STATE OF CALIFORNIA GRAY DAVIS, *Governor*

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

May 9, 2003

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

Decision 03-05-034 is being mailed without the Dissent of Commissioner Carl W. Wood. The Dissent will be mailed separately.

Very truly yours,

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

ANG:jyc

Decision 03-05-034 May 8, 2003

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 Decision 02-11-022 for a list of appearances.)

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OPINION ADOPTING RULES FOR SWITCHING EXEMPTION

Today's decision adopts rules regarding the rights and obligations of Direct Access (DA) customers to return to bundled service and subsequently switch back to DA service. These issues include consideration of legality of the "switching exemption" pursuant to the limited rehearing of Decision (D.) 02-03-055 granted by D.02-04-067.

I. Background

DA service was authorized as part of the Commission's electric restructuring program in the mid 1990s whereby retail electricity customers were permitted to choose the entity from which they purchased their electricity. Customers could either subscribe to "bundled" service from the public utility or DA service from an electric service provider (ESP). Customers who purchase bundled service pay an electricity charge to cover the utility's power supply costs. Bundled service customers' total bill includes charges for all utility services, including distribution and transmission as well as electricity. A DA customer receives distribution and transmission service from the utility, but purchases electricity from its ESP.

Pursuant to the Governor's Proclamation of January 17, 2001,[1] and Assembly Bill No. 1 from the First Extraordinary Session (AB 1X). (See Stats. 2002, Ch. 4.), the California Department of Water Resources (DWR) became responsible for procuring electricity on behalf of the customers of the California utilities. As part of its provisions to deal with California's energy crisis, AB 1X

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[1] On January 17, 2001, Governor Davis issued a Proclamation concerning a "state of emergency" within California resulting from dramatic wholesale electricity price increases.

also called for the suspension of DA. In compliance, the Commission issued D.01-09-060, suspending the right to enter into new contracts or agreements for DA after September 20, 2001.

In D.01-09-060, we reserved for subsequent consideration matters related to various implementation issues concerning DA suspension.[2] On January 14, 2002, we instituted the instant Rulemaking (R.) 02-01-011 to consider various pending implementation issues concerning the suspension of DA. As an initial phase of that proceeding, we issued D.02-03-055 which, among other things, adopted an exemption to the suspension requirements of D.01-09-060 by permitting contract renewals and assignments whereby existing DA customers could choose a new ESP and continue on DA even if they had returned to bundled service after September 20, 2001, subject to certain restrictions.[3] (D.02-03-055, p. 21.) This exemption is referred to as the "switching exemption."

The Utility Reform Network (TURN) subsequently filed an application for rehearing, arguing that the "switching exemption" was unlawful and challenged its basis. (TURN's Application for Rehearing, pp. 6-7.) In D.02-04-067, the Commission granted a rehearing on this issue, and directed that the issue be made part of the phase of this proceeding on the DA cost responsibility surcharges. As stated in D.02-04-067, the limited rehearing was to consider the

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[2] (Id. at pp. 8-9; see also, Order Modifying Decision (D.) 01-09-060, and Denying Rehearing, As Modified [D.01-10-036, pp. 1-2 (slip op.)] (2001) ___ Cal.P.U.C. ___ (hereafter, "D.01-10-036").)

[3] On page 25 of D.02-03-055, the Commission sets forth a list of those customers or types of new locations or loads that are ineligible to move from bundled service to direct access. (D.02-03-055, p. 25.)

switching exemption further in light of AB 1X and D.01-09-060, and to develop an adequate record.

In accordance with D.02-04-067, an ALJ ruling was issued on May 2, 2002, directing parties to address the switching exemption issue within the scope of the evidentiary hearings scheduled on DA cost responsibility issues in this proceeding. Accordingly, parties addressed the switching exemption as part of the opening testimony on DA CRS submitted on June 6, 2002, and reply testimony submitted on June 20, 2002. Evidentiary hearings were held from July 11 through July 24, 2002, which included the issue of the switching exemption. Post-hearing opening briefs were filed on August 30, 2002, and reply briefs were filed on September 6, 2002. In D.02-11-022, addressing DA CRS issues, consideration of the switching exemption was deferred to today's order.

Active parties in this phase of the proceeding represented a range of interests including the investor-owned utilities: Pacific Gas and Electric Company and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E); parties representing bundled customers (i.e., Office of Ratepayer Advocates (ORA) and TURN; and parties representing DA customers, either through industry associations or as individual customers. The most active parties representing DA interests include the Alliance for Retail Energy Markets and the Western Power Trading Forum (AReM/WPTF), California Large Energy Consumers Association (CLECA), California Industrial Users (CIU), and California Manufacturers & Technology Association (CMTA). Other DA parties presented testimony or filed briefs.

II. Basis for the Switching Exemption

A. Parties' Positions

TURN renews its assertion that the switching exemption is contrary to law, and cites § 80110 of the Water Code which provides in relevant part:

> After passage of such period of time after the effective date of this section as shall be determined by the commission, *the right of retail end use customers* pursuant to Article 6 (commencing with § 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code *to acquire service from other providers shall be suspended* until the department no longer supplies power hereunder. (Emphasis added)

TURN contends that by allowing a customer that has returned to bundled service subsequent to the September 20, 2001, suspension date to thereafter select a new ESP and resume DA service, the Commission violates the plain language of § 80110. TURN interprets the statute as forbidding any bundled service customer from selecting a new ESP, regardless of whether the customer was previously served via DA. TURN maintains that such an action constitutes acquiring service from another provider, and is precisely what the statute forbids. TURN argues that the law does not provide for a "standstill" in the amount of load on DA as of the suspension date, but absolutely bars a customer from acquiring service from another provider after the suspension date. In the event that the Commission chooses to consider permitting the switching exemption to continue over its objections, TURN proposes terms and conditions to govern the switching of customers back and forth between bundled and DA service.

SCE agrees that DA customer migration in and out of bundled service should be curtailed and specifically advocates elimination of the switching exemption and/or a requirement that returning customers remain on bundled service for a full five years.[4]

Other parties, however, dispute the contention that the switching by a DA customer into or out of bundled service after September 20, 2001, violates AB 1X. AREM argues that the prohibition on acquiring service from an ESP only applies to a new arrangement or agreement for DA. AREM contends that customers with a valid DA contract in place on or before September 20, 2001, had already "acquired" DA before the suspension took effect, and maintains that the renewal or assignment of such contracts under the switching exemption only involves the continuation of an existing contract right, rather than a new arrangement or agreement. Other parties representing DA interests also oppose the elimination of the switching exemption, particularly if applied on a retroactive basis. Various DA parties argue that existing DA customers that have previously used the switching exemption should be grandfathered and entitled to retain DA service, or propose various methods to clarify how the exemption should be administered.

SDG&E believes it would be consistent with the Commission's "standstill" principle to continue the switching exemption. SDG&E offers a proposal to permit the switching exemption to continue in a manner designed both to protect bundled service customers and maintain the viability of DA. PG&E and ORA likewise both propose restrictions on switching to protect bundled customers and to preserve DA customer choice, rather than advocating an outright elimination of the switching exemption.

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[4] SCE Brief at pp. 51-52.

B. Discussion

In D.02-03-055, we discussed the principles underlying our approach to implementation of DA suspension as follows:

> Generally, we favor a balanced approach which allows existing direct access customers to continue in the direct access market, but limits additional load moving to direct access to load changes associated with normal usage variations on direct access accounts in effect as of September 20, 2001. This standstill concept is consistent with the provisions of AB 1X and D.01-09-060 that direct access be suspended and there be no new arrangements.
>
> Under the standstill approach described below, we will permit assignments and renewals, but not add-ons of new load. This approach is consistent with our policy reasons for imposing direct access cost responsibility surcharges or exits fees, in lieu of an earlier suspension date, as an appropriate way to alleviate the significant cost-shifting of DWR costs on to bundled service customers.

We are not persuaded by TURN's argument. We lawfully exercised our discretion in implementing the suspension of DA mandated in AB 1X. Accordingly, we did not violate AB 1X in adopting the "standstill" principle as articulated in D.02-03-055. The provisions of AB 1X relating to DA suspension do not prohibit us from adopting the switching exemption for customers who had received DA service prior to the DA suspension date. These customers had already acquired DA and the switching is no more than a resumption of DA service. A customer can only "acquire" DA where it did not previously have such service. In contrast, the customer who previously took DA service is merely resuming a service option that the customer already possessed, albeit with a break in service.

In D.02-03-055, our goal was to ensure that the DA load would not increase beyond the levels that existed on the September 20, 2001, suspension date. Customers with a written and executed contract in place on or before September 20, 2001 had already "acquired" DA before the suspension took effect.[5] Merely allowing DA customers with valid contracts in place or customers verified per § 366.5 on or before September 20, to switch ESPs does not impair the suspension of the rights of customers to acquire new DA load.

[5] D.02-03-055, mimeo. at 22-23.

Nothing in AB 1X prohibits the switching between bundled service and DA service after the suspension date so long as the customer had a written and executed DA contract or had been verified under § 366.5 prior to September 21, 2001. Thus, such customers that switch back to DA from bundled service are merely resuming service and are not "acquiring" new service. Although switching ESPs may require a new written contract, there is no increase in DA load. This is similar to how we view the renewal or assignment of such ESP contracts as discussed in D.02-03-055, where there is no change in load, and thus, no cost shifting.

TURN's interpretation of the law would mean that DA was not only suspended at levels existing as of September 20, 2001, but actually set up to decline from those levels. By creating a one-way-only exit, with no reentry, the result would be not merely a suspension, but would purposefully cause a decline in DA load every time a DA customer reentered bundled service.

Not to permit the switching exemption would place all DA customers who have already switched ESPs in a position of substantial uncertainty, and could place the continued viability of the DA program in further jeopardy. Such action would be contrary to our previously stated policy in D.02-03-055 that there is value in maintaining DA. In D.02-03-055, we noted that DA diversifes the California electric power market, and therefore helps to protect California against uncertainty. (D.02-03-055, pp. 14, 15; (slip op.).) We further observed that the growth of DA load in summer 2001 contributed to a substantial reduction in the level of the DWR revenue requirement estimate for the period through December 31, 2001. (Id.) Eliminating the switching exemption would not advance the viability of DA.

We thus conclude that the switching exemption is consistent with the applicable law, is beneficial, and should be permitted. We also recognize, however, that reasonable limitations on the exemption must be adopted, both with respect to DA customers returning to bundled service, as well as switching back to DA service, to ensure that bundled customers are not adversely impacted. The Commission must separately decide the terms under which a DA customer may return to bundled service, and upon such return, the terms under which the customer may switch back to DA service. We address the necessary terms and restrictions in the following section.

We remind parties that all customer changes in status between bundled and DA service as provided for in this order shall continued to be determined pursuant to the Direct Access Service Request (DASR) process. Nothing in this order is intended to allow either customers, or ESPs acting on their behalf, to switch customers between bundled and DA service by any process other than through a properly executed DASR pursuant to adopted tariff rules.

III. Terms and Conditions for Switching Between Bundled and DA Service

A. Transitional Rules Applicable to "Grandfathered" DA Customers

We first address the treatment of DA customers that have already returned to bundled service subsequent to September 20, 2001, up through the date of today's order.

1. Parties' Positions

In order to allow customers and suppliers an opportunity to respond to the DA CRS provisions adopted in D.02-11-022 and the switching rules adopted in this order, PG&E proposes a three-month transition period during which all DA customers that return to bundled service, including large customers, would simply pay the portfolio price without having to pay any increment for spot prices above bundled customers' portfolio price. PG&E proposes that this short transition period be instituted after the decision in this proceeding is issued during which time DA customers may return to bundled service

SCE supports a 45-day open-window period to permit customers time to consider the new options available to them resulting from the Commission's order, and to make a rational choice on the relative merits of bundled service or continued DA. SCE also believes this window of time will permit any new load opting back to bundled service to be incorporated in its procurement planning process.

SDG&E supports the continued ability of grandfathered DA customers to switch back and forth between bundled and DA service under the switching exemption. For example, a former DA customer who has returned to bundled service and is paying a re-entry fee who now opts to switch back to DA service, would cease paying the re-entry fee and begin paying the DA CRS.

ORA proposes that the Commission allow a 45-day window before any rules prohibiting or restricting switching are implemented to allow DA customers to return to bundled service without being required to pay the highest marginal price.

CIU also supports adoption of a transition period or open season during which DA customers might choose to return to bundled service without being subject to adopted "coming and-going" rules. CIU agrees with PG&E's proposed three-month return period. CIU believes such a return should be subject to other "coming-and-going" rules, including the right to return to DA in a year.

Given past disputes over DA Service Requests (DASR) processing, CIU argues the Commission should be quite specific in defining the end of the transition period. CIU suggests that if a DASR is submitted by close of business the last day of the transition period, the customer should be deemed to have timely returned to bundled service, even if utility electrons do not flow until a later date. CIU makes this proposal based on the premise that customers have no control over how rapidly DASRs are processed.

CIU also objects to certain parties' use of the term "amnesty period" in referring to the window of time during which DA customers may switch in or out of bundled service without penalty. "Amnesty" means "the act of an authority (as a government) by which pardon in granted to a large group of individuals." (Webster's Ninth New Collegiate Dictionary (1983) p. 79.) CIU argues that DA customers did nothing illegal in exercising their legal right to choose DA right up to the suspension date, have done nothing requiring pardon, and that no title should be attached to an open season implying otherwise.

2. Discussion

We recognize that certain DA customers have already returned to bundled service since the suspension date of September 20, 2001. At the time of their return, such customers did not know what DA CRS provisions would be adopted or what the disposition of the switching exemption rules would be. Since that time, we have issued D.02-11-022, adopting DA CRS provisions, including an interim cap of 2.7 cents/kWh, subject to further review and revision by July 1, 2003. Today, we also issue the instant order, providing further disposition of the rules relating to the DA switching exemption.

Because these DA customers did not know what Commission policies or surcharges would be adopted with respect to these matters at the time that they returned to bundled service, we conclude that is appropriate to grandfather such customers under existing bundled rates, with the option to return to DA without penalty for a limited window of time. This limited window will provide time for these "grandfathered" customers to determine what course they wish to pursue in view of D.02-11-022 and today's order.

Accordingly, we authorize a 45-day period from the effective date of notification by letter for these grandfathered DA customers that have switched back to bundled service to make an election either to remain on bundled service or to return to DA service. If they return to DA service during this window period, they will resume responsibility for payment of DA CRS on the same basis as applicable to other existing DA customers pursuant to D.02-11-022, but will not incur any other additional charges. We emphasize that only DA-eligible load with written and executed contracts as of September 20, 2001, will be permitted to switch. If grandfathered DA customers elect to remain on bundled service, they will pay the bundled procurement rate and shall be required to make a minimum commitment as a bundled customer for a three-year minimum period before having the option of returning to DA. We explain the basis and terms of the three-year commitment in Section III.C.

Within 30 days of the effective date of this order, we shall direct the Commission's Energy Division to convene a Rule 22 Working Group meeting to address necessary implementation details associated with the switching rules and the process of notifying grandfathered DA customers concerning their options for returning to DA within a 45-day window period. Participants in the Working Group meeting shall identify any unresolved implementation issues for which no consensus can be reached. The Working Group shall produce a report identifying such remaining issues so that the need for further hearings or other process to address remaining contested issues may be considered. The ALJ shall provide further guidance by ruling concerning the timing and process for producing the report.

We shall direct the utilities to file advice letters within 45 days of the effective date of this order to implement the switching rules adopted in this order. Within 15 days of the filing of the advice letter, the utilities shall be required to notify grandfathered DA customers by letter that they have 45 days from the date of the letter during which to respond if they elect to return to DA.

B. Temporary "Safe-Harbor" Return To Bundled Service While Switching ESPs

1. Parties' Positions

Several parties propose that the utilities provide a "safe-harbor," by allowing DA customers to temporarily return to bundled service in the process of changing Energy Service Providers (ESP). DA customers would thereby be able to use bundled service as a "safe harbor" for a short period of time, without incurring any obligation to take bundled service for a defined length of time.

CMTA proposes that DA customers be given a "safe harbor" for 90 days in order to find a new ESP and to have DASRs submitted to the utilities. As long as DASRs are submitted within the 90-day period, the customers would be free to return to DA service. Under CMTA's proposal, DA customers would pay the prevailing spot market price during the "safe harbor" period, plus all applicable generation-related surcharges that apply to DA customers. If the DA customer had no DASR submitted on its behalf within the 90-day period, CMTA proposes that the customer would be required to remain on bundled service for the next 12 months, and to pay the average generation rate for bundled service. The customer would remain responsible for its share of past surcharges that exceeded the rate cap.[6] By allowing a 90-day "safe harbor" period and by requiring the customer to pay the spot price during this period, CMTA claims that the customers will not impose costs on bundled service customers, but may switch ESPs without undue disruptions. Because the customer is not given unlimited access to the IOU portfolio at a favorable rate, CMTA argues that its proposal eliminates the possibility of customers "gaming" the market by switching from bundled service to DA service whenever spot prices are expected to be low, or vice versa.

CLECA believes that DA customers returned involuntarily to the utility should retain the ability to return to DA service within a "reasonable" period of time, perhaps 60 days. Similarly, if a DA customer is in the midst of changing DA suppliers, and there is a minor delay in processing the DASR change, CLECA believes the customer should be able to use utility power for the interim and pay utility tariffed rates. CLECA believes these instances are highly unlikely to occur all at one time and the very diversity of the occurrences will work to mitigate, if not virtually eliminate, any adverse impacts on the utility and bundled customers. CLECA argues that the ability of current DA customers to switch suppliers should not be constrained by imposing restrictive coming and going rules that would merely give current ESPs inordinate and inappropriate leverage in the pricing of DA power.

AREM/WPTF raise the issue of timely utility processing of DASRs so that customers may return to DA within the specified "safe harbor" time limits and not be "held hostage" to bundled service. AREM/WPTF support the

[6] Exh. No. 40 at 15.

recommendation of the Los Angeles Unified School District (LAUSD) that the utility be required to process DASRs within two billing periods of submission.

CIU agrees that at a minimum, a safe harbor should be adopted to allow customers who are switching providers to return to bundled service if their DASRs cannot be processed in time for the shift to occur without such a return. (CIU OB, p. 21.) CIU takes issue with some parties' premises that it is a customer's fault such a shift does not occur on a timely basis, and argues that the customer has no control over how fast the utility processes the DASR. CIU argues that as long as such a customer is willing to pay the spot price for power, the customers should be allowed to remain in the "safe harbor." Otherwise, CIU proposes that specific time periods for utility DASR processing be adopted with built-in liquidated remedies provisions whereby customers would be held harmless if the utility fails to deliver on time.

PG&E opposes the "safe harbor" proposals. PG&E does not believe these customers should be allowed to "lean on" the utility for service, but should be required to make a seamless transition, with their procurement service switching directly from one ESP to the next. PG&E argues that requiring DA customers who return to bundled service to remain for a year is a reasonable constraint in order to protect and be fair to existing bundled customers. PG&E believes the safe harbor would simply be a way for DA customers to circumvent this requirement, to the possible detriment of existing bundled customers.

SCE does not oppose allowing parties a 30-day safe-harbor in order to switch from one ESP to another, with the proviso that those customers pay the higher of day-ahead spot price plus all other non-bypassable charges or the generation rate of their otherwise applicable tariff. SCE also argues that other restrictions may need to be imposed to prevent wholesale abuse, such as a limitation on the absolute amount of load that can shift into the safe harbor in a given calendar period. SCE proposes that such issues should be addressed in an implementation workshop forum.

SDG&E believes some parties' proposals go too far by requiring that a customer returning to bundled service remain on bundled service for 12 or more months, even if the customer involuntarily returned to bundled service by reason of an ESP default.[7] Another party proposes that each customer switch be evaluated on a case-by-case basis to determine if bundled customers are harmed.[8] SDG&E contends these proposals are unworkable or violate the principles of protecting bundled customers, while at the same time keeping DA viable and balancing bundled and DA customer interests. SDG&E claims however, that any further restrictions on customers exercising the switching exemption would not incrementally protect bundled customers and would not move in the direction of maintaining the viability of DA.

2. Discussion

We conclude that DA customers should be permitted to return to bundled service on a transitional basis while switching from one ESP to another, or for similar reasons where a temporary "safe harbor" is needed. Because of uncertainties in the contracting process with the ESPs and the utilities' processing of DASRs, a DA customer may need to take bundled service for some temporary period while switching ESPs. The safe harbor will provide for a brief bundled service interlude, necessitated by conditions not necessarily under the

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[7] Tr. 7 at 980.

[8] Ex. 28 at 51-52.

customer's control, and will prevent the customer's loss of the right to resume DA service.

We also clarify that if a customer was exempt from DWR charges as a "continuous" DA customer (ie, taking DA prior to February 1, 2001), that customer does not lose the exemption upon returning to DA service after utilizing the "safe harbor" provisions. We also clarify that for switches to utility bundled service for transitional purposes prior to the effective date of this order, the safe harbor period shall be 60 days from the time the DA status of the account was deactivated until a new DASR is submitted. We conclude that such accommodation is appropriate for switches that occurred prior to this order since parties were not on notice as to the 60-day limit adopted in this order.

DA customers that only seek bundled service as a temporary "safe harbor" before moving to a new ESP may do so, but shall be required to pay the incremental short-term power costs incurred on their behalf, and must continue to pay any applicable DA CRS. Accordingly, such transient customers will not be entitled to the bundled portfolio rate.

To the extent the utility must plan for the contingency that significant amounts of DA load may return to bundled service on short notice, its procurement costs will be impacted. To compensate for this risk, it is appropriate for returning DA customers to pay for the added portfolio costs they place on the system. DA customers returning to bundled service on a temporary basis should therefore be required to pay for the incremental costs that will be imposed on the system due to additional short-term spot supplies procured to serve them.

The remaining bundled customers should not be burdened with these added costs. If the utility relies on short-term power procurement to avoid stranding long-term contracts, it risks higher prices. It is thus reasonable for the risks associated with such short-term power costs to be assigned to the DA customers on whose behalf it is purchased. We shall therefore require DA customers returning to bundled service for only a temporary period to pay for the costs of short term power, whether those costs are above or below the bundled rate.

The DA customer will not be able to use the "safe harbor" as a means of gaming or arbitraging, because we shall require such transient customers to pay the spot price for power rather than the bundled rate. Because they will reimburse the utility for any incremental costs incurred on their behalf, bundled customers should be left indifferent to whether DA customers use the utility as temporary "safe harbor."

We recognize that it would be unduly complex and impractical to require each utility to calculate actual short-term commodity costs on an hour-by-hour basis incurred to serve "safe harbor" customers. SCE, for example, explains that it does not receive actual charges from the Independent System Operator (ISO) until at least 90 days after a trade date. We shall thus permit the utilities to use monthly estimates of the applicable short-term power costs chargeable to returning "safe-harbor" customers, rather than actual hour-by-hour data. Moreover, in order to simplify and standardize the process of pricing short-term power charged to "safe harbor" customers, we shall direct that the Cal-ISO Hourly EX Post Incremental Price be used as a pricing index. The use of this pricing index was proposed by AreM on the basis that it is the best, most transparent, verifiable, and noncontroversial approach to pricing. SDG&E expresses agreement with the use of the pricing index. No party disagrees. We thus find this index to be appropriate for the reasons identified above, and shall hereby adopt it.

AreM also proposed to include a nominal administration fee (e.g., 5 mills). Yet, the utilities have argued that DA customers returning to the "safe harbor" shall be liable for additional administrative overhead costs (such as meter reading) incurred by the utility to serve them. We have no basis to conclude that the nominal administrative charge suggested by AreM would reasonably cover necessary administrative overhead. Thus, we cannot arbitrarily limit the administrative adder to a nominal 5 mills. As part of their advice letter filing implementing this order, we shall authorize the utilities to identify relevant incremental administrative charges (such as meter reading) necessary to service returning "safe harbor" customers. The utility charges applicable to DA customers returning to the "safe harbor" shall also include other relevant costs associated with the spot power procured to serve them including ancillary services, grid management, unaccounted for energy, and similar charges paid to the ISO.

In their advice letter filings to implement tariff changes to comply with this order, the utilities shall explain more specifically what accounting and tracking measures they propose to use to identify, and apply short-term commodity costs to the bills of DA customers temporarily returning to bundled service and to exclude such costs from bundled portfolio charges.

We note the concern raised by SCE as a potential problem regarding the possible need for limits on the absolute amount of load that can shift into the safe harbor during a given calendar period. We shall impose a time limit of 60 days for DA customers to remain in the safe harbor. This is a reasonable compromise between the recommendations of SCE and CMTA, and is the time period suggested by CLECA. Imposing this 60-day time limit should have some effect on limiting the amount of DA load in the safe harbor at any given time. We believe that further consideration may be warranted as to whether any limits on the absolute amount of load permitted under the safe harbor provisions are necessary, and if so, what the terms of any limits should be. We shall direct that the further proceedings ordered elsewhere in this order include consideration of this issue.

On the other hand, customers should not be unduly confined to bundled service for an extended period because of the failure of the utility to process their DASR on a timely basis. The DA customer should not enter the safe harbor before being ready to begin the process of switching to a new ESP. The safe harbor is not intended as a place to be used to shop around among different ESPs while taking bundled service and delaying submission of a DASR. The safe harbor provision is intended to facilitate an already contemplated switch to a new ESP.

We recognize that there may be instances, however, where a DA customer is involuntarily returned to bundled service as a result of the ESP unilaterally discontinuing DA service. In such a situation, the DA customer may enter the safe harbor without having an immediate candidate for a new ESP. The DA customer that is involuntarily switched back to bundled service may remain in the safe harbor for 60 days to provide an opportunity to select a new ESP and for a DASR to be submitted. By no later than the end of the 60-day safe harbor period, the DA customer must have at least have a DASR submitted and an acknowledgment of receipt from the utility. If the customer has not satisfied this requirement by the end of the 60 days, the customer will be returned to bundled service and becomes subject to the same pricing terms and conditions as apply to other bundled customers.

To the extent that any delays in completing the processing of the DASR within the 60-day safe harbor time limit are due to beyond the control of the customer, the customer will be permitted to remain under the safe harbor pricing provisions until the DASR processing is completed.

C. Switching After the Initial Transition Period: Minimum Term and Price

The following section addresses the rules for switching after the end of the initial transition period, and for reasons other than a temporary "safe harbor."

1. Parties' Positions

(a) PG&E

After the initial transition period, PG&E proposes that when a large DA customer returns to bundled service, it pay the higher of (1) the utility's marginal price to obtain power, or (2) the utility's rate generally applicable to bundled customers, continuing for a three-year period.[9] If the marginal cost of power is higher than the utility's average portfolio price, PG&E argues that its proposal avoids burdening the remaining existing bundled customers under those circumstances.

PG&E defines large DA customers as those taking service on Rate Schedules A-10 and above.[10] PG&E distinguishes large DA customers on

[9] PG&E/Burns Ex. 41, p. 7-4.

[10] Large customers are defined as those receiving service under Rate Schedules A-10, E-19V, E-19, E-20, E-25, A-RTP, and AB-B. (Ex. 41, p. 7-3.)

this basis because, in the aggregate, DA load is mostly due to those larger customers. It is the switching behavior of these larger customers that is more likely to have a noticeable impact on PG&E's portfolio[11] than is the case for smaller DA customers.

PG&E proposes no restrictions on smaller DA customers' access to bundled service at this time, but would permit them simply to return to bundled service and pay the bundled portfolio price. PG&E proposes no minimum holding period during which they would have to remain a bundled customer before returning to DA service.

Without this constraint on large DA customers, PG&E argues that the utility has essentially no option but to purchase for a returning customer only on the spot market. With this constraint, the returning customer's loads can be incorporated, at least somewhat, into the utility's overall procurement plan.[12] This provides benefit to the portfolio, which benefits bundled customers generally.

(b) SCE

SCE believes that customers on DA as of September 20, 2001, that have since returned to bundled service, and had permissibly switched under any granfathered rules, should be required to make an election to stay on bundled service. SCE proposes that any such customers electing to stay on bundled service should not be allowed to switch back to DA for five years. Customers qualifying for DA service under other exemptions authorized in

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[11] PG&E/Burns Ex. 41, p. 7-3.

[12] PG&E/Burns Ex. 41, p. 7-4.

D.02-03-055, would have to make a positive selection for either DA or bundled service for five years when they become eligible for DA service.

SCE also proposes that any current DA Customers that subsequently elect to return to bundled service be required to remain bundled service customers for at least five years.[13] SCE claims that a five-year minimum commitment is appropriate based on the time horizon of SCE's proposed procurement portfolio in the R.01-10-024, establishing the procedure for the utilities to resume procurement of electricity to serve their net short. In order to promote a stable, low cost portfolio, SCE claims that longer-term contracts must be utilized. In order to incorporate returning load into the planning process, SCE believes that imposing a five-year requirement will allow sufficient stability in the procurement load enabling SCE to provide for that load in an orderly and cost-effective manner.

SCE proposes that DA Customers returning to bundled service be required to pay the higher of day-ahead spot price plus all other non-bypassable charges or the generation rate of their otherwise applicable tariff, for the first six months after returning to bundled service.[14] SCE claims that this rule, combined with the minimum five-year commitment rule, will protect the existing bundled service customers from DA customers gaming the spot price and the bundled service portfolio price. SCE proposes that DA customers returning to bundled service remain responsible for the pro-rata portion of any accrued undercollection in the SCE proposed balancing account due to the capping of the DA Cost Responsibility Surcharge.

[13] SCE/Collette, Ex. 22, p. 53.

In addition to the five-year time commitment, SCE proposes that DA customers returning to bundled service should not be allowed to return to DA until the undercollection is fully recovered to ensure that customers cannot reallocate their obligations to other DA customers by returning to bundled service.

(c) SDG&E

SDG&E proposes that customers returning from DA to bundled service pay the higher of SDG&E's existing bundled customers commodity rate or the spot price i.e., the Short-term Commodity Rate (STCR).[15] Customers on the STCR could remain on this rate for any length of time, and if

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[14] SCE/Collette, Ex. 22, p. 53.

[15] Details regarding the STCR and SDG&E's proposed proxy for the spot price, the Procurement Cost Adjustment Mechanism (PCAM), are discussed in Ex. 54, pp. 6-7.

permitted under the DA suspension rules, return to DA. In addition, returning customers may elect SDG&E's bundled commodity rate. Under this alternative, customers would have to remain on bundled service for a period of either one or five years, depending on the customer's size, before the customer can return to DA.[16]

SDG&E proposes that its largest customers electing bundled commodity priced service (as opposed to the short-term spot rate) must remain on that rate for five years, whereas small customers returning to bundled service would need to remain on bundled service only for one year. Like SCE, SDG&E claims that a five-year commitment is reasonable and necessary for its largest industrial customers but unnecessary for smaller customers, whose return to bundled service would have a disproportionately smaller impact on SDG&E's procurement planning. If a large customer determined that SDG&E's five-year commitment was too long, then that customer would be free to select an ESP and return to DA. Under all of these options, SDG&E claims that bundled customers remain protected from additional stranded costs.

SDG&E also proposes that DA customers pay a levelized re-entry fee to recover the shortfall due to the cap imposed on DA CRS. SDG&E proposes that the re-entry fee would be levelized for the same term as the DA CRS. SDG&E argues that levelization is necessary because of the same problem of over- and under-recovery of costs from the factors of fee levelization.

SDG&E proposes that re-entry fees be vintaged, that is, a customer would pay the particular re-entry fee calculated for the year the

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[16] Details regarding SDG&E's bundled commodity rate alternative are discussed in Ex. 54, pp. 8-9.

customer returns to bundled service, and continue paying that year's re-entry fee for the full term of the DA exit fee or until the customer switches back to DA service. SDG&E argues that vintaging is appropriate for re-entry fees because unlike DA CRS, re-entry fees are based on current year and past year costs only. The current year costs are projected and will change, therefore necessitating a true-up, but the particular year's re-entry fee always will be based on the same time period of costs. A new re-entry fee will be calculated each and every year to be applied to DA customers returning to bundled service in that given year. The particular annual re-entry fee applied to a returning customer should remain with that customer through the term of the exit fee.

(d) TURN

TURN concludes that if a DA CRS were imposed based upon the full annual forecasted obligation, then there will not need for a separate entrance fee to return to bundled service. In D.02-11-022, however, we adopted a cap on the DA CRS so that DA customers do not currently pay their full accrued obligation. Because the DA customer is essentially borrowing money from bundled ratepayers in the early years and repaying them in the later years through the DA CRS, the DA customer returning to bundled service would leave behind an underpaid obligation. TURN argues that the DA customer must repay the underpayment if it is returning to a bundled rate that has no such capped provision.

As an entrance provision for return to bundled service, TURN proposes that the DA customer pay the greater of (1) the utility's bundled service rate or (2) the utility's incremental cost of short-term and intermediate-term purchases for a period of time (12 months). In addition, TURN argues that returning customers should pay an entrance fee to cover their share of DA customers' obligation for deferred DA CRS payments due to the effects of caps on the current DA CRS.

TURN also believes the rush back to DA from bundled service must also be prevented to avoid stranding significant amounts of capacity. TURN argues that DA customers' loads are large enough that they can create purchasing instability and raise rates for bundled service customers. This phenomenon is particularly unpleasant if DA customers demand bundled service precisely when prices spike so that bundled service is cheaper than their original contracts.[17]

Because bundled service is served by long-term resources, TURN believes there should be a substantial minimum contract term for any large customer (over 500 kW) returning to bundled service (three to five years) to prevent customers from using bundled service to take advantage of short-term market timing, and in order for the utilities to be able to incorporate returning load into their procurement planning.

(e) ORA

ORA notes that the purpose and need for DA return conditions and terms is to mitigate "the potential for bundled electric utility customers to be economically harmed by DA customers having the freedom of no constraints upon both exit and re-entry to utility bundled service." (Ex. 50, p. 2-1.)

ORA recommends the that all DA customers who return to bundled service be required to remain for a minimum term of 12 months. ORA

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[17] By speculating on the potential for new departures to direct access, TURN does not concede that any new departures are permissible under § 80100 of the Water Code.

believes a three-year minimum return service strikes a proper balance: long enough for the utility to reconfigure its short-term purchases to account for the additional load, but short enough so that the value of customer choice is preserved for DA customers returning to utility bundled service.[18]

In addition, ORA proposes that all returning customers above 50kW in load be required to take service on a real-time pricing (RTP) or "dynamic" price tariff for that 12-month period. The Commission has before it RTP proposals from the three UDCs as part of A.00-11-038[19] as well as a recent dynamic pricing proposal from SDG&E (AL 1406-E-A). As part of this proceeding ORA recommends that PG&E and SCE be ordered to file an RTP tariff – which in the first instance would be applicable only to returning DA customers over 50kW in load.

Since DA customers above 50kW were required to install an RTP meter to take DA service, this RTP approach should be readily implementable for these customers. In addition, since these larger customers comprise at least 80% of the current DA load (based on March 2002 data). It is the return by these customers who can most impact the utilities planning and incremental costs.

In addition to this interim condition, ORA proposes a number of additional options for longer term provisions for the departure and return to bundled service by DA customers. ORA does not recommend, however, that any of these additional options go into effect at this time especially since further movement to DA is suspended.

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18 ORA/Ex. 50, pp. 2-5 through 2-10.

19 Proposals were filed August 17, 2001

(f) CLECA

CLECA argues that a DA customer should be permitted to return to utility bundled service in the normal course without condition, unless there clearly is an adverse impact on the utility's resource costs. In the latter instance, CLECA suggests various constraints that might include the option to stay bundled for a period of 2-3 years at normal tariff rates, or to stay for a shorter period but purchase out of some utility short-term power source and pay the associated prices.

CLECA acknowledges that if a large amount of DA load were to return in a short period of time, there could be a noticeable effect of the utilities' resources. The extent of the impact would depend on the amount of the returning load, the cost of incremental power supplies at the time in relation to the utility's average cost of power, the relative costs of power from new sources and the duration of the returning load.[20] CLECA argues, however, that the diversity of DA customers, particularly in the manner in which they use power, and the variety of generation provide a substantial cushion with which the utilities can accommodate changes in load. CLECA believes the difference in overall load resulting from seasonal and year-to-year climate variations is likely to exceed any increase in load resulting from the return of DA customers.

(g) CIU

CIU proposes that if a customer gives six months notice before returning to bundled service from DA, the customer should be allowed to return at the otherwise applicable tariff rate. CIU contends that with that much notice, such a returning customer would not cause the utility to incur unexpected costs and thus would not impact other bundled customers, since the utility should be able to make necessary changes in purchase plans to serve the customer without increasing the average portfolio cost. (Chalfant (CIU) ex. 33, p. 12.) CIU claims that this is especially so with so many long term contracts in place due to DWR's procurement strategy. (Chalfant (CIU) 7/16, pp. 726-27.)

If a customer does not give appropriate notice, even if the customer is involuntarily returned, then the utility will not have time to prepare for the return. In that circumstance, CIU agrees a transitional rate would be appropriate. CIU argues, however, that the rate should be the spot price of electricity, whether that price is higher or lower than the otherwise applicable tariff.. If the spot price is lower, then CIU contends that the returning customer would not cause the utility to incur costs exceeding bundled rates and thus would not negatively impact other bundled customers. CIU argues that this rate structure is appropriate because it reflects cost causation. If such returning customers do not cause the utility to incur additional costs, CIU argues that no transitional rate is necessary. (Chalfant (CIU) ex. 33, p. 12.) CIU argues, moreover, that there is no evidence of *customer* gaming during the most recent energy crisis, noting that customers did not choose to return, but were returned by their ESPs.

(h) CMTA

CMTA claims there is no reason to require a three to five year commitment for taking bundled service, but that prudent procurement practices would dictate maintaining a diverse portfolio containing short-, mid-, and long-

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[20] Barkovich CLECA, Ex. 28, p. 52.

term contracts.[21] CMTA supports ORA's request that the Commission not adopt punitive conditions that could impede the ability "to re-establish a healthy and thriving DA market."[22] CMTA's proposes that its three-year commitment to bundled service should apply once the suspension on new DA contracts is lifted.

2. Discussion

(a) Overall Framework

We shall adopt appropriate restrictions on DA customers' switching options using the framework described in this section. While the rules for the switching by DA customers should guard against placing any burden on bundled customers, the rules should also promote customer choice and economic efficiency. DA customers should not have the indiscriminate ability to come and go from bundled service without regard to the cost-shifting effects that may result. On the other hand, DA customers should not be unduly constrained from selecting the most economically efficient service option, consistent with avoidance of cost shifting. We shall require existing DA customers who wish to switch to bundled service (other than for purposes of a temporary "safe harbor" while switching ESPs) to make the election for a minimum three-year period.

(b) Applicability of Switching Rules to Large Versus Small Customers

Parties disagree as to whether the switching rules should apply only to large customers (e.g., those with loads over 50 MW) or to all DA

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[21] *E.g.* Exh. No. 50 at Ch. 2, pp. 3-4 (ORA) (noting that the IOU portfolios will have to be designed to account for significant short-term swings in end-use demand or resource availability, even without potential changes in direct access loads).

[22] *Id.*

customers, and whether there is any inherent difference related to size that makes those restrictions reasonable only for large DA customers.

Pub. Util. Code § 453(c) states that: "No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." Thus, differences in rules are permissible under the statute, provided that such differences are reasonable.

It is neither unfairly discriminatory nor punitive to apply different rules among different customer groups, as long as those distinctions in rules are based on objective differences among those customer categories and are applied on a consistent basis within a customer group. Because large industrial customers represent a disproportionately large share of load, the large DA customers that return to bundled service will have a disproportionately larger impact on utility procurement plans. In order to obtain the lowest commodity price, the utility may find a greater need to enter into long term contracts to meet the needs of returning large industrial customers as opposed to smaller customers.

We find it reasonable to conclude that the movement of a few large customers with a disproportionately large load could have a greater impact on utility procurement than that of the same number of smaller customers. Yet, the difference appears to be a matter of degree rather than of kind. While there are differences in how utility procurement is impacted by large versus small customers, we do not believe that the record is sufficiently developed to quantify how those differences would translate into procurement decisions or size-specific rules. Moreover, certain restrictions that we adopt aimed at preventing incentives for arbitraging or other related activities are not necessarily a function of customer size.

Accordingly, we decline to adopt a different set of rules for large customers in contrast to small customers at this time. The rules we adopt in this order shall apply uniformly to all DA customers irrespective of size. In the proceedings that we order herein, we may consider further how customer size differences may be relevant in designing and implementing rules relating to DA switching between bundled and DA service on a prospective basis.

(c) Switching After Initial Transition Period: Minimum Term and Price

We next address the rules on a prospective basis applicable to existing DA customers that elect to switch between DA and bundled service. We agree that certain restrictions are appropriate in order to prevent arbitrage, and to prevent cost shifting to bundled customers. In D.02-03-055, as clarified by D.02-04-067, we determined that bundled customers should not experience cost shifting as a result of DA customers' departure from bundled service. We adopted measures in D.02-11-022 to implement this principle of no cost shifting. Consistent with these principles, costs incurred on behalf of DA customers returning to bundled service must not be shifted to remaining bundled customers if the customer subsequently switches back to DA.

Restrictions on DA customers' switching options should correspond to the level of commitment that the DA customer elects to make upon return to bundled service. For example, as discussed previously, a customer switching to bundled service merely on a temporary basis while changing ESPs to another should not be obligated to remain on bundled service for an extended period. Such a transient customer, is not entitled to benefit from the price stability offered by the bundled portfolio. On the other hand, a customer that returns to bundled service to obtain price stability should be obligated to remain on bundled service for an appropriate minimum commitment in order to avoid gaming, cream skimming, or cost shifting to other bundled customers.

It is not unreasonable to require customers benefiting from the price stability of the utility's portfolio to give up the ability to go back immediately to cheaper DA supplies as soon as electric prices fall. If a current DA customer does not want the restrictions of a long-term commitment, then bundled utility service is not the appropriate option for that customer. If DA customers want competition on a short-term basis, they remain free to choose competitive options outside of bundled utility service.

As a general principle, we conclude that the minimum commitment term should bear some relationship to the duration of contractual supply commitments underlying the bundled portfolio. The potential exists for cost shifting to occur if DA customers are permitted to abandon bundled service at will without any responsibility for the ongoing costs that the utility may incur under multi-year contracts that were undertaken to serve the DA customer, returning as part of bundled load.

If the DA customers were permitted to depart bundled service without restriction, they could leave long-term supply commitments stranded, and thereby shifted to the remaining bundled customers. When market prices are high, DA customers would have an incentive to return to bundled service and potentially cause higher costs to be incurred as new long-term contracts are signed.[23] Conversely, when market prices decline, DA customers would have the incentive to switch back to DA. Yet when prices are low, it is harder for the utility to broker the stranded capacity to recover a reasonable portion of the contract costs.

Parties disagree as to the potential for stranded costs from the returning DA customers switching back to DA. SCE and SDG&E argue for a commitment from returning DA customers as long as five-years to cover the long-term contract costs that would be incurred to serve them. Others claim that any portfolio impact caused by returning DA customers could be mitigated with a shorter service commitment, such as one or two years or even less.

In practice, the utility procures a mix of short-term, intermediate, and long term contracts to balance portfolio cost with supply reliability. The contract terms take into account customer growth, and also seasonal demand fluctuations, among other things. Since the utility serves bundled load from such a diverse mix of resources having terms varying from day-ahead to several years in length, we question the basis for assuming that a five-year term necessarily reflects the average life of resource commitments to serve bundled load.

Moreover, the portfolio of supplies will experience turnover through time, as old contracts expire and new ones are signed. Yet, the utility proposals only address commitment requirements at the initiation of the DA customer's return to bundled service. We conclude that whatever rules are

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[23] SCE/Collette, Tr. 3/450.

adopted need to recognize the effects of ongoing provisions for prospective procurement obligations.

We shall adopt as an initial commitment, a three-year minimum period for returning DA customers to remain on bundled service. Based on the testimony of various parties, we conclude that three-year minimum commitment period is sufficient to eliminate the potential for DA customers basing a gaming strategy on anticipated seasonal pricing patterns. A three-year period strikes a reasonable balance between parties' conflicting positions proposing either a shorter or longer commitment period.

As an added precaution, we shall require the DA customer to provide advance notice to the utility prior to becoming eligible for the bundled portfolio rate. We conclude that a six-month advance notice is reasonable, at least on an initial basis, for returning DA customers to request to receive the bundled rate. A six-month advance notice was proposed by CIU witness Chalfant, and no utility witness offered evidence that a six-month advance notice was insufficient to adjust its procurement to accommodate the additional load. During the six-month waiting period, the DA customer will be permitted to return to bundled service, but will continue to pay the applicable spot price, whether it is higher or lower than the bundled rate. Once the six-month waiting period has elapsed, the DA customer will begin to pay the bundled portfolio rate, whether it is higher or lower than spot prices. The customer will be required to remain on bundled service for a minimum of three years.

We decline, however, to require DA customers returning to bundled service under the three-year commitment to pay the higher of spot price or bundled portfolio rate, as some parties propose. Under the restrictions we adopt today, DA customers returning to bundled service will be precluded from "skimming the cream" off of the bundled portfolio. The advance notice and minimum term commitment requirements together will guard against arbitrage or other gaming practices that could be detrimental to bundled customers. Either the customer will be required to remain on bundled service for a sufficient period of time to compensate for the long-term portfolio obligations, or in the case of the "safe-harbor" option, the customer will pay a rate that fully compensates the utility for its incremental short-term purchases of power incurred to serve returning DA load. Moreover, the "safe-harbor" customer will be limited to a stay of only 60 days on bundled service. Either way, bundled customers will not be harmed or put at risk for higher costs, and DA customers will not be getting a "free" benefit.

(d) Extensions of Bundled Service Commitment Beyond Three-Year Minimum

While we adopt the three-year commitment as an initial minimum term required to guard against gaming activity by DA customers, we remain concerned that three years may not be long enough to recoup all costs for any long-term contracts undertaken to serve returning DA customers. As a result, stranded costs could result from customers that switch back to DA at the end of one year.

We find the record lacking concerning whether or to what extent a further commitment beyond three years may be necessary to compensate for the effects on each utility's bundled portfolio of serving a returning DA customer. Accordingly, we shall conduct further proceedings and issue a subsequent order concerning whether, or to what extent, a commitment beyond the initial three-year period may be appropriate. Pending the results of those further proceedings, we shall limit the commitment to three years at this time, but leave open the option of considering the need for a further extension of the commitment period.

At the end of their initial three-year bundled service commitment, DA customers that have returned to bundled service will be given the option of switching back to DA or remaining on bundled service based on any subsequent rules we later adopt. Customers returning to DA service at the end of the three years, however, shall not be permitted to switch to DA service for any additional load beyond that the level that was eligible for DA service as of the September 20, 2001 suspension date. Those customers electing to continue on bundled service for a prescribed period, would continue to pay the bundled procurement rate.

If the customer elects to leave bundled service after the three-year period, and if the utility had undertaken contract commitments to serve the customer, stranded contract costs could potentially be shifted to other bundled customers. As a matter of policy, we find that the DA customer should remain responsible for stranded costs otherwise shifted to bundled customers due to the premature departure.

That customer should only be allowed to return to DA service after provision is made for recovery of applicable stranded costs, if any. The determination and recovery of any such stranded costs are factual questions that require further inquiry.

As part of our additional proceedings, therefore, we shall also consider whether customers that switch back to DA after returning to bundled service for only three years cause any costs to shift to other bundled customers, and what, if any, cost responsibility provision may be appropriate for customers switching back to DA before completing a designated minimum commitment period. Any such cost responsibility obligation shall be related to incremental costs that become stranded as a result of the departure of the incremental load back to DA service. By holding switching customers responsible for this obligation, bundled customers will not be burdened with such costs.

We shall consider the effects on power supply commitments, resulting from serving returning DA customers through the bundled portfolio, including the effects of ongoing return and departure of DA customers. In developing the record, it may also prove helpful in these subsequent proceedings for parties to look to the record on procurement issues that has already been developed in the Procurement R.01-10-024.

(e) Advance Notice Requirements for Departure from Bundled Service

In the event that a customer intends to return to DA service after the three-year commitment period, the customer should give the utility sufficient advance notice of its impending departure so that appropriate adjustments can be made in prospective procurement of power to serve bundled customers, and to minimize stranded costs. If the DA customer sought to terminate its bundled service commitment earlier than the minimum prescribed term or without giving adequate advance notice, the customer should be assessed an appropriate surcharge for the stranded costs resulting from the customer's early departure.

The advance notice required depends on how long it takes the utility to adjust its procurement planning and practices for the departure of the customer. As noted above, we are adopting the proposal of CIU Witness Chalfant for a six-month advance notice as an initial requirement for DA customers returning to bundled service before they can receive the bundled portfolio rate. Therefore, in the absence of any alternative proposal offered by parties, reasonable also to apply the same six-month notice requirement for such customers that seek to switch back to DA.

The appropriate advance notice period is another question, however, that may benefit from further evidence. Accordingly, we invite parties to present evidence on whether the six-month notice is an appropriate advance notice period, or whether some other advance notice is appropriate for the utilities to adjust their procurement strategies for customers switching back to DA.

(f) Responsibility of Returning Customers for Previous DA CRS Undercollections

Even if the DA customer returning to bundled service elects to remain on bundled service indefinitely, the customer shall not use the return to bundled service as a way to bypass responsibility for payment of DA CRS in excess of the adopted cap that would otherwise be due in the future. As determined in D.02-11-022, a 2.7 cents/kWh interim cap was adopted as a means of mitigating the immediate impacts of charging DA customers their full DA CRS obligation. DA CRS recovered in later years will include a provision to pay back the undercollections built up in the early years. To the extent the undercollections were incurred during periods that customers were on DA service prior to returning to bundled service, the DA customers must remain responsible for those payments relating to deferred undercollections from past periods that the customer was on DA service and was subsidized by bundled customer rates.

We do not believe, however, that such obligations should become due and payable in one lump sum upon migration to bundled service.

Such treatment could be unduly discriminatory toward such customers, and would create economic barriers to switching. The return to bundled service should have no effect on this pre-existing obligation. The DA customer will continue to be liable to pay off such obligations under the same time frame as existed prior to the customer's return to bundled service. Accordingly, once other DA customers begin to pay down the undercollections that accumulated as a result of any applicable DA CRS cap, the customer that returned to bundled service shall likewise be responsible for paying their share of such undercollections. Customers that remain on DA are not currently paying for the past undercollection, but it is being deferred, with interest, for future collection, as prescribed in D.02-11-022.

Therefore, we shall require that DA customers returning to bundled service remain liable for their respective share of DA CRS undercollections resulting from the period they took DA service. The returning DA customer shall thus remain responsible for the difference between the total DA CRS obligation at the date of the customer's switch to bundled service and the total amount paid pursuant to any DA CRS caps. Customers that switch to bundled service shall thereby continue to be liable for such undercollections, even if they remain permanently on bundled service.

We recognize, however, that there are practical limitations of the ability of a utility to determine the specific billing for each customer's individual share of the applicable DA undercollection. Thus, instead of requiring individual calculations of each returning DA customer's share of the undercollection, we shall direct participants in the Rule 22 Working Group meeting as ordered above to address the issue of developing a tariff-based solution to provide for returning DA customers' repayment of an appropriate share of the accrued undercollection. We shall address the issue of the process for returning DA customers repayment of prior obligations after this matter is addressed in the Rule 22 Working Group. The ALJ shall issue any necessary rulings to facilitate further resolution of this issue.

IV. 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.

V. Comments on the ALJ Proposed Decision

The Proposed Decision of Administrative Law Judge (ALJ) Thomas R. Pulsifer was filed and served on parties on April 8, 2003. Comments on the Proposed Decision were filed on April 28, 2003, and reply comments were filed on May 5, 2003.

We have reviewed parties' comments and taken them into account, as appropriate, in finalizing this order.

VI. Assignment of Proceeding

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

Findings of Fact

1. As part of its provisions to deal with California's energy crisis, AB 1X was enacted by the Legislature which, among other things, called for the suspension of DA.

2. D.02-03-055 did not change the DA suspension date of September 21, 2001, but created an exemption to the suspension requirements of D.01-09-060 (the

"switching exemption") by permitting existing DA customers to choose a new ESP and continue on DA even if they had returned to bundled service after September 20, 2001, subject to specified restrictions.

3. In D.02-04-067, the Commission granted a limited rehearing on the issue of the switching exemption, to be considered further in light of AB 1X and D.01-09-060, and so that an adequate record could be developed.

4. Parties presented testimony and briefs on issues relating to the switching exemption in this proceeding.

5. Preservation of the switching exemption, along with protective restrictions, will provide flexibility to DA customers and will help to preserve DA as a viable service option.

6. Consistent with the principles set forth in D.02-03-055 (as clarified in D.02-04-067) and D.02-11-022, DA customers remain responsible for costs they cause resulting from their return to bundled service. To the extent those customers switch back to DA service, they remain responsible for costs that potentially would become stranded due to obligations entered into on their behalf.

7. If the DA customers are permitted to depart bundled service without restriction, they could potentially leave long-term supply commitments stranded, to be shifted to the remaining bundled service customers.

8. A 45-day period provides a reasonable window during which DA customers that have returned to bundled service since September 20, 2001, to make an elections either to remain on bundled service or to return to DA.

9. It is reasonable for DA customers to be permitted to return on a temporary basis to bundled service for up to 60 days as a “safe harbor” while switching ESPs.

10. By charging DA customers for the incremental costs of short-term power during their temporary return to bundled service as a “safe harbor,” no costs will be shifted to bundled customers.

11. To the extent the utility must plan for the contingency that significant amounts of DA load may return to bundled service on short notice, its procurement costs will be impacted

12. A three-year minimum term commitment to bundled service is the shortest period that is sufficient to adequately plan to serve bundled customers

and to eliminate the potential for DA customers to base a gaming strategy on anticipated seasonal pricing patterns.

13. A period longer than a three-year commitment may be necessary to avoid stranding long-term portfolio supply obligations undertaken to serve DA customers returning to bundled status, although the record on this issue needs further development.

14. A six-month advance notice by DA customers to the utility prior to any shifting into or out of the bundled portfolio rate provides a reasonable opportunity for the utility to adjust its portfolio and also guards against arbitraging or similar activities by customers.

15. It is appropriate for returning DA customers to pay for the added portfolio costs they place on the system as a result of switching between bundled and DA service in order to avoid cost shifting to other bundled customers.

16. While there are differences in how utility procurement is impacted by large versus small customers, a better record is needed to quantify how those differences would translate into procurement decisions or size-specific rules.

17. There are billing implementation issues related to a returning DA customer’s responsibility associated with the DA CRS undercollection that warrant further development by the utilities, with review of the Rule 22 Working group.

Conclusions of Law

1. The switching exemption is lawfully permitted.

2. There is no violation of AB 1X in adoption of the “standstill” principle as articulated in D.02-03-055.

3. To the extent that customers had already acquired DA service as of September 20, 2001, or are eligible under the DA suspension rules, switching subsequent to that date is no more than a resumption of DA service.

4. Because a customer can only "acquire" DA service where it did not previously have such service, the suspension applies to those customers that had not acquired DA, service as of September 20, 2001.

5. Even though the switching exemption is warranted, appropriate limitations need to be imposed on DA customers return to or departure from bundled service to guard against potential arbitrage or cost shifting that could harm bundled customers.

6. The switching rules should be designed so that DA customers may not avoid their cost responsibility by switching into or out of bundled service without appropriate restrictions, consistent with the requirements of AB 1X and AB 117 relating to DA cost responsibility.

7. The rules set forth in the order below are reasonable and should be adopted as a basis for DA customers returning to bundled service or switching back to DA.

8. In order to prevent arbitrage or similar potential activities, and to prevent cost shifting to bundled customers, it is reasonable to adopt restrictions on DA switching relating both to minimum term commitments and rates paid for bundled service.

9. Further proceedings should be held to develop a more extensive record on the need for bundled service commitments beyond three years and to determine what cost responsibility, if any, should be assessed on customers switching back to DA.

10. DA customers should be permitted to return to bundled service for a temporary period of not more than 60 days while switching ESPs or for related reasons, subject to appropriate restrictions as adopted in the order below.

11. This decision construes, applies, implements, and interprets the provisions of AB 1X (Chapter 4 of the Statutes of 2001-02 First Extraordinary Session).

12. Pub. Util. Code § 1731(c) (any 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.

O R D E R

IT IS ORDERED that:

1. This order shall apply to Southern California Edison Company. Pacific Gas and Electric Company, and San Diego Gas & Electric Company.

2. A 45-day period is hereby authorized from the effective date of this order for "grandfathered" Direct Access (DA) customers (i.e., those that have switched to bundled service since September 20, 2001) to elect either to remain on bundled service or to return to DA service. The UDCs shall notify customers of this 45-day window by letter following conclusion of the Rule 22 Working Group meeting as ordered below.

3. Customers returning to DA service during the 45-day window period, will resume responsibility for payment of DA CRS on the same basis as applicable to other existing DA customers pursuant to Decision 02-11-022.

4. Returning DA customers that elect to remain on bundled service beyond the transitional window period shall be required to make a minimum commitment as a bundled customer for a three-year minimum period in order to continue to receive the bundled portfolio rate.

5. DA customers shall be permitted to return to bundled service on a transitional basis while switching from one electric service provider to another, or for similar reasons for up to a 60-day period as a temporary “safe harbor.”

6. DA customers returning to bundled service for only a temporary “safe harbor” shall pay the utility for procurement at the short term spot price, whether that rate is above or below the utility’s bundled rate.

7. For purposes of determining applicable charges for returning DA customers subject to “safe harbor” provisions, the utility shall utilize the Cal-ISO Hourly EX Post Incremental Price as a pricing index. The utility charges applicable to DA customers returning to the “safe harbor” shall also include other relevant costs associated with the spot power procured to serve them including ancillary services, grid management, unaccounted for energy, and similar charges paid to the ISO. The utility charges shall also include applicable administrative costs, such as meter reading, incurred to serve “safe harbor” customers.

8. The utilities shall jointly develop advice letters to implement tariff changes and implementation timing and details necessary to comply with the provisions of this order (including the recovery of undercollections) and review with the Rule 22 working group within 30 days of this order. In their advice letter filings to implement tariff changes, the utilities shall explain more specifically what accounting and tracking measures they propose to use to identify, and apply requisite charges to the bills of DA customers temporarily returning to bundled service. Utility advice letters to be filed within 45 days of the effective date of this order. Until such advice letters take affect, DA customers will continue to operate under current DA provisions.

9. Customers intending to switch ESPs shall not be penalized for failure beyond customer control to complete the DASR processing within the 60-day window but shall continue to pay the spot price for bundled energy consumed during the delay in DASR processing and switching.

10. The utilities shall file advice letters within 15 days of the effective date of this order to implement tariff changes necessary to comply with the provisions of this order. In their advice letter filings to implement tariff changes, the utilities shall explain more specifically what accounting and tracking measures they propose to use to identify, and apply short-term commodity costs to the bills of DA customers temporarily returning to bundled service and to exclude such costs from bundled portfolio charges.

11. Customers that elect to receive the bundled portfolio rate shall be required to provide six-months advance notice and shall make a three-year minimum commitment to remain on bundled service.

12. During the six-month waiting period after providing advance notice, customers may return to bundled service, but will pay the spot price of power as billed by the utility.

13. Further proceedings shall be conducted on what options shall be available to returning DA customers after the conclusion of a three-year minimum bundled service commitment, either in terms of a further bundled service commitment or payment of cost responsibility for stranded costs if switching back to DA service.

14. Customers that switch to bundled service shall continue to be liable for DA CRS undercollections attributable to the period that they took DA service. Even if those customers remain permanently on bundled service, they shall remain responsible for paying off the accumulated DA CRS undercollections.

Because of practical problems limiting the feasibility of customer specific billing, an alternative billing methodology shall be addressed through the Rule 22 Working Group meeting as ordered above.

15. Further proceedings shall be conducted on what options shall be available to returning DA customers after the conclusion of a three-year minimum bundled service commitment, either in terms of a further bundled service commitment or payment of cost responsibility for stranded costs if switching back to DA service.

16. Customers that switch to bundled service shall continue to be liable for DA CRS undercollections and rules shall be incorporated in utility advice letters as defined in this order.

This order is effective today.

Dated May 8, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I will file a dissent

/s/ CARL W. WOOD
Commissioner

I dissent.

/s/ LORETTA M. LYNCH
Commissioner