supra*, 20 Cal.3d at p. 828.) Moreover, the California Supreme Court has further established that we may "mitigate the windfall" of past utility over-collections by reducing future collections, and that such an action by the Commission does not violate the rule against retroactive ratemaking. (*Id.* at p. 830.) In

the present case, we are only dealing with the very limited issue of the disposition of asset sale proceeds from the RTB stock redemption, and are not in any way engaged in general ratemaking similar to a general rate case. (D.10-06-029, p. 47.) We are aware of no authority, and Rehearing Applicants cite to none, which would preclude the Commission from ordering credits or refunds, particularly under circumstances in which Rehearing Applicants, over a significant period of time, failed to disclose to their primary regulating agency the revenue they received from the RTB stock redemption process.

Thus, the refunds and credits ordered in D.10-06-029 do not implicate the rule against retroactive ratemaking, and Rehearing Applicants' arguments to the contrary lack merit.

C. D.10-06-029 Is Consistent With The Commission's *Gain On Sale Decision*.

Rehearing Applicants next allege that D.10-06-029 contradicts our *Gain on Sale Decision* [D.06-05-041], *supra,* as modified by D.06-12-043. (Reh. App., pp. 34-42.) Rehearing Applicants argue that the Decision fails to apply the allocation principles articulated in D.06-05-041 and draws flawed conclusions about RTB proceeds that applicants allege were not included in their rate base. (Reh. App., pp. 35-38.) They further contend that the RTB proceeds are not "gains" subject to the rules articulated in D.06-05-041, and that the Decision ignores the allocation percentages set forth in D.06-05-041. (Reh. App., pp. 38-40.) Finally, Rehearing Applicants argue that the Decision ignores the directive in D.06-05-041 to apply the allocation percentages to after-tax gains, and allege that the Decision's allocation of proceeds is arbitrary and capricious. (Reh. App., pp. 40-42.) These allegations of error lack merit.

As to the tax issue, the Decision makes clear that Rehearing Applicants may file a petition to modify D.10-06-029 to the extent that they actually owe and pay any state or federal taxes on the RTB redemption proceeds. (See D.10-06-029, p. 58 [Ordering Paragraph 4].) Matters of tax liability fall within the purview of the tax authorities, whereas the proper allocation of the RTB stock redemption proceeds, as between shareholders and ratepayers, falls within our exclusive jurisdiction. With

sufficient documentation, the Decision offers Rehearing Applicants a clear and simple way to modify the Decision to conform to any such determination made by the tax authorities. (*Ibid*.)

As to the other issues related to the application of D.06-05-041, these arguments similarly lack merit. In D.06-05-041, we addressed the proper allocation of gains on sale of utility assets, and determined as a general principle that the rewards from any gains on the sale of utility assets should go to those who bear the burden of whatever risk is undertaken. (D.06-05-041, pp. 27-28.) As discussed above, in the present case we determined that both the patronage refund stock and the 5% mandatory purchase stock emanated from the loans that Rehearing Applicants obtained, with our approval, from the RTB. (D.10-06-029, pp. 21-36.) As a matter of law, the Commission was only authorized to permit Rehearing Applicants to obtain these loans involving the encumbrance of public utility property *for public utility purposes*, not to advance the pecuniary interests of Rehearing Applicants' shareholders. (*See* Pub. Util. Code, §§ 817 & 818.) Thus, the patronage stock and the 5% mandatory purchase stock, both of which were direct by-products of the RTB loans, constitute regulated public utility assets, for which the ratepayers were liable. (D.10-06-029, pp. 21-36.) Further, the interest on the RTB loans was financed by ratepayers, not the shareholders. (*Ibid*.) For these reasons, and consistent with the general principles articulated in D.06-05-041 regarding the economics of utility regulation, we determined that all proceeds related to the patronage stock and the 5% mandatory purchase stock are properly allocated to ratepayers. Because shareholders did not provide the capital at risk in acquiring the patronage stock and the mandatory purchase stock, the proceeds from the sale of such stock are properly allocated to ratepayers. (*See* D.10-06-029, p. 24; *see also* D.06-05-041, pp. 27-28.)

Thus, Rehearing Applicants' arguments regarding our interpretation and analysis of *Gains on Sale Decision* [D.06-05-041], *supra*, as modified by D.06-12-043, and its application to the present Commission proceeding, lack merit.

D. The Decision's Determinations Are Properly Supported By Record Evidence.

Rehearing Applicants next allege that the Decision is not supported by record evidence in several key areas. (Reh. App., pp. 42-59.) Specifically, they dispute our conclusion that ratepayers, as opposed to their shareholders, funded the acquisition of the Class B shares of stock, which were obtained by them as patronage refunds and as 5% mandatory purchase stock. (Reh. App., pp. 42-54.) Rehearing Applicants further assert that our conclusion that they should not have paid taxes on RTB proceeds received in 2006 is erroneous. (Reh. App., p. 54.) They also argue that the Decision adopts carrying charges that are unsupported by the record. (Reh. App., pp. 54-57.) Rehearing Applicants further assert that the Decision prejudges the outcome of the order to show cause portion of the proceeding in proposing carrying costs to be levied, in addition to maximum statutory fines, if Rehearing Applicants do not prevail in the order to show cause phase of the proceeding. (Reh. App., pp. 57-58.) Finally, they claim that the Decision contains a mathematical error which must be corrected with respect to total RTB proceeds received by Kerman Telephone Company. (Reh. App., pp. 58-59.) With the exception of the allegation regarding Kerman Telephone Company, these allegations of error lack merit.

As to the order to show cause issues, Rehearing Applicants are well aware that this adjudicatory phase of the proceeding is ongoing, and no determination has been made to date as to liability for the Rule 1 violation and/or what fines, if any, may be assessed upon Rehearing Applicants due to their conduct during this proceeding. Nothing in D.10-06-029 prejudges the outcome of the order to show cause phase of the proceeding, and Rehearing Applicants will be afforded ample opportunity to demonstrate that their conduct was consistent with the requirements of D.91-09-042 and Rule 1 of the Commission's Rules of Practice and Procedure, and therefore not subject to any sanction.

As to the alleged mathematical error regarding Kerman Telephone Company, Rehearing Applicants are correct that the amount stated on page 11 of the

Decision is inaccurate. (*See* D.10-06-029, p. 11.) The Decision is modified to change the amount noted for Kerman Telephone Company from $1,511,629.00 to $1,506,596.00.

As to tax issue, we made no findings as to Rehearing Applicants' tax liability for the RTB stock and made no determination as to whether they should have paid state or federal taxes on the proceeds from the RTB stock redemption. (*See* Discussion in section 3, *supra*, and in section 5, *infra*.) We assumed, for purposes of the Decision, that funds obtained from ratepayers and returned to ratepayers should not create tax liability for Rehearing Applicants, but if that assumption is incorrect, they are expressly authorized to file a petition to modify D.10-06-029 to the extent that they actually paid taxes owed to the state or federal governments. (*See* D.10-06-029, pp. 49, 58 [Ordering Paragraph 4].) As noted above, matters of tax liability fall within the purview of the tax authorities, whereas the proper allocation of the RTB stock redemption proceeds, as between shareholders and ratepayers, falls within our exclusive jurisdiction.

As to the issue regarding our determination that ratepayers, as opposed to shareholders, funded the acquisition of the Class B shares of stock (Reh. App., pp. 42-54), this allegation of error also lacks merit. When parties challenge a Commission decision on the ground that the decision is not supported by record evidence, courts generally will not reweigh the evidence or exercise independent judgment to draw conclusions from the record, but instead focus on whether our conclusions are reasonably supported. Conflicts of evidence are resolved in favor of the findings of the Commission, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (Pub. Util. Code, §1757, subd. (a)(4); s*ee, e.g.,; Strumsky v. San Diego Co. Emp. Retirement Assn.* (1974) 11 Cal.3d 28, 35; *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604.) Moreover, if findings are based on inferences reasonably drawn from the record, the decision is considered to be supported by "substantial evidence in light of the whole record," and it will not be

disturbed by the courts. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187; *People v. Lane* (1956) 144 Cal.App.2d 87, 89.)

As discussed extensively above in section 1 and below in section 6, we fully considered all of the evidence presented by Rehearing Applicants in support of their point of view regarding the appropriate allocation of the RTB stock redemption proceeds. The fact that we adopted a different interpretation of the evidence than that advanced by Rehearing Applicants is not a proper ground to overturn the Decision. The Decision discusses Rehearing Applicants' key assertions in detail, thus demonstrating that we did consider and weigh their contentions. (*See* D.10-06-029, pp. 22, 26, 28, 29, 34, 35, 39, 45-49.) The Decision made express findings and conclusions regarding the origin of the patronage stock and 5% mandatory purchase stock. (*See*, *e.g.*, D.10-06-029, pp. 50-51, 53, 54 [Findings of Fact 2, 6-8, 10 & 11; Conclusions of Law 3, 5-7, 14, 16 & 17].) These findings and conclusions are supported by record evidence presented in this proceeding. (*See* D.10-06-029, pp. 3-5, 7-10, 16, 17, 19, 21-23, 26-33, 35, 39, 46-49.) Attachment A to D.10-06-029 also contains a detailed analysis of the various Commission decisions authorizing Rehearing Applicants to obtain RTB loans, including loan amounts, amounts funded by RTB, amounts of Class B stock, net loan amounts, and Class B stock percentage, if any. (*See* D.10-06-029, Attachment A.) For these reasons, Rehearing Applicants' arguments regarding the sufficiency of record evidence to support the Decision lack merit.

Finally, Rehearing Applicants contend that the Decision errs in adopting carrying charges that are unsupported by the record. (Reh. App., pp. 54-57.) This allegation lacks merit because, as acknowledged in the rehearing application, the Decision leaves open the issue of what carrying charges should be applied pending the resolution of the order to show cause phase of the proceeding. (*See* Reh. App., pp. 55-56; *see also* D.10-06-029, pp. 39-40.) The Decision specifically states that "we do not resolve the issue of whether the Rehearing Applicants had an obligation to disclose their receipt of the Rural Telephone Bank stock redemption proceeds in 2006," and instead leaves that issue to be resolved as part of the order to show cause phase. (D.10-06-029,

p. 39.) As a result, the Decision further states that we could not, and did not, determine in D.10-06-029 whether the 90-day commercial paper rate of 0.5% should apply (as advocated by Rehearing Applicants), or whether a higher interest rate of 10% should be charged for late remittances of California High Cost Fund A surcharges. (D.10-06-029, p. 39.) Thus, Rehearing Applicants' allegation that the Decision adopts improper carrying charges lacks merit because the Decision did not make a determination as to the carrying charges to be imposed, leaving that issue to be decided in the order to show cause phase of the proceeding.

For the reasons discussed above, Rehearing Applicants' arguments regarding evidentiary support for the Decision are unfounded and lack merit.

E. The Process By Which The Decision Was Adopted Complied With All Applicable Principles Of Due Process.

Rehearing Applicants next allege that the process by which the Decision was adopted violated their due process rights. (Reh. App., pp. 59-67.) Specifically, they claim the denial of their two motions to reopen the record precluded them from introducing relevant evidence. (Reh. App., pp. 61.) Applicants further assert that the Decision rests upon unproven assertions that are the subject of the pending order to show cause phase of this proceeding. (Reh. App., pp. 61-63.) Rehearing Applicants also argue that the Commission failed to allow applicants equal ex parte access to Commissioners prior to the issuance of the Decision. (Reh. App., pp. 63-65.) Finally, they allege that the Decision contains certain factual conclusions regarding Rehearing Applicants' applicants' tax responsibilities and about our approval of the RTB loans that are not supported by the record and which Rehearing Applicants did not have an opportunity to rebut with their own evidence or testimony. (Reh. App., pp. 65-67.) These allegations of error lack merit.

First, it should be clarified that Rehearing Applicants have filed at least *three* motions to reopen the record after the evidentiary phase of the proceeding was already closed. Rehearing Applicants' first motion to reopen the record, filed on October 12, 2009, was granted by the administrative law judge ("ALJ") on October 15, 2009.

Rehearing Applicants were given until November 12, 2009 to file and serve any additional evidence and argument. Rehearing Applicants filed two additional motions to reopen the record on February 22 and April 6, 2010. As to the February 22 motion, the Division of Ratepayer Advocates, a party to the proceeding, opposed Rehearing Applicants' motion as nothing more than a "delaying tactic" seeking a different outcome. The ALJ denied applicants' February and April 2010 motions to reopen the record in a June 25, 2010 ruling. (*See Administrative Law Judge's Ruling Granting Motion for Equal Ex Parte Time and Denying Motions to Reopen Record*, June 25, 2010.)

The Commission's Rules of Practice make clear that granting motions to reopen the record is entirely discretionary. Rule 13.14(b) provides that a motion to reopen the record must contain an explanation as to why the evidence was not produced during the evidentiary phase of the proceeding and must demonstrate "material changes of fact or of law alleged to have occurred since the conclusion of the hearing." (Cal. Code of Regs., tit. 20, § 13.14, subd. b.) Nothing in the language of Rule 13.14(b) indicates or suggests that reopening the record is mandatory; rather, whether to grant or deny such requests rests with the discretion of the ALJ. In addition, Rule 13.10 states that the ALJ "may" require the production of additional evidence after the record is closed, thus further indicating that granting such requests is discretionary. (Cal. Code of Regs., tit. 20, § 13.10.) Finally, there is no adequate explanation as to why Rehearing Applicants waited so long to present evidence to the Commission that they claim to believe is highly relevant to the proceeding. This proceeding was opened on December 20, 2007, almost three years ago. Rehearing Applicants had ample opportunity to present any exhibits or prepared testimony during that time period, and in fact were given an additional month, between October and November 2009, to file and serve additional evidence and argument when the ALJ granted their first motion to reopen the record. Instead, Rehearing Applicants themselves caused further delay in the proceeding by repeatedly, and over the course of well over a year, providing incomplete responses to Commission staff data requests. For these reasons, the ALJ properly and reasonably exercised her discretion in denying Rehearing Applicants' second and third motions to

reopen the record, and this denial did not any way deprive them of their due process rights.

Next, as to the issues regarding the order to show cause of the proceeding and ex parte equal time, Rehearing Applicants' arguments similarly lack merit. No determination whatsoever has been made as to the merits of the issues raised in the order to show cause phase of this proceeding, which Rehearing Applicants acknowledge is ongoing. (Reh. App., p. 61.) No final order or decision has been issued in this pending adjudicatory phase. Contrary to Rehearing Applicants' assertion, the substantive outcome of the Decision does not rest upon anything that remains to be determined in the order to show cause phase, but rather rests upon our determination, discussed above, that as both a factual and legal matter, the majority of the RTB stock redemption proceeds were properly allocated to ratepayers, not to Rehearing Applicants' shareholders. While the Decision does mention that Rehearing Applicants' behavior may have violated D.91-09-042 and Rule 1, it does not find liability on the Rule 1 allegations and imposes no fines or penalties whatsoever, instead leaving these issues for determination in the order to show cause phase of the proceeding.

As to the ex parte issue, Rehearing Applicants express concern regarding a February 2, 2010 meeting between representatives of DRA and advisors to four Commissioners.[9] During this meeting, DRA urged the Commission to vote out the ALJ's proposed decision without amendment. DRA filed a notice of this ex parte communication on February 5, 2010. Rehearing Applicants' interpreted this ex parte contact to violate the ALJ's ban on any ex parte communications related to the order to show cause phase of the proceeding because the issuance of the order to show cause was, in fact, a component of the proposed decision, and because, during this ex parte meeting,

[9] In a December 17, 2009 ruling, the ALJ prohibited ex parte contacts related to the order to show cause phase of the proceeding.

DRA discussed some of the Rehearing Applicants' alleged conduct that would be relevant to the underlying basis for the issuance of the order to show cause.

Rehearing Applicants filed a motion on February 19, 2010 seeking equal ex parte time, and this motion was granted a day after the Commission issued D.10-06-029. (Reh. App., pp. 63-65.) In their rehearing application, Rehearing Applicants allege that they were denied due process as to the issue of whether the order to show cause should be adopted by the Commission because they were not given their equal time prior to the issuance of the Decision. This allegation of error lacks merit.

There is no due process violation as to the issuance of the order to show cause. Both Rehearing Applicants and DRA had ample opportunity to address whether the proposed decision, including the order to show cause component, should be issued without amendment, in their respective comments on the proposed decision filed on October 12, 2009, January 21, 2010 and January 28, 2010.

It should also be noted that DRA did not understand its February 2, 2010 ex parte meeting to violate the ALJ's ex parte ban on communications related to the order to show cause phase, and in fact DRA filed a response to Rehearing Applicants' motion for equal ex parte time on February 24, 2010. In that response, DRA stated its view that the ban was too vague to be enforced and did not appear to take effect until the actual issuance of the order to show cause by the Commission. (*See Response of the Division of Ratepayer Advocates to Small Local Exchange Carriers' Motion to Modify the Ex Parte Prohibition*, February 24, 2010.) In addition, the order to show cause phase of the proceeding is still ongoing, and Rehearing Applicants were granted equal time (forty-five minutes each with the same Commission advisors that DRA met with on February 2, 2010), and in fact they did take advantage of their equal time in a meeting with an advisor to President Peevey on September 8, 2010. Rehearing Applicants filed notice of this ex parte contact on September 9, 2010. Thus, any alleged violation of the ex parte rules is harmless, or has been cured and is now moot.

Further, Rehearing Applicants fails to demonstrate a due process violation, even if there were an alleged violation of the ex parte rules. Rehearing Applicants fail to demonstrate how the DRA meeting was pivotal in our determination regarding whether to issue the order to show cause, particularly when each party was given notice and an opportunity to file comments on the proposed decision as to the issuance of the order to show cause. As noted above, Rehearing Applicants and DRA both availed themselves of this opportunity and filed comments on the proposed decision.

Finally, Rehearing Applicants allege that the Decision contains certain factual conclusions regarding their tax responsibilities and about our approval of the RTB loans that are not supported by the record and which applicants did not have an opportunity to rebut with their own evidence or testimony. (Reh. App., pp. 65-67.) This argument also lacks merit because we made no findings as to Rehearing Applicants' tax liability for the RTB stock and made no determination as to whether Rehearing Applicants should, or should not, have paid state or federal taxes on the proceeds from the RTB stock redemption. Rather, we assumed, for purposes of the Decision, that funds obtained from ratepayers and returned to ratepayers should not create tax liability for Rehearing Applicants. (*See* D.10-06-029, p. 49.) If, however, that assumption is incorrect and Rehearing Applicants obtain documentary evidence in the form of letter rulings demonstrating that taxes were in fact owed, Rehearing Applicants are authorized to file a petition to modify D.10-06-029 to the extent that they actually paid taxes owed to the state or federal governments. (*See* D.10-06-029, p. 58 [Ordering Paragraph 4].) As noted above, matters of tax liability fall within the purview of the tax authorities, whereas the proper allocation of the RTB stock redemption proceeds, as between shareholders and ratepayers, falls within our exclusive jurisdiction. With sufficient documentation, the Decision offers Rehearing Applicants a clear and simple way to modify the Decision to conform to such determination made by the tax authorities. As such, this allegation of error lacks merit.

F. The Commission Made Sufficient And Reasonable Findings In Support Of All Issues Material To The Decision.

As their final allegation of error, Rehearing Applicants raise section 1705 arguments by alleging that Commission failed make adequate findings on all issues material to the Decision. (Reh. App., pp. 67-70.) Specifically, they assert that the Decision did not and cannot make findings that the redeemed RTB stock could be considered regulated revenues for ratemaking and cost allocation purposes. (Reh. App., pp. 67-68.) Rehearing Applicants also argue that the Decision contains no findings explaining how ratepayers could have funded ownership of the RTB shares prior to 1997. (Reh. App., p. 69.) They further allege that the Decision's findings that shareholders did not pay for stock obtained as patronage refunds, and that the Commission considered long-term debt in Rehearing Applicants' 1997 rate case, lack underlying evidentiary support. (Reh. App., pp. 69-70.) Finally, they claim that the Decision fails to include findings on critical, material issues raised by Rehearing Applicants regarding the Decision's conclusion that ratepayers paid for the RTB stock. (Reh. App., p. 70.) These allegations of error lack merit.

Section 1705 provides that Commission decisions "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision." (Pub. Util. Code, § 1705.) Relevant case law instructs that our findings must afford a rational basis for judicial review and allow parties to understand why the case was lost. (*See*, *e.g.*, *Utility Consumers' Action Network v. Public Utilities Commission* (2004) 120 Cal.App.4th 644, 662; *Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813.) Section 1705 does not require the Commission to make express legal and factual findings as to each and every issue or sub-issue raised by a party to a Commission proceeding. Rather, it only requires sufficient findings and conclusions to assist the court in ascertaining that we acted properly and to assist parties in preparing for rehearing or court review. (*See*, *e.g.*, *Goldin v. Public Utilities*

Commission (1979) 23 Cal.3d 638, 670; *In re San Diego Gas & Electric Company* [D.03-08-072] (2003) __ Cal.P.U.C.3d __ , at p. 12 (slip op.).)

In the present case, our findings are properly supported by record evidence, and the Decision contains sufficient findings to support the outcome. The Decision discusses Rehearing Applicants' key assertions, thus demonstrating that we did consider and evaluate their contentions by weighing the record evidence. (*See* D.10-06-029, pp. 22, 26, 28, 29, 34, 35, 39, 45-49.) The Decision expressly found that we authorized Rehearing Applicants to encumber public utility property as security for repayment of the RTB loans, and that their shareholders did not pay for the stock obtained as RTB patronage refunds. (D.10-06-029, pp. 50-51 [Findings of Fact 2 & 6].) The Decision further found that Rehearing Applicants presented the full amount of RTB loans in their cost of long term debt tabulations for general rate cases, and that interest in the RTB loans was a component of each Rehearing Applicant's regulated cost of service. (D.10-06-029, p. 51 [Findings of Fact 7 & 8].) The Decision also determined as a factual matter that, from 1997 to 2001, the Commission excluded the 5% RTB stock from rate base and increased Rehearing Applicants' cost of debt, and some of the Rehearing Applicants continue under this structure, with five of them moving 5% stock into rate base between 2001 and 2003. (D.10-06-029, p. 51 [Finding of Fact 10].) Finally, the Decision further found that we did consider long term debt in reviewing cost of capital and evaluating resulting return on equity. (D.10-06-029, p. 51 [Finding of Fact 11].)

In terms of the legal effect of these factual findings, we concluded that we are prohibited from authorizing the encumbrance of public utility property for the private pecuniary interests of Rehearing Applicants' shareholders. (D.10-06-029, p. 53 [Conclusion of Law 3].) We also determined that the patronage refund stock was a distribution from the RTB proportional to the interest paid by each Rehearing Applicant on the RTB loans, and that Rehearing Applicants' shareholders did not provide capital to acquire the patronage refund stock. (D.10-06-029, p. 53 [Conclusions of Law 5 & 6].) The Decision further found that the 5% RTB stock was secured by mortgages on public utility property authorized by the Commission, and as such the 5% stock is also public

utility property subject to our ratemaking and cost allegation jurisdiction. (D.10-06-029, p. 53 [Conclusion of Law 7].) We concluded that the dividends, residual payment and par value redemption amounts associated with stock purchased with shareholder funds should be credited to the shareholders, but also determined that all such amounts related to the patronage refund stock or the 5% stock should be credited to ratepayers because ratepayers paid the interest on the RTB loans, and the patronage refunds were issued based upon interest paid. (D.10-06-029, p. 54 [Conclusions of Law 16 & 17].) After independently reviewing all of the evidence submitted by applicants, we concluded that "[a]pplicants have not met their burden of proving that their proposal for shareholders to retain over $31 million in Rural Telephone Bank stock proceeds and ratepayers receive about $3,000 is justified by the record, or that the resulting rates would be just and reasonable." (D.10-06-029, p. 54 [Conclusion of Law 14].)

The findings and conclusions discussed above are supported by record evidence presented in this proceeding. (*See* discussion in D.10-06-029, pp. 3-5, 7-10, 16, 17, 19, 21-23, 26-33, 35, 39, 46-49.) Attachment A to D.10-06-029 also contains a detailed analysis of the various Commission decisions authorizing applicants to obtain RTB loans, including loan amounts, amounts funded by RTB, amounts of Class B stock, net loan amounts, and Class B stock percentage, if any. (See D.10-06-029, Attachment A.) For these reasons, Rehearing Applicants' arguments regarding insufficiency of findings and conclusions and lack of evidentiary support lack merit.

G. Request For Oral Argument

Rehearing Applicants also request oral argument on the issues raised in their rehearing application. (Rehearing App., pp. 70-72.) Rule 16.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the rehearing application establishes new Commission precedent, or changes or departs from prior precedent, or raises issues of first impression or great complexity and public importance that are likely to have significant precedential impact. (Cal. Code of Regs., Tit. 20, § 16.3.) Rule 16.3 further provides that "[t]he Commission has complete

discretion to determine the appropriateness of oral argument in any particular matter." (*Ibid*.)

In the present case, there is ample evidence in the record regarding the relevant issues involved in this proceeding. We have a full understanding of the record, and there are no legal issues requiring further briefing, whether orally or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, Rehearing Applicants' request for oral argument is denied.

H. Request For Stay

On July 28, 2010, Rehearing Applicants filed a motion for stay of D.10-06-029. Rehearing Applicants argue that a stay is necessary because they are likely to prevail on the merits of their claims and because they will suffer serious and irreparable harm if a stay is not granted. (Motion for Stay, p. 1.) However, because we have already resolved the issues in the application for rehearing, and determined that the allegations of error lack merit, we need not resolve the motion for stay. According, this motion is denied, as moot.

I. Motion For Order Directing Docket Office To Accept July 28, 2010 Request For Official Notice For Filing

After Rehearing Applicants filed their application for rehearing, they attempted to introduce new evidence in the record by filing their July 28, 2010 request for official notice and accompanying documents, which appear to be 2009 income statements for various entities.[10] This request is denied as an improper attempt to reopen the evidentiary record at the application for rehearing stage.

Rehearing Applicants are aware that the factual record in this proceeding was closed many months before they attempted to file their request for official notice.

[10] We observe that the 2009 income statements are of marginal relevance with respect to the RTB stock redemption proceeds which were paid out to Rehearing Applicants in 2006.

Indeed, as discussed above, Rehearing Applicants filed no less than three motions to reopen the record in this proceeding, on October 12, 2009, and on February 22 and April 6, 2010. Their October 12, 2009 motion to reopen the record was granted by the ALJ, and they were given until November 12, 2009 to file and serve any additional evidence and argument. As to the February 22, 2010 motion, the Division of Ratepayer Advocates, a party to the proceeding, opposed Rehearing Applicants' motion as nothing more than a "delaying tactic" seeking a different outcome. The presiding officer in this proceeding specifically denied Rehearing Applicants' February and April 2010 motions to reopen the record in a June 25, 2010 ruling. (*See Administrative Law Judge's Ruling Granting Motion for Equal Ex Parte Time and Denying Motions to Reopen Record*, June 25, 2010.)

In support of their July 28, 2010, request for official notice, Rehearing Applicants cite Rule 13.9 of the Commission's Rules of Practice and Procedure, which provides that "[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq." (Cal. Code of Regs., tit. 20, § 13.9.) Rule 13.10 of the Commission's Rules of Practice and Procedure further provides that, upon agreement of the parties, the presiding officer may authorize the receipt of specific, additional documentary evidence as part of the record. (Cal. Code of Regs., tit. 20, § 13.10.) Both of these rules are entirely discretionary.

In issuing D.10-06-029, we relied upon the factual record as it then existed, and it is improper to attempt to introduce new evidence at the application for rehearing stage. A more appropriate vehicle for seeking to introduce new evidence after the issuance of the Decision would be by way of a petition for modification pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure. (Cal. Code of Regs., tit. 20, § 16.4.) Rule 16.4(b) specifically allows a party to present new or changed facts to the Commission in a petition for modification, if supported by declarations or affidavits.

Accordingly, Rehearing Applicants' motion for an order directing Docket Office to accept July 28, 2010 request for official notice for filing should be denied because the evidentiary record in this proceeding was already closed, and because the presiding officer already denied two of their prior motions to reopen the record in her June 25, 2010 ruling. More importantly, any attempt to reopen the evidentiary record at the application for rehearing stage is improper, and should not be permitted.

III. CONCLUSION

For the reasons stated above, D.10-06-029 is hereby modified to correct a mathematical error. As modified, the application for rehearing of D.10-06-029 is denied because no legal error has been shown. The motion for stay is denied as moot. The July 28, 2010 request for official notice is also denied.

Therefore **IT IS ORDERED** that:

1. D.10-06-029 is hereby modified as follows: As to Kerman Telephone Company, the amount noted on page 11 of D.10-06-029 is changed from $1,511,629.00 to $1,506,596.00.
2. As modified, the application for rehearing of D.10-06-029 is denied.
3. The motion for stay is denied as moot.
4. The July 28, 2010 request for official notice is denied.
5. The proceeding, Application (A.) 07-12-026, remains open as the order to show cause phase is pending.

This order is effective today.

Dated October 28, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

Commissioner Dian M. Grueneich, being necessarily absent, did not participate.