Decision 01-10-036 October 10, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for verification, consolidation, and approval of costs and revenues in the transition revenue account.	Application 98-07-003 (Filed July 1, 1998)
In the Matter of The Revenue Adjustment Proceeding (RAP) application of San Diego Gas and Electric Company (U 902-E) for approval of 1) Consolidated changes in 1999 authorized revenue and revised rate components; 2) the CTC rate component and associated headroom calculations; 3) RGTCOMA balances; 4) PX credit computations; 5) disposition of various balancing/memorandum accounts; and 6) electric revenue allocation and rate design changes.	Application 98-07-006 (Filed July 1, 1998)
Application of Southern California Edison Company (U 338-E) to: 1) consolidate authorized rates and revenue requirements; 2) verify residual competition transition charge revenues; 3) review and dispose of amounts in various balancing and memorandum accounts; 4) verify regulatory balances transferred to the transition cost balancing account on January 1, 1998; and 5) propose rate recovery for Santa Catalina Island diesel fuel costs.	Application 98-07-026 (Filed July 1, 1998; Petition for Modification filed January 25, 2001)

ORDER MODIFYING DECISION (D.) 01-09-060, AND DENYING REHEARING, AS MODIFIED

I. INTRODUCTION

In Decision (D.) 01-09-060, we issued an interim order, effective as of September 20, 2001, in which we suspended the right to enter into new contracts or

agreements for direct access after that date, and reserved for subsequent consideration and decision matters related to the effect to be given to all contracts executed or agreements entered into on or before the effective date, including renewals of such contracts. This decision was in response to the mandates set forth in Assembly Bill No. 1, First Extraordinary Session ("AB 1 X"). (See Pub. Util. Code, §80110; see also, Stats. 2001 (1st Extraordinary Sess.), ch. 4, p. 14.)

The following parties filed timely applications for rehearing of this decision: (1) The Newark Group, Inc. ("Newark"); (2) AES Newsenergery, Inc. ("AES"); (3) The Alliance for Retail Energy Markets, Association of California Water Agencies – Utility Service Agency, Western Power Trading Forum, AB&I Foundry, California Cast Metals Association, California League of Food Processors, California Retailers Association, Community College League of California, DDU Enterprises, Immanuel Industries, Lam Research, SPURR-REMAC, Standard Metal Products, Tricon Global Restaurants, Douglas Adair, Frank Ancona, Chris Annunziato, Danny Corrales, Paul Delaney, Joan Delong, Steve Elliot, Lawrence Guarnieri, Don Hallmark, Jr., Benny Munoz, Monica Murphy, Steven Pellnitz, Allan Perez and Pete Turpel (jointly, "AREM"); (4) California Manufacturers & Technology Association, California Industrial Users and California Large Energy Consumers Association (jointly, "CMTA"); (5) University of California and California State University ("UC/CSU"); (6) Commonwealth Energy Corporation ("Commonwealth").

In its rehearing application, Newark argues that D.01-09-060 is unlawful because the decision does not contain adequate findings of fact and is not supported by substantial evidence and the Commission violated federal and state procedural due process by allegedly failing to provide adequate notice to interested parties and to conduct an evidentiary hearing.

In its rehearing application, AES raises arguments similar to Newark. Additionally, AES alleges that retroactive suspension would be unconstitutional, as violations of the Contract, Due Process and Takings clauses of the federal and state constitutions.

In their joint rehearing application, AREM allege the following: (1) The Commission violated federal and state constitutional provisions for due process and Public Utilities Code Sections 1708 and 1708.5(f) by failing to conduct an evidentiary hearing before suspending direct access; (2) the findings of fact in D.01-09-060 are not sufficient to justify suspending direct access for the reasons stated in the decision and are not supported by the record; (3) the Commission impermissibly relies on evidence outside the record in violation of due process; (4) D.01-09-060 interferes with interstate commerce in violation of Section 8 of Article I of the U.S. Constitution; (5) and the Commission is prohibited from considering the retroactive suspension of direct access by Water Code Section 80110, and any retroactive suspension would be inconsistent with the Legislature's intent in enacting this statutory provision, and would be in violation of the contract and takings clauses of the federal and state constitutions; (6) the Commission has impermissibly converted a ratemaking proceeding into a quasi-legislative proceeding in violation of Public Utilities Code Section 1701.1(a) by not having evidentiary hearings; and (7) D.0-09-060 is inconsistent with AB 9 XX.

In their joint rehearing application, CMTA raise the same arguments as Newark regarding the sufficiency of findings of fact and the lack of substantial evidence to support the decision. Also, like AREM, CMTA argues that the Commission violated Public Utilities Code Section 1708.5(f) by failing to conduct evidentiary hearings prior to suspending direct access.

In their joint rehearing application, UC/CSU argue that there is no factual basis or evidentiary support for D.01-09-060 to the extent that it allows or requires utilities to refuse to process Direct Access Service Requests ("DASRs") for an account under a pre-September 20 contract, and if that is the effect of the decision, then the Commission should have held evidentiary hearings. They also ask the Commission to clarify that the utilities are required to continue to process DASRs for all accounts under an existing contract. They further claim that the decision errs because it threatens to retroactively suspend direct access, which is contrary to law and in excess of the

Commission's authority, and would violate the federal and state constitutional prohibitions against the impairment of contracts.

In its rehearing application, Commonwealth argues that the Commission should have had evidentiary hearings to consider the impact of its decision on electric service providers ("ESPs") and whether less onerous alternatives could have been adopted. Specifically, it believes that D.01-09-060 errs by not allowing customers whose contracts expire to renew their contracts with their ESP; not allowing certain customers to procure "green" power without restriction; and not allowing customers who are new to California to procure power from ESPs. It also alleges that the suspension of direct access constitutes an unconstitutional taking.

Responses were due on October 5, 2001. Energy Producers and Users Coalition filed in support of AREM's application for rehearing. The California Department of Water Resources ("DWR") submitted comments in response to the rehearing applications and in support of D.01-09-060.

The instant decision resolves the applications for rehearing. We have carefully considered those applications and the responses thereto. Although we do not discuss each of the numerous allegations that the rehearing applicants assert justify rehearing, all bona fide allegations have been considered.[1] Herein we decide that

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[1] For example, Commonwealth's claim that a suspension of direct access constitutes an unconstitutional taking of its property is made without any specificity or discussion. (See Commonwealth's Application for Rehearing, p. 3 [as numbered], fn. 1. Since there are no page numbers in Commonwealth's application for rehearing, they have been numbered for purpose of referring to them.) Thus, it is not a bona fide rehearing allegation that comports with the requirements of Rule 86.1 of the Commission's Rules of Practice and Procedure, which provides:

> "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission." (Code of Regs., title 20, §86.1.)

applicants' allegations of error, whether or not discussed, do not show good cause for rehearing. While we conclude that rehearing is not warranted, we do recognize certain errors or ambiguities in the Decision that require correction or clarifying modification. Therefore, our order today modifies D.01-09-060 consistent with our discussion below.

II. DISCUSSION

A. Retroactive Suspension of Direct Access Issues

In today's decision, we will not address or dispose of any arguments raised by several of the rehearing applicants concerning the Commission's authority to consider and adopt an early effective date for suspending direct access. These arguments include but are not limited to, the allegations that a retroactive suspension effective date would be a violation of the Contract Clause of the federal and state constitutions, and would constitute an unlawful taking. (See e.g. AREM's Application for Rehearing, pp. 15-19; UC/CSU's Application for Rehearing, pp. 3-5; AES's Application for Rehearing, pp. 5-7.)

In D.01-09-060, we specifically reserved any issues related to retroactive suspension for a subsequent decision. As we stated: "All other pending issues concerning direct access contracts or agreements executed before today remain under consideration by the Commission and will be resolved in a subsequent decision." (D.01-09-060, p. 8; see also, p. 9.) We also concluded that "[t]he effect to be given to contracts

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(OII Re Mobile Telephone Service and Wireless Communications [D.95-03-043] (1995) 59 Cal.P.U.C.2d 91, 102, fn. 4, 1995 Cal.CPUC LEXIS 288; see also, Pub. Util. Code, §1732, which requires rehearing applicants to present their allegations with specificity.)

Another example of a claim that does not comport with this rule is the unspecified and unsubstantiated broad sweeping claim made by both Newark and AES that the Commission improperly relied upon "extra-judicial statements made by the Governor or the State Treasurer or pressure from other external sources that influenced its decision-making processes." (Newark's Application for Rehearing, p. 5; AES's Application for Rehearing, p. 2.)

executed, agreements entered into or arrangements made for direct access [on or] before [September 20, 2001], including renewals of such contracts, as well as comments of the parties will be addressed in a subsequent decision." (D.01-09-060, p. 10 [Conclusion of Law No. 4] & p. 13 [Ordering Paragraph No. 9].)

In order to avoid any prejudgment of any matter that has been reserved for future consideration, we will not consider any rehearing issues related to the Commission's authority to consider and adopt an earlier effective date for suspending direct access than September 20, 2001. Further, any such challenges on issues yet to be determined are premature and unripe.

B. Sufficiency of Findings and the Adequacy of the Record to Support the Findings.

Several parties, Newark, AES, AREM, and CMTA, argue that the findings of fact are not sufficient to justify suspending direct access and these findings are not supported by the record. (Newark's Application for Rehearing, pp. 2-5; AES's Application for Rehearing, pp. 3-5; AREM's Application for Rehearing, pp. 19-24; CMTA's Application for Rehearing, pp. 2-4.) We dispose of these issues in the manner discussed below.

1. Sufficiency of the Findings

With respect to the sufficiency of the findings, Section 1705 provides that Commission decisions shall contain findings of fact and conclusions of law by the Commission on all issues material to the order or decision. (Pub. Util. Code, §1705.) The California Supreme Court has observed that findings of fact and conclusions of law by the Commission are intended to assist the court in ascertaining the principles relied on by the Commission so that the court can determine whether the Commission acted arbitrarily. (California Manufacturers Ass'n v. Public Utilities Com. (1979) 24 Cal.3d 251, 258-259.) Additionally, findings and conclusions are meant to assist the parties in preparing for rehearing or court review. (Id.) It is noted that the California Supreme Court has held that the findings of fact and conclusions of law by the Commission were

adequate if they disposed of all issues necessary and relevant to the Commission's decision. (Goldin v. Public Utilities Commission (1979) 23 Cal.3d 638, 670.)

In D.01-09-060, we explained our reasoning and determinations for suspending direct access after September 20, 2001. Suspension was mandated by the Legislature, and it was enacted in response to the emergency declared by the Governor's Proclamation of January 17, 2001. (D.01-09-060, p. 3.) The Legislature left the determination of when direct access should be suspended to the Commission. (Water Code §80110.) Findings of Fact No. 1 and 2 are derived from this discussion. (D.01-09-060, p.10.)

We also fully explained in D.01-09-060 the need to suspend direct access after September 20, 2001. We discussed the "unprecedented debt incurred by the State to help weather the energy crisis," and how repayment of the State's General Fund would be accomplished through the issuance of DWR Power Supply Revenue bonds at investment grade." (D.01-09-060, pp. 6 and 8.) We explained how suspending the right to acquire direct access service after September 20, 2001, was necessary to assist the Administration and the State Treasurer in proceeding with the bond transaction that they were currently undertaking, and would assist and ensure these bonds would issue at investment grade. We discussed how the bonds would provide DWR with a stable customer base that was necessary to recover the costs of the power it has purchased and to continue purchasing power for retail customers. (D.01-090-060, pp. 4 and 8.) We also believe that the impact of customers switching from utility bundled service to electric service providers would result in cost-shifting. (D.01-09-060, p. 8.) In addition, we rejected the argument that the emergency no longer existed. (D.01-09-060, p. 7.) Given these considerations, we determined that "it was not in the public interest for the Commission to delay action to suspend direct access service beyond this time." (D.01-09-060, p. 8.)

Although we fully explained our reasoning and determinations for suspending the right to enter into new contracts or agreements after September 20, 2001, those explanations are in the text of D.01-09-060, and are not all contained in separate findings of fact in the decision as required by Public Utilities Code Section 1705.

However, this error was inadvertent, and thus, we will modify D.01-09-060 to make separate findings of fact that encompass all the rationale and policy determinations that we discussed in the text of this decision. We modify D.01-09-060 in the manner set forth in the ordering paragraphs below.

2. Adequacy of the Record to Support the Findings

Contrary to the allegation of several of the rehearing applicants (e.g., Newark, AES, AREM, and CMTA), there is record evidence to support our reasoning and policy determinations for suspending the right to acquire direct access and for making the suspension effective for contracts executed or agreements entered into after September 20, 2001, the date of the issuance of D.01-09-060. An administrative record in a proceeding where the Commission is acting in its legislative capacity, as in this case, can be lawfully developed through notice and comment, and formal evidentiary hearings are not required. (See discussion below.)

The administrative record for D.01-09-060 includes, but is not limited to, the comments filed by parties, the memo, dated June 12, 2001, from the State Treasurer, Department of Finance, and the Department of Water Resources ("June 12, 2001 Memo"), which was attached as Appendix A or Appendix B to the various Draft Decisions and Alternate Draft Decisions,[2] and DWR's recent report on the nature of its contractual commitments, of which the Commission took official notice (see D.01-09-060, p. 6.) The following items from the administrative record support the Commission's

[2] AREM attempt to discredit reliance on this memo by asserting that it is material outside the record. (AREM's Application for Rehearing, pp. 12-13.) However, they are wrong. This memo was incorporated into the record in this proceeding as an attachment to the various draft decisions and alternate draft decisions mailed to the parties. (See Appendix A attached to both the August 15, 2001 and August 27, 2001 draft decisions of ALJ Barnett; see also, Appendix B attached to both the June 15, 2001 and August 29, 2001 alternate draft decisions of Commissioner Bilas.) Thus, this document was part of the administrative record for the proceedings, and the parties had notice and an opportunity to comment on this document and the record evidence drawn from this document in making the Commission's determination to suspend direct access in D.01-09-060.

reasoning and policy determinations, including the findings that will be added to D.01-09-060:[3]

The June 12, 2001 Memo evidences the concerns of the State Treasurer, DWR, the Department of Finance, and members of the financing team for the DWR Power Purchase Revenue Bonds regarding the impact direct access will have on the bonds' issuance and repayment, and on the customer base for the recovery of the DWR revenue requirement. The memo states: "To sell the bonds with the investment grade ratings required by law, it will be necessary to control the conditions under which ratepayers (generally large users, such as industrial customers) 'exit the system,' and such controls and conditions are needed to ensure those who depart pay their 'fair share' of costs incurred on their behalf, and thus to prevent the remaining ratepayers (generally small commercial and residential users) from being left to shoulder a disproportionate share of the costs incurred by DWR on behalf of all existing ratepayers." (June 12, 2001 Memo, p. 2.) The memo also supports our determination that direct access should be suspended to achieve investment grade rates for the bonds and to ensure the creditworthiness of the power purchase program." (June 12, 2001 Memo, pp. 2-3.) DWR expressed that action had to be taken "now," rather than waiting for any future PUC or legislative action. (June 12, 2001 Memo, p. 3.)

In comments, DWR, as the entity who would be issuing the bonds pursuant to AB 1 X, indicated that the suspension of direct access was necessary to "significantly facilitate the ability of the Department to issue its revenue bonds by addressing one of the critical credit issues which must be addressed to assure that such bonds obtain necessary ratings, to continue to address the current state of emergency as declared by the Governor, and to implement AB 1X." (Comments of Non-Party DWR on the Draft Decision Regarding the Suspension of Direct Access, filed September 4, 2001, p. 2.)

[3] This includes the findings that the suspension of direct access was necessary to ensure the repayment of the debt through the issuance of bonds at investment grade, the recovery of the costs of power DWR has purchased, the stabilization of the customer base for the recovery of DWR's costs by not permitting switching, and the need to suspend direct access in the interim as of the date of issuing D.01-09-060.

DWR also stated in these comments: "The amount of load subject to direct access is a critical area of concern for credit rating agencies, providers of credit enhancement (such as bond insurers and letter of credit bonds), and the capital market participants generally." (Comments of Non-Party DWR on the Draft Decision Regarding the Suspension of Direct Access, filed September 4, 2001, p. 4.)

In addition, comments filed by DWR support the Commission's concerns regarding the impact on switching. In those comments, DWR stated: "If departing customers are not required to pay those costs, remaining customers of the Department will be required to bear not only their own costs of power, but also the costs attributable to the departing customers." (Supplemental Comments of Non-Party DWR on the Draft Decision Regarding the Suspension of Direct Access, filed September 12, 2001, p. 2.)

In its comments, the Office of Ratepayer Advocates ("ORA") recognized that continuing direct access would impair the repayment of DWR's "power purchases on behalf of the vast majority of the ratepayers of the major investor owned utilities (because direct access customers are not currently liable for the DWR surcharge per D.01-05-064)." (Comments of ORA on the Draft Decision of ALJ Barnett, filed September 4, 2001, p. 1.) ORA further noted in its comments that "this impairment would occur if more ratepayers seek to avoid the DWR surcharge by taking direct access service and thereby leaving a smaller number of ratepayers to pay DWR costs. (Comments of ORA on the Draft Decision of ALJ Barnett, filed September 4, 2001, p. 1.) These comments support our rationale explaining what impact continuing direct access would have on the repayment of State's power purchases.

Southern California Edison Company ("Edison") described the impact that direct access was having as of the end of August 2001: "Since the first version of the Draft Decision was issued, however, energy service providers ("ESPs") have led a stampede of large industrial and commercial customers to DA. As of the end of August 2001, SCE had DA service or requests for service equal to 7.9% of its load. The large majority of these accounts are over 500 kW. This is a very rapid rate of DA increase which now approximates 20-25% of the net short in [Edison's] service territory. SCE

presumes that PG&E and SDG&E show similar trends." (Comments of Edison on the August 27, 2001 Draft Decision of ALJ Barnett and August 29, 2001 Alternate Draft Decision of Commissioner Bilas, filed September 4, 2001, pp. 3-4.) These comments provide record support for the our determination to not delay suspension of direct access.

Also, comments from TURN further support our rationale for the need to suspending direct access due to the energy crisis. In these comments, TURN stated that suspension of direct access will "ensur[e] that all customers will be treated the same for purposes of determining the route out of the current crisis." (Comments of TURN on the Draft Decision of ALJ Barnett and Alternative Draft Decision of Commissioner Bilas, filed June 25, 2001, p. 1.)

We inferred from DWR's recent report,[4] which is dated August 7, 2001, that bundled electric customers would be faced with high energy costs over the next few years. (D.01-09-060, p. 6. See generally, Memo from DWR to Commissioner Brown, dated August 7, 2001.) We took official notice of this report in D.01-09-060, and thus, it is part of the administrative record.

As discussed above, there was an adequate administrative record to support our rationale and determination to suspend the right to enter into new contracts or agreements after September 20, 2001, and to not delay this determination. Therefore, there is no merit to the allegations that D.01-09-060 is unsupported by the record.

3. Weight of the Evidence

In D.01-09-060, we denied the motions of AREM and the Association of California Water Agencies ("ACWA") to postpone the Commission's consideration of the suspension of the right to acquire direct access service based on new information from the State Treasurer's Preliminary Official Statement, dated August 31, 2001, and the California's Senate's Concurrent Resolution No. 46, issued on September 14, 2001. (D.01-09-060, p. 11; see also, Motion of AREM to Postpone Consideration of Direct

[4] It is noted that D.01-09-060 does not specify the date of the DWR's recent report. It is the August 7, 2001 Memo from DWR to Commissioner Brown. We will modify D.01-09-060 to make this clear.

Access Suspension in Light of New Information from the State Treasurer and State Senate, filed September 18, 2001, pp. 2-5; Motion of the ACWA to Suspend Commission Consideration of Draft Decision Ending Direct Access in Light of New Information, filed September 19, 2001, Attachment 1, p. 8.). In their rehearing application, AREM faults us for denying these motions, and for not giving the information from these sources more weight. (AREM's Application for Rehearing, pp. 7 & 13.) AREM uses the information from these sources as evidence to refute the "state of emergency" justification for suspending direct access.

However, as we discussed in D.01-09-060, we were not convinced that this new information justified delaying the suspension of direct access. We are more concerned with the impact that switching will have, especially if this will result in higher rates for customers who continue to receive utility bundled service. (D.01-09-060, pp. 9-10.) Thus, we concluded that the public interest would not be served with any delay in the suspension. (See D.01-09-060, p. 11 [Conclusion of Law No. 11.]) Further, we were not persuaded by this new information that "the risks to California electricity consumers have been eliminated," especially if it would result in lulling us "into a sense of complacency." (D.01-09-060, p. 8.)

Thus, in exercising our discretion, we weighed the evidence in the administrative record, including the new information, and determined that a delay in suspending direct access would not be in the public interest. (See Eden Hospital Dist. B. v. Belshe (1998) 65 Cal.App.4th 908, 915.)

C. Evidentiary Hearings

The rehearing applicants have argued that we erred in not holding evidentiary hearings prior to suspending direct access effective September 20, 2001. (Newark's Application for Rehearing, p. 5; AREM's Application for Rehearing, pp. 8-12; CMTA's Application for Rehearing, p. 2; Commonwealth's Application for Rehearing,

p.3 [as numbered]; AES's Application for Rehearing, p. 2.)[5] Generally, these rehearing applicants argue that in not holding evidentiary hearings, federal and state constitutional provisions for due process have been violated. Further, several rehearing applicants argue that by failing to conduct evidentiary hearings, we have not complied with Sections 1708, 1708.5(f) and 1701.1(a) of the Public Utilities Code.

1. Constitutional Due Process Arguments

Applicants' constitutional arguments with respect to a right to an evidentiary hearing in these matters are without merit. The U.S. Supreme Court has held that there is no right to an evidentiary hearing where a rule of conduct applies generally. (See Bi-Metallic Investment Company v. State Board of Equalization of Colorado (1915) 239 U.S. 441, holding there was no right to a hearing before state entities could increase property taxes in that state; see also, Londoner v. City and County of Denver (1908) 210 U.S. 373.) Here, the Commission's decision in D. 01-09-060 to suspend the right of retail customers to acquire direct access after September 20, 2001, is a generally applicable prohibition — it affects ratepayers and their electricity providers, as a whole, and does not affect the rights of any specific individual or entity. Thus, the Commission acted appropriately when putting forth that order without conducting an evidentiary hearing. (See also, Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292, where the California Supreme Court held that the adoption of utility credit rules pursuant to advice letters and without hearings did not violate due process.)[6]

[5] However, UC/CSU argue that an evidentiary hearing is needed only if the effect of D. 01-09-060 is to allow or require utilities to refuse to process DASRs for an account under a pre-September 20, 2001 contract. (UC/CSU's Application for Rehearing, p. 2.)

[6] The California Supreme Court stated: "In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected ratepayers." (Wood v. Public Utilities Commission, supra, 4 Cal.3d at p. 292.)

2. Statutory Due Process Arguments

a) Section 1708 and 1708.5(f) arguments

AREM argues that the issuance of D.01-09-060, without evidentiary hearings, violates Public Utilities Code Sections 1708 and 1708.5(f). (AREM's Application for Rehearing, pp. 10-12.) CMTA also raises a Section 1708.5 challenge. (CMTA's Application for Rehearing, p. 2.) We disagree.

Public Utilities Code Section l708 provides in relevant part:

> "The [C]ommission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it." (Pub. Util. Code, §1708.)

Public Utilities Code Section 1708.5(f) provides:

> "Notwithstanding Section 1708, the [C]ommission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708." (Pub. Util. Code, §1708.5, subd. (f).)

These rehearing applicants argue that D.01-09-060 modified previous Commission decisions, including the decision that adopted direct access (see Preferred Policy Decision [D.95-12-063, as modified by D.96-01-009], [7] and the decisions implementing direct access. Thus, they assert that we have modified these decisions without an evidentiary hearing and the modifications of these decisions do not comport

[7] Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation ("Preferred Policy Decision") [D.95-12-063, as modified by D.96-01-009] (1996) 64 Cal.P.U.C.2d 1.

with Public Utilities Code Sections 1708 and 1708.5(f). (AREM's Application for Rehearing, pp. 10-12; CMTA's Application for Rehearing, p. 2.)

Specifically, AREM argues that since the decision adopting direct access was issued after "extensive hearings," we were not permitted to have suspended direct access without first conducting evidentiary hearings. (AREM's Application for Rehearing, pp. 11.) AREM and CMTA further argue that D.01-09-060 also modified other decisions, like D.97-08-056 and D.99-06-058, since these decisions involving the implementation of direct access were issued after evidentiary hearings. (AREM's Application for Rehearing, pp. 11-12; CMTA's Application for Rehearing, p. 2.) These assertions are without merit for the following reasons.

First, AREM and CMTA assert that we modified several of our previous decisions, particularly those involving the implementation of direct access and related to the PX credits and the allocation of direct access costs (see D.97-08-056 and D.99-06-058), and thus, was required under Public Utilities Code Sections 1708 and 1708.5(f) to hold evidentiary hearings. Although the instant proceeding also involved implementation issues concerning the PX credit to electric service providers, we did not modify any direct access implementation policies previously adopted by the Commission. In fact, the implementation issues concerning the PX credits were preserved for the next phase of the proceedings (see D.01-09-060, p. 5), and therefore, there was no modification of any direct access implementation decisions. Accordingly, if there is no modification, there is no statutory right to evidentiary hearings.

Second, if we did modify any of our previous decisions, it was the Preferred Policy Decision that adopted direct access.[8] However, simply because there is a modification does not mean that evidentiary hearings are required under all circumstances. Public Utilities Code 1708.5(f) provides that no evidentiary hearing is required in the amendment or repeal of a regulation if that regulation was adopted using

[8] The right to enter into direct access contracts or agreement was codified in A.B. 1890. (Pub. Util. Code, §§330, subds. (d) & (k); see also, Stats. 1996, ch. 854.)

notice and comment rulemaking procedures and without evidentiary hearings. (Pub. Util. Code, §1708.5, subd. (f).) That is the situation in the instant case.

In adopting direct access, we were establishing a regulation that had "general applicability and future effect." (See Stats. 1999, ch. 568, §1, subsection (b), which defines a regulation.) We adopted this regulation in the Preferred Policy Decision without conducting evidentiary hearings on direct access. There were no "evidentiary hearings" where witnesses presented testimony under oath and were cross-examined. (See Re Southern California Gas Company [D.96-11-022] (1996) 69 Cal.P.U.C.2d 238, 240, 1996 Cal.PUC LEXIS 1146.) AREM and CMTA, however, argue that we did conduct "evidentiary hearings" by referring to full panel hearings and public participation hearings. However, these "hearings" were not "evidentiary hearings" within the meaning of Public Utilities Code Section 1708.5(f). During these hearings, individuals and organizations presented written and oral comments and provided public input about various components of electric restructuring, including direct access. (See Preferred Policy Decision [D.95-12-063, as modified by D.96-01-009], supra, 64 Cal.P.U.C.2d at p. 27, 107-110; see also, Re Proposed Policies Governing Restructuring California Electric Services Industry and Reforming Regulation ["Second Interim Opinion on Direct Access") [D.97-05-040] (1997) 72 Cal.P.U.C.2d 441, 452.) The information gathered during these informal hearings became a part of the administrative record that was developed by notice and comment in support of the Commission's adoption of direct access. These hearings did not involve witnesses testifying under oath and under cross-examination, as is required for an evidentiary hearing. Therefore, since there were no evidentiary hearings on the adoption of direct access, Public Utilities Code Section 1708.5(f) did not require us to conduct an evidentiary hearing before issuing D.01-09-060.

b) Section 1701.1(a) argument

AREM argues that Public Utilities Code Section 1701.1(a) requires the Commission to have held evidentiary hearings. This statute provides, in pertinent part:

> "The [C]ommission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing. The [C]ommission shall determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing." (Pub. Util. Code, §1701.1, subd. (a).)

In this proceeding, we chose to issue D.01-09-060 based on notice and comments. This is the manner of due process afforded to interested parties. Although parties asked for evidentiary hearings, we did not conduct such hearings prior to its issuance of D.01-09-060, and as discussed above, such evidentiary hearings were not required.

Further, in implementing AB 1 X, the Commission was acting in its legislative capacity, and thus, had the authority to determine the due process procedures for this proceeding. (Wood v. Public Utilities Commission, supra, 4 Cal.3d at p. 292, citing Pub. Util. Code, §701.)[9] Further, in Public Utilities Code Section 1701.1(a), the Legislature has given the Commission the discretion to decide whether hearings are required or needed. (Pub. Util. Code, §1701.1(a).) In the instant proceeding, we chose not to conduct hearings prior to issuing our interim order. This was justified in light of the important need to implement the Legislature's directive to suspend direct access

[9] It is noted that whether this proceeding constituted a rate-setting, or was quasi-legislative, an evidentiary hearing was not required. As the California Supreme Court noted in Wood v. Public Utilities Commission, supra, 4 Cal.3d at p. 292:

> "In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected ratepayers. [Citation omitted.] . . . . The Public Utilities Code does not require public hearings before rate increases or rule changes resulting in rate increases may be authorized."

because it was not in "the public interest for the Commission to delay action to suspend direct access beyond this time." (See D.01-09-060, pp. 7-8.)

However, D.01-09-060 does not clearly explain why we chose not to have evidentiary hearings. In the manner set forth in the ordering paragraphs below, we will modify D.01-09-060 to provide such a clarifying explanation. We note that part of this explanation incorporates the one that was set forth in the August 27, 2001 and August 15, 2001 draft decisions of ALJ Barnett, but was inadvertently left out of D.01-09-060. (See August 27, 2001 Draft Decision of ALJ Barnett; pp. 6-7; August 15, 2001 Draft Decision of AL:J Barnett, p. 6.)

D. Commerce Clause

In its rehearing application, AREM asserts that the Commission's decision to suspend direct access violates the Commerce Clause found in Article 1, Section 8 of the U.S. Constitution. AREM recites general legal principles relating to the Commerce Clause and concludes that the Commission's decision interferes with interstate commerce because "many ESPs import power into California." (AREM's Application for Rehearing, p. 14.) AREM's claim of a Commerce Clause violation is wholly without merit as evidenced by the U.S. Supreme Court's decision in General Motors Corporation v. Ohio (1996) 519 U.S. 278, 306, which rejected a facial discrimination challenge to an Ohio order that exempted local distribution companies (LDCs) from taxes otherwise applicable to sellers of natural gas that did not qualify as natural gas companies. That decision also reaffirmed the Court's "longstanding doctrine [of] upholding the States' power to regulate all direct in-state sales to consumers, even if such regulation resulted in an outright prohibition of competition." (Id. at p. 306, emphasis added.)

E. The Effect of AB 9 XX Which Has Not Been Signed Into Law

In its rehearing application, AREM argues that our suspension of direct access is contrary to the most recent legislative intent as reflected by the California Legislature's passage of AB 9 XX, a bill which would (among other matters) authorize customer aggregation by cities, counties, other government bodies and private entities.

Specifically, AREM argues that D. 01-09-060 is "expressly in conflict with the will of the Legislature," as reflected in AB 9 XX, because that bill could not "be implemented without the availability of direct access." (AREM's Rehearing Application, p. 27.) Thus, AREM maintains that AB 9 XX "constitutes a later legislative direction" with regard to the subject of the suspension of direct access and indicates that "the Commission's suspension was both precipitous and contrary to the will of the Legislature." (AREM's Rehearing Application, p. 27.)

Contrary to AREM's argument, we are not bound by the legislative intent reflected in the Legislature's passage of AB 9 XX, which was enrolled on September 13, 2001, because the Governor has not yet signed the bill into law. Accordingly, AB 9 XX and what the Legislature intended in its passage have no controlling effect on the Commission's implementation of AB 1 X that requires suspension of direct access. Moreover, there is no such law that requires the Commission to be controlled by a bill that has not become law, and AREM cited to no law in their rehearing application.

F. Clarification of the Effective Date and the Submittal of DASRs

In its rehearing application, UC/CSU seek clarification on whether D. 01-09-060's prohibition of any new contracts for direct access service after September 20, 2001, allows or requires utilities to refuse to process DASRs for an account under a pre-September 20 contract. Specifically, UC/CSU state that it entered into a contractual relationship with an ESP in 1998 for direct access service and, under the terms of that contract, all existing and new UC/CSU accounts are eligible to be on direct access service. (UC/CSU's Rehearing Application, p. 5.) UC/CSU want the Commission to provide the utilities with clear direction that they are required to process DASRs received pursuant to the UC/CSU contract (as well as similar contracts of other entities), filed beyond September 20, 2001.

In D. 01-09-060, we stated:

> "[W]e issue this interim order in which we suspend the right to enter into new contracts or agreements for direct access [after September 20, 2001]. This decision prohibits

> the execution of any new contracts for direct access service, or the entering into, or verification of any new arrangements for direct access service pursuant to Public Utilities Code Sections 366 or 366.5, after [September 20, 2001]. All pending issues concerning direct access contracts or agreements executed before today remain under consideration by the Commission and will be resolved in a subsequent decision. In other words, effective today, no new contracts or agreements for direct access service may be signed; the effect to be given to contracts executed or agreement entered into before the effective date of this order, including renewals of such contracts or agreements, will be addressed in a subsequent decision.
>
> . . . .
>
> We direct the utilities not to accept any . . . [DASRs] . . . for any contracts executed or agreements entered into after [September 20, 2001]." (D.01-09-060, pp. 8-9.)

Additionally, Ordering Paragraph No. 7 provides:

> "PG&E, SCE and SDG&E shall not accept any direct access service requests for any contracts executed or agreement entered into after September 20, 2001." (D.01-09-060, p.12.)

As evident from the above language, the direction to the utilities with respect to which DASRs they can accept in light of D. 01-09-060 is clear, but warrants reiteration in light of the issues raised by UC/CSU. We reaffirm that for the time being, and unless the Commission states otherwise in a subsequent decision, utilities are required to process DASRs relating to contracts or agreements that were executed on or before September 20, 2001, including DASRs for service to new facilities or accounts if the underlying contract pursuant to which those DASRs are submitted allowed for the provision of that additional service. Thus, for example, with respect to the specific ESP

contract described by UC/CSU in their rehearing application,[10] the utilities are required to accept, even after September 20, 2001, any DASRs they receive that legitimately relate to that contract.

Additionally, UC/CSU state that "utilities have indicated that they will set a deadline for the filing of DASRs." (UC/CSU's Rehearing Application, p. 7, fn. 5.) UC/CSU argue that "utilities cannot arbitrarily set a deadline after which they refuse to process DASRs" and that the Commission "must make clear that there is no deadline for submitting DASRs for accounts that are under a contract lawfully executed on or before September 20, 2001." (UC/CSU's Application for Rehearing, p. 6.)

For purpose of utility compliance with D.01-09-060, we want to make it clear that, unless otherwise directed or allowed to in a subsequent Commission decision, utilities cannot set a deadline after which they could refuse to process DASRs relating to contracts executed on or before September 20, 2001.

However, we note that our clarifications today regarding the requirements for accepting DASRs should not be interpreted in any way to diminish or restrict the utilities' obligations, that we ordered in D.01-09-060, to take appropriate measures to ensure that any DASRs they do accept are for contracts executed or agreements entered into on or before September 20, 2001. We expect ESPs and other entities to cooperate with the utilities in their verification activities.

[10] In its rehearing application, UC/CSU state that: they entered into a system-wide contract with Enron Energy Services, Inc. for direct access service in early 1998; under the terms of that contract, all existing and new UC/CSU accounts are eligible to be on direct access service; and the universities retained the right to switch the remaining campus accounts to direct access service at any point during the term of the contract. Also, UC/CSU state that DASRs were filed in 1998 with the utilities for the majority of the accounts for the UC/CSU campuses and that new accounts are being added to UC/CSU campuses and new buildings are being constructed or new facilities are being purchased. Additionally, UC/CSU state that the campuses need to have the ongoing administrative capability for adding or changing account numbers and that, inevitability, there will be DASRs filed well beyond September 20, 2001, that relate to the 1998 Enron contract. (UC/CSU's Application for Rehearing, pp. 5-6.)

G. Procedural Due Process Requirements for Notice and Opportunity to Be Heard

Both Newark and AES argue that since certain affected ESPs and ESP customers did not receive formal notice of the proceeding, the Commission did not provide sufficient notice of to all parties, and thus due process was denied. (Application for Rehearing, p. 5; AES's Application for Rehearing, pp. 2-3.) This due process argument is without merit.

The U.S. Supreme Court set forth the requirements for notice in Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314:

> "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation omitted.] The notice must be of such nature as reasonably to convey the required information, [citation omitted], and must afford a reasonable time for those interested to make their appearance. . . ."

Before acting in our legislative capacity to suspend direct access, the public, including any interested parties, had notice from the agendas for Commission's meetings on June 28, July 12, August 2 and 23, and September 13, 2001. For each of these agendas, there was a notice informing the public that we would be considering the suspension of direct access. (See Commission Agenda, dated June 28, 2001 (Items H-26 & H-26a), July 12, 2001 (Items H-20 & H-20a), August 2, 2001 (Items H-14 & H-14a), August 23, 2001 (Items H-10 & H-10a) and September 13, 2001 (Items H-7 & H-7a).) Parties in this proceeding, which included ESPs and ESP customers, were mailed a copy of draft decisions and alternate draft decisions, and copies of these proposed decisions were publicly available. Further, the parties and the public had an ample time and opportunity to comment on the draft decisions and the alternate draft decisions prior to the suspension of direct access.

The rehearing applicants argue that the ESPs and the customers should have been given individual notice. However, the law does not require this. If the action is of a legislative nature, the agency need not provide individual notice, especially if it is impracticable and absent a statutory requirement. (See BiMetallic Investment Company v. State Board of Equalization of Colorado (1916) 239 U.S. 441, 445-446.)

THEREFORE, IT IS ORDERED that:

1. D.01-09-060, p. 10, shall be modified to add Findings of Fact Nos. 3 through 10, as follows:

> "3. The State has incurred an unprecedented debt to help weather the energy crisis.
>
> 4. Repayment of this debt to the State's General Fund can be accomplished through the issuance of bonds at investment grade.
>
> 5. It is not in the public interest to permit customers to switch from utility bundled electric service to direct access service.
>
> 6. Avoiding cost-shifting and establishing a stable customer base justify why suspension of direct access should not be delayed.
>
> 7. It is not in the public interest for the Commission to delay action to suspend direct access service beyond this time."

2. D.01-09-060 is modified to add the following clarifying language between lines 11 and 12 on page 8 of D.01-09-060:

> "We are aware that some parties have asked for us to hold hearings on the timing of the suspension of direct access. We have carefully reviewed the comments filed by various parties on this point and are not convinced that any party has identified any material factual issue that requires an evidentiary hearing. Thus, we do not intend to hold evidentiary hearings,

> especially as we are simply implementing a clearly worded statute that directs the Commission to suspend direct access. Further, we see no need to hold evidentiary hearings at this time, especially in the light of the important need to implement the Legislature's directives to suspend direct access, under the circumstances described above, and in the manner we did in today's interim order."

3. Following the sentence beginning with the words, "In addition, we take official notice . . . ." on line 1 of page 6 in D.01-09-060, the following clarification should be added: "(See generally, Memo from DWR to Commissioner Brown, dated August 7, 2001.) "

4. Rehearing of D.01-09-060, as modified, is denied.

This order is effective today.

Dated October 10, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a written dissent.

/s/ HENRY M. DUQUE
Commissioner

Commissioner Henry M. Duque dissenting:

The rehearing applications raise a number of valid allegations of legal error. Primary among them is the allegation that the decision is not supported by substantial *record* evidence. There is no record evidence which supports the few findings set forth in decision. The decision primarily relies on the Governor's January proclamation; however, circumstances have changed, and there are no facts to support the finding of an on-going emergency. The California Senate, for example, declared an end to the state of emergency announced by the Governor.

The decision similarly fails to cite record evidence of how the immediate, and possibly retroactive suspension, of direct access relates to or alleviates the emergency declared by the Governor almost nine months ago. The self-serving statements by bond counsel, DWR and the Department of Finance are untested, extra-record and conclusory. If a hearing was held, I believe the evidence would show that direct access could help decrease the amount of power DWR must purchase to cover the utilities' net short position. This, in turn, would help conserve state funds expended by DWR. The evidence would also show that direct access, which comprises less than 5% of load, is not a threat to DWR or the bonds.

Because of the time sensitivity associated with the disposition of the rehearings and the related bonds issuance, I am not holding up this decision to circulate an alternate legal analysis for consideration by the full Commission. I am instead voting no and deferring to the state and/or federal courts to fully address these allegations.

For these reasons I must respectfully dissent.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

San Francisco, California
October 10, 2001