

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
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August 1, 2008

TO PARTIES OF RECORD IN CASE 07-03-026, DECISION 08-08-001,
MAILED AUGUST 1, 2008.

On June 30, 2008, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 15.5(a) of the Commission's Rules of Practice and Procedures provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

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

ANG:rbg
Attachment

Decision 08-08-001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Building Industry Association,

Complainant,

vs.

Southern California Edison Company (U338E),

Defendant.

Case 07-03-026
(Filed March 27, 2007)

Vidhya Prabhakaran and James D. Squeri, for California
Building Industry Association, complainant.
Maricruz Prado and Michael D. Montoya, for Southern
California Edison Company, defendant.

DECISION GRANTING COMPLAINT

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DECISION GRANTING COMPLAINT

In this complaint case, we are called upon to determine whether, in 2006, defendant Southern California Edison Company (Edison or SCE) made a permissible change in the interpretation and implementation of one of its tariffs, Electric Rule 15.E.6, or whether - as the California Building Industry Association (CBIA) contends - the change violates Section 454 of the Public Utilities Code and Commission General Order (GO) 96-A, which generally prohibit changes by utilities in rates, services or practices without prior Commission authorization.

Electric Rule 15.E.6 concerns line extensions that do not yet serve enough load to recover their costs, and on which Edison is therefore entitled to a "monthly ownership charge" from the developer. Rule 15.E.6, the current version of which dates to 1995, is entitled "Unsupported Distribution Line Extension Cost" and provides as follows:

"When any portion of a refundable amount has not qualified for a refund at the end of twelve (12) months from the date SCE is first ready to serve, Applicant [i.e., the developer] will pay to SCE a Monthly Ownership Charge for administration and general (A&G) expense including Franchise Fees and Uncollectibles (FF&U), ad valorem tax, insurance, and operations and maintenance (O&M) in the percentages shown in Rule 2, Section H.2.c on the remaining refundable balance. Monthly ownership charges are in addition to the refundable amount and will normally be accumulated and deducted from refunds due to Applicant. This provision does not apply to individual residential Applicants."

The basis for the dispute here is that between 1995 and 2005 -- and, in fact, dating back to about 1970 -- Edison had deducted the monthly ownership charges from the developer's "remaining refundable balance," even if no refund was due to the developer. However, beginning in January 2006, after obtaining an opinion from its Regulatory Policy & Affairs (RP&A) Department that the

prior practice had been incorrect, Edison began to bill the developers separately for monthly ownership charges when no refund was due. As of the date of hearings in this case, the amount that had been billed on account of this change in tariff interpretation amounted to approximately \$1,451,000.

For the reasons set forth below, we conclude that Edison's change of tariff interpretation, and its consequent change in billing practice with respect to Rule 15.E.6, violates both Pub. Util. Code § 454 and GO 96-A. We therefore direct Edison to make refunds (with interest) to those developers who have paid bills for monthly ownership charges due to the change, and to cancel the bills for such charges that have not been paid.¹ If Edison wishes to collect monthly ownership charges through separate billings, it should seek to amend Rule 15.E.6 through our advice letter process (or, if necessary, by application).

1. Procedural Background

The complaint in this case was filed electronically on March 27, 2007. On May 10, 2007, Edison electronically filed its answer, admitting it had changed its interpretation of Rule 15.E.6 in the final quarter of 2005, and alleging that its new billing practices were permissible under the language of the rule (and related rules and contracts).

A telephonic prehearing conference (PHC) was held on June 13, 2007. During the PHC, CBIA and Edison both agreed that the case was not likely to be susceptible to alternative dispute resolution, but could probably be disposed of on briefs, with no need for hearings.

¹ According to Exhibit (Ex.) 7 in this proceeding, of the \$1,451,119 that Edison has billed as a result of its change of interpretation of Rule 15.E.6, only \$730,714 has actually been paid.

However, after the assigned Administrative Law Judge (ALJ) stated that he thought questions might arise about the facts, a schedule for hearings was worked out. First, the parties agreed to file a joint stipulation of facts on August 15, 2007. To the extent they could not agree on factual matters, the parties would file opening testimony on September 12, 2007, and reply testimony on September 26, 2007. Five days were set aside for hearings beginning on October 29, 2007, although it was generally agreed that not all of this hearing time was likely to be necessary.

The parties adhered to this schedule, and hearings in the case were held on October 29 and 30, 2007. At the conclusion of the hearings, the ALJ directed the parties to file opening briefs on November 30, 2007, and reply briefs on December 14, 2007.

Owing to the press of other Commission business, the ALJ was not able to turn his attention to drafting a Presiding Officer's Decision (POD) in this case until late in the first quarter of 2008. Accordingly, on March 14, 2008, the Commission issued Decision (D.) 08-03-014, which extended the 12-month statutory deadline for the proceeding by six months, until September 26, 2008.

2. CBIA's Position

CBIA's argument in this case is straight-forward. It contends that whatever the language of Electric Rule 15.E.6 may permit, the change that Edison made beginning in January 2006 to its method of collecting monthly ownership charges pursuant to the rule violates Pub. Util. Code § 454 and GO 96-A. Section 454 provides in pertinent part:

“[N]o public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.”²

In order to put this controversy in context, some background understanding of how Electric Rule 15.E.6 works is necessary. The first issue under the rule is whether a particular developer has a “refundable balance.” CBIA witness Carl Lower gives the following explanation of how that is determined:

“Under Rule 15, a refundable balance occurs when an applicant . . . follows the tariff and contributes an advance payment for the construction of a distribution line extension that is greater than SCE’s allowance, if any, for that distribution line extension. To give an example using hypothetical numbers, the tariff might require that all Applicants advance a sum of \$100,000 for the construction of a distribution line extension of a certain length. So a CBIA builder advances \$100,000 to SCE in order to have a distribution line extension of that length constructed to and within the new development it is building. However, SCE may provide allowances of \$6,000 for the model homes. In that instance, the CBIA will be left with a refundable balance of \$94,000.” (Ex. 1, pp. 2-3.)

² Similarly, the pertinent portion of Section VI of GO 96-A provides:

“The tariff schedules of a utility may not be changed whereby any rate or charge is increased, or any condition or classification changed so as to result in an increase, or any change made which will result in a lesser service or more restrictive conditions at the same rate or charge, until a showing has been made before the Commission and a finding by the Commission that such increase is justified.”

Although GO 96-A has now been wholly superseded by GO 96-B, the parties agree that the language of GO 96-A applies here, because the complaint herein was submitted for filing prior to July 1, 2007. (See CBIA Opening Brief, p. 2, fn. 3.)

Lower points out that the refundable balance is not refunded in one lump sum, but is usually paid back over an extended period of time:

“[U]nder Rule 15.E, refunds are based on the same revenue-based allowance amount, generated by the new distribution line extension as a result of new customers’ permanent load. Refunds are accumulated as a result of that calculation and paid out within 90 days and only for a period of ten years after SCE is first ready to serve over the distribution line extension.” (*Id.* at 3.)

Lower also notes that how Edison treats monthly ownership charges depends upon whether or not a refund is due to the developer for a particular month. In situations where a refund is due, Lower describes the procedure as follows:

“In those months where a refund [is] due to an applicant, SCE deduct[s] the monthly ownership charge from the refund due to the applicant and sen[ds] only that net amount to the applicant. The refundable balance for the applicant would then be decreased by the refund that was originally due without regard to the monthly ownership charge. Thus, to begin a new hypothetical example, let’s suggest that a CBIA builder had a remaining refundable balance of \$50,000 at the beginning of the month, accumulated a \$9,000 refund that month, and was assessed a \$200 ownership charge. SCE, in that hypothetical situation, would send the CBIA builder a refund of \$8,800, and the CBIA builder would have a remaining refundable balance of \$41,000 at the end of the month.” (*Id.* at 5.)

Lower continues that prior to the change Edison instituted in January 2006, it handled situations where a refund was not due to the developer in the following way:

“In those months where a refund was not due to an applicant since the project has been fully occupied, SCE would deduct the monthly ownership charge from the remaining refundable balance. No bill was sent to the applicant and no actual money was collected from the applicant . . . [T]o use a hypothetical example, let’s suggest that

a CBIA builder had a remaining refundable balance of \$50,000 at the beginning of the month, did not accumulate a refund that month, and was assessed a \$200 ownership charge. SCE, in that hypothetical situation, would send neither a refund nor a bill to the CBIA builder, but the CBIA builder would be left with a remaining refundable balance of \$49,800 at the end of the month.” (*Id.* at 5.)

According to Lower, this is the same approach that has long been followed (and continues to be followed) by the other two major electric utilities in California, Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E). (*Id.* at 5-6.)

However, in 2006 Edison changed the way it handled monthly ownership charges in those months where the developer had a refundable balance but no refund was due. Lower gives the following description of how the change works:

“[W]hen no refunds were due to an applicant, SCE changed its practice and procedure without changing their CPUC approved rule and contract by sending a bill to the applicant, collecting actual money from the applicant, and making no change to the remaining refundable balance. To use a hypothetical example, let’s suggest that a CBIA builder had a remaining refundable balance of \$50,000 at the beginning of the month, did not accumulate a refund that month, and was assessed a \$200 ownership charge. SCE, since January 2006 and given that hypothetical example, would send a bill to the CBIA builder for \$200, collect that money from the builder, and leave the remaining refundable balance at \$50,000.” (*Id.* at 6.)

In its briefs, CBIA argues that Edison’s change of practice is not only unfair, but contravenes established caselaw. CBIA relies on D.01-03-051, *Barratt American, Inc. v. Southern California Edison Company*, in which the issue was whether Edison could, without Commission permission, change its practice of giving customers a credit for pole removal when the customers were required to

switch from overhead to underground electrical facilities. Under its new interpretation of the relevant undergrounding tariff, Edison began to bill customers for pole removal. When Barratt American challenged this change of practice, Edison argued that it was not required to seek Commission permission for the change unless it resulted in an actual conflict with the tariff language.

The Commission disagreed:

“The issue here, however, is not whether SCE’s pole removal practice conforms to its tariffs. The issue is whether the change in that practice required prior Commission approval. We conclude that it did. To conclude otherwise would allow a utility, in practical effect, to increase its charges without Commission authorization. This would contravene Pub. Util. Code § 454, G.O. 96-A, and the rule of construction just cited that [any ambiguity in] a tariff must be construed in favor of the customer.” (D.01-03-051, pp. 7-8.)

CBIA reads *Barratt American* as controlling here, and finds analogous the decision’s language “that ‘[i]f a utility for 30 years interprets its tariff to give a substantial credit to customers [. . .],’ the utility could not ‘without the approval of this Commission reinterpret its tariff to take that credit away.’” (CBIA Opening Brief, p. 5.)

3. Edison’s Position

In both its testimony and briefs, Edison takes the position that its new practice of separately billing developers not due a refund for monthly ownership charges, rather than deducting these charges from the remaining refundable balance, is not only consistent with the tariff language that has been in effect since 1995, but more in keeping with that language than Edison’s prior practice, which SCE now considers erroneous.

In its direct testimony, Edison notes that its Ledgers organization is responsible for keeping track of contracts entered into with developers pursuant

to Rule 15, as well as managing those contracts and computing the amounts of any remaining refundable balances and monthly ownership charges. Edison also notes that since the early 1990s, the Ledgers organization has used an in-house computer system to keep track of these matters. However, after the Rule 15 tariff language changed in 1995, the in-house system was not kept up-to-date:

“Since 1992, Ledgers has utilized an in-house built system known as the Ledgers Accounting System (LAS) to manage Rule 15 Form Contracts in accordance with applicable tariffs. LAS is a single source system that contains the data necessary for such management.

“ . . . Rule 15 was modified in 1995. At such time, LAS was not updated to reflect the changes made to Rule 15. Instead, a manual process was created to accommodate the changes made to Rule 15. Specifically, once it was determined that ownership charges were due on nonresidential or developmental Rule 15 Form Contracts, Ledgers used manually-prepared spreadsheets to make the calculations deemed necessary to comply with the applicable tariffs. The calculation results were then manually entered back into LAS.”
(Ex. 5, p. 2.)

After new leadership took over the Ledgers organization in 2002, the new leaders began to raise questions about how certain accounting issues were being handled. One of the areas examined was Rule 15 contracts:

“In or around June 2005, as part of its on-going efforts for system consistency, efficiency and compliance, Ledgers commenced a review of the calculation and collection of ownership charges from applicants. One of the questions that arose after Ledgers reviewed and compared the manually-prepared paper spreadsheets against LAS programming was whether or not reducing the remaining refundable balance by the calculated ownership charges was appropriate when no refunds were due to the applicant. Specifically, Ledgers questioned whether the collection of ownership charges from applicants by way of reducing their remaining

refundable balance was supported by Rule 15. In addition, Ledgers was unsure whether applicants could be directly billed the ownership charges due to SCE when no refunds were due to applicants because Rule 15 did not specifically address this issue.” (*Id.* at 3.)

Because of these issues, the Ledgers Department sought a “tariff clarification” from Edison’s RP&A Department, which responded in late December 2005. Edison describes the changes it made in response to the RP&A tariff clarification as follows:

“In or around January of 2006 and in accordance with RP&A’s recommendations, Ledgers changed the methodology used to collect ownership charges when no refunds were due to applicants. Instead of collecting ownership charges by reducing the applicant’s remaining refundable balance, Ledgers began directly billing ownership charges on a quarterly basis when no refunds were due to the applicant. Billing of ownership charges when no refund was due to the applicant was deemed an internal process correction needed to comply with the language set forth in Rule 15.

“Based on the clarification received from RP&A, system modifications were made to LAS. The system modifications were implemented in late June 2007 using RP&A’s clarification as a guideline. In addition, Ledgers’ staff was instructed on the proper application of ownership charges and billing requirements to ensure consistent application of RP&A’s clarification.” (*Id.* at 4.)

Although Edison does not take issue with CBIA’s description of how monthly ownership charges were computed before and after the January 2006 change in billing practice, SCE insists that the change it made in situations where a refund is not due is more consistent with the language of Rule 15.E.6 than the practice SCE followed – with the help of the manual spread sheets described above – from 1995 to 2005.

In its testimony, Edison argues that until Rule 15 assumed its present form in 1995, prior versions had expressly provided for the reduction of refundable balances by the amount of monthly ownership charges. According to Edison, the 1995 removal of this language from the rule – plus the addition of language that “monthly ownership charges are in addition to the refundable amount” -- supports Edison’s new practice:

“Ownership charges have always been a part of line extension project costs. However, the methodology used to collect ownership charges has evolved over the years. In fact, prior to 1985, Rule 15.1 specifically stated that ownership costs will normally be made by deducting the developer’s advance. When the three rules [i.e., Rules 15, 15.1 and 15.2] were consolidated in 1995, the reference to deducting from the developer’s advance was not reinstated into Rule 15 and the phrase ‘monthly ownership costs are in addition to the refundable amount’ was added. The fact that the reference to a reduction of the developer’s advance was removed from Rule 15 is a strong indication that by 1995 the Commission no longer favored the collection of ownership charges through the reduction of the remaining refundable balance.” (*Id.* at 6; footnote omitted.)

Edison argues that its previous practice of deducting monthly ownership charges from remaining refundable balances was not only inconsistent with the language of Rule 15.E.6 as amended in 1995, but was also conceptually incorrect, because “the deduction of ownership charges owed by the applicant from the remaining refundable balance when no refund is due to the applicant inappropriately reduces the amount available for refund to the applicant.” (*Id.* at 5.)³

³ Elsewhere in its testimony, Edison points out that the Ledgers Department had also raised the issue whether SCE’s longstanding method of calculating remaining

Footnote continued on next page

Finally, in addition to arguing that its new interpretation of Rule 15.E.6 is more consistent with the history and language of the rule, Edison argues that CBIA's position finds no support in *Barratt American*. In Edison's opinion, *Barratt American* was a case that turned on tariff ambiguity, and there is no ambiguity in the tariff here:

"Barratt American dealt with a major change by SCE to its 30-year practice of not charging developers the cost of pole removal when they converted existing overhead facilities to underground facilities. To determine whether there was an ambiguity in Rule 20 with respect to the payment of pole removal costs, the Commission reviewed Rule 20 in its entirety. The fact that Rule 20 was completely silent on the issue[,] coupled with the fact that it was the Commission's policy to encourage conversion to underground facilities, convinced the Commission that it was not unreasonable for SCE to assume that it should bear the removal costs. Although SCE's [new] interpretation that the Applicant should bear the removal costs was plausible and compliant with Rule 20, there was enough ambiguity on the issue of cost responsibility to sway the Commission against Edison's [new] interpretation." (Edison Opening Brief, p. 12.)

refundable balances when no refund was due amounted to an inappropriate mixing of distinct accounting concepts:

"Although Ledgers was unclear about whether or not Rule 15 supported direct billing of ownership charges when no refunds were due to applicants, it was believed that the deduction of ownership charges from the remaining refundable amount when no refunds were due created an inappropriate mixed use of capital and expense funds. The refundable advance is intended to support the capital investment (e.g., building the electrical distribution and/or service facilities) made by SCE to serve the applicant. On the other hand, ownership charges are intended to cover the ongoing expenses associated with maintaining electrical facilities, such as administration and general expenses, insurance and operations and maintenance expenses, among others." (*Id.* at 3-4.)

Edison argues that unlike the tariff in *Barratt American*, there is no ambiguity in Rule 15, because that rule and its predecessors have always required the payment of monthly ownership charges when the capital costs of line extensions were not being fully recovered. The 1995 addition of the phrase “monthly ownership charges are in addition to the refundable amount,” plus the 1985 deletion of language providing for the reduction of remaining refundable balances by the amount of monthly ownership charges, are clear evidence to Edison that the utility is authorized to bill developers separately for monthly ownership charges when a refund is not due. (*Id.* at 12; Ex. 5, p. 6.)

4. Discussion

Although Edison has presented some interesting policy and historical arguments in support of its change of interpretation of Rule 15.E.6, we agree with CBIA that the change Edison made in early 2006 violates both Pub. Util. Code § 454 and GO 96-A. Contrary to Edison’s contentions, we also find that this case presents a situation very analogous to *Barratt American*.

In a case that turns so heavily on questions of tariff interpretation, we think it is appropriate to begin our discussion with the actual language of the tariff. As noted in the introduction, Rule 15.E.6 provides in full:

“When any portion of a refundable amount has not qualified for a refund at the end of twelve (12) months from the date SCE is first ready to serve, Applicant will pay to SCE a Monthly Ownership Charge for administration and general (A&G) expense including Franchise Fees and Uncollectibles (FF&U), ad valorem tax, insurance, and operations and maintenance (O&M) in the percentages shown in Rule 2, Section H.2.c on the remaining refundable balance. Monthly ownership charges are in addition to the refundable amount and will normally be accumulated and deducted from refunds due to Applicant. This provision does not apply to individual residential Applicants.”

Even on a cursory reading, several things stand out about this language. First, it does clearly state, as SCE has repeatedly pointed out, that “monthly ownership charges are in addition to the refundable amount.” Second, it states that these charges “will normally be accumulated and deducted from the refunds due to Applicant,” thus setting forth what Edison presumably considers the “normal” situation. However, even if one assumes that the “abnormal” situation is one in which no refund is due,⁴ the rule does not specify how monthly ownership charges are to be collected in that instance.

Edison admits this linguistic gap exists, but seeks to plug it (and thus defend its 2006 change of interpretation) by relying on the clause that “monthly ownership charges are in addition to the refundable amount.” Edison argues that this clause is authorization to bill separately for the charges, as it has been doing since January 2006. However, while Edison’s reading is a plausible interpretation of the rule’s language, it is not the only possible interpretation, as

⁴ During his cross-examination by the ALJ, CBIA witness Lower acknowledged that the word “normally” does not clarify the meaning of Rule 15.E.6:

“Q: What has been your understanding of the use of the term ‘normally’?

That is a word that always causes concern, I think, for a lawyer who sees it because no two people probably can ever agree on what ‘normally’ means.

A: Your Honor, I was involved in writing these rules, and that was a very bad choice in language. But as it stands right –

Q: Are you confessing that you came up with this? (Laughter)

A: No, I’m not, sir, but I was very much involved in a six-year project to redo these rules from 1989 to ‘95.

And the word ‘normally’ to me doesn’t mean much unless they would identify the abnormal. And there’s no other alternative here except the deduction from the refunds due to the applicant. So the word ‘normally’ doesn’t add anything.” (Transcript, p. 40.)

indicated by Edison's practice from 1995 to 2005 of accounting for monthly ownership charges when no refund was due by deducting the monthly charges from the remaining refundable balance, a practice SCE now claims is improper.

Edison also tries to argue that the linguistic gap in Rule 15.E.6 is not an ambiguity, and that this position is strengthened by the deletion in 1985 of language from Rule 15's predecessor stating that "payment of such ownership charges will normally be made by deduction from the developer's advance."

However, while the 1985 deletion arguably supports Edison's position, that position has been substantially undercut by the way in which Edison's own Ledgers Department accounted for remaining refundable balances through the end of 2005. As Edison witness Lisa Vallenoweth conceded in her opening testimony, the "collection process" of how to account for monthly ownership charges in situations where no refund is due "is not specifically addressed in Rule 15.E.6, nor is it addressed in any other subsection of Rule 15." (Ex. 5, p. 5, lines 11-12.) Further, as SCE witness Tracy Reeves pointed out, the Rule 15 issue was referred to Edison's RP&A Department in the fall of 2005 partly because the Ledgers Department "was unsure whether applicants could be directly billed" monthly ownership charges when no refund was due, "because Rule 15 did not specifically address this issue." (*Id.* at 3, lines 17-19.) In view of the uncertainties about the permissible scope of Rule 15 within Edison's own department charged with administering the rule, we conclude that Rule 15.E.6 is ambiguous, because it is silent on the issue of whether developers not due a refund may be billed separately for monthly ownership charges.

It is also clear that the effects of the billing change Edison instituted in 2006 have not been trivial. As noted in the introduction, Edison has billed developers about \$1.45 million for monthly ownership charges since the change of

interpretation of Rule 15.E.6 took effect. As CBIA has repeatedly pointed out, these billings are for charges that Edison had not previously billed; until the 2006 change, monthly ownership charges had *always* been deducted from the developer's remaining refundable balance, even if no refund was due. The 2006 change of interpretation means that, whatever the tariff language may say, developers are now expected to pay for charges that for more than 35 years have been deducted from refunds, if any, owed to the developer.

The silence of Rule 15.E.6 on this critical billing issue, and the uncertainty within Edison as to the permissible scope of the rule, give this case a strong resemblance to the *Barratt American* case, D.01-03-051. In that proceeding, the issue was whether homebuilders who were compelled by SCE's Rule 20.B to convert overhead to underground electric facilities should receive a credit for the costs of pole removal. It was undisputed that for more than 30 years, Edison had granted such a credit to developers who were compelled by the tariff to convert their electric facilities to underground. However, after an "internal review," Edison began to charge for pole removal, a change of practice it argued was consistent with the tariff language.

When questioned by the ALJ about its change of practice, Edison argued that the change was permissible, because it was not inconsistent with the tariff language. The description of Edison's position on this point in *Barratt American* is virtually identical to the language SCE has used in this case:

"SCE's practice is to implement procedures in accordance with its tariffs. So long as SCE's procedures are not inconsistent or in conflict with its tariffs, SCE does not typically seek approval of the specific procedures it is implementing. Likewise, if SCE determines that a procedure should be changed, it does not seek approval if the procedure, as changed, is still consistent with SCE's tariff."
(D.01-03-051, p. 2.)

Edison is correct that in *Barratt American*, the Commission examined the language and history of Rule 20.B and concluded that Edison's new position on pole removal costs was not inconsistent with the tariff's language. However, this linguistic consistency did not prevent the Commission from finding that an ambiguity was present:

"SCE insists that its change in policy is consistent with the language of Rule 20. Certainly, when the tariff language is considered as a whole--including the Rule 20.B.3 provision specifically addressing removal of overhead facilities--that interpretation appears valid. When determining whether there is ambiguity in a tariff, we are required to consider tariff language as a whole . . . On the other hand, Rule 20.B.2.c does not address pole removal costs and, given the Commission's intent in D.73078 to encourage conversion to underground facilities, it was not unreasonable for SCE for 30 years to assume that it should bear the removal costs. It is settled law that an ambiguity in a tariff must be construed against the utility and in favor of the customer . . ." (*Id.* at 7.)⁵

Thus, although agreeing with Edison that its new position on pole removal costs was consistent with the tariff language of Rule 20.B, *Barratt American*

⁵ Although, as noted in footnote 2, this case is governed by GO 96-A rather than GO 96-B, it should be noted that the rule requiring ambiguities in a tariff to be construed against the utility is now expressly incorporated in GO 96-B, which became effective on July 1, 2007 pursuant to D.07-01-024. General Rule 8.2.1 of GO 96-B provides in pertinent part:

"Any ambiguity in a tariff provision shall be construed in the way most favorable to the customer, and any representation made by a utility, in advertising or otherwise, with respect to a tariffed service shall be consistent with the terms and conditions of the applicable tariff." (Emphasis supplied.)

Thus, in view of the ambiguity we have found in this case, the outcome in this proceeding would be no different under GO 96-B than it is under GO 96-A.

nonetheless held that the change was impermissible, because it violated Pub. Util. Code § 454 and GO 96-A:

“The issue here, however, is not whether SCE’s pole removal practice conforms to its tariffs. The issue is whether the change in that practice required prior Commission approval. We conclude that it did. To conclude otherwise would allow a utility, in practical effect, to increase its charges without Commission authorization. This would contravene Pub. Util. Code § 454, GO 96-A, and the rule of construction just cited that a tariff must be construed in favor of the customer.” (*Id.* at 7-8; emphasis in original.)

It is clear that under the reasoning of *Barratt American*, Edison’s change of interpretation of Rule 15.E.6 -- a change that allowed it to begin separately billing monthly ownership charges to developers not due a refund -- is impermissible under § 454 and GO 96-A.

Not surprisingly, Edison has sought to distinguish this case from *Barratt American* on a number of grounds. First, Edison argues that *Barratt American* should be restricted to its facts, relying upon a sentence in D.01-03-051 that “our order is confined to the facts of this case.” (Edison Reply Brief, p. 6, n. 15.)

However, it is apparent when one examines the full passage in which this sentence appears that the Commission was not holding that *Barratt American* was non-precedential. Responding to Edison’s argument that seeking Commission approval for the change of practice would amount to obtaining an advisory opinion, and that the Commission would be “inundated” with filings if Commission approval were required each time such a practice was changed, the Commission said:

“We believe these contentions overstate the effect of our decision today. Our order is confined to the facts of this case. It finds that *Barratt American* has stated a valid complaint under GO 96-A. SCE should have sought Commission approval before changing a practice that

had been in place for 30 years and that eliminated a substantial credit to applicants for underground conversion.” (D.01-03-051, p. 8; emphasis supplied.)

Edison also argues that *Barratt American* is distinguishable because although the Commission found the undergrounding rule to be silent on the issue of who should pay for pole removal, the language of Rule 15.E.6 clearly states that “monthly ownership charges are in addition to the refundable amount.” Thus, in Edison’s view, there is no tariff ambiguity, and Rule 15.E.6 should not be considered ambiguous merely because the rule fails to spell out SCE’s possible billing options:

“CBIA would like the Commission to believe that the absence of phrases like ‘SCE shall send a bill to Applicant’ in Rule 15 creates an ambiguity as to whether or not the Applicant is responsible for the payment of ownership fees. Clearly, this ambiguity does not exist in Rule 15. Attempting to spell out every conceivable collection methodology available to SCE in the *abnormal* circumstance where the Applicant is not due a refund would be imprudent, unnecessary and inefficient. Rule 15 clearly holds the Applicant responsible for the payment of ownership costs.” (Edison Opening Brief, p. 12; emphasis in original.)

The answer to this argument is that it fails to recognize that by starting to bill developers separately for monthly ownership charges when they are not due a refund, Edison has changed an accounting practice of 35 years’ standing. The discussion in *Barratt American* makes clear that such a change is covered by the language of § 454 and GO 96-A:

“SCE next contends that the requirements of Pub. Util. Code § 454 apply only to ‘new rates,’ and that no new rates are at issue here. That is a highly restrictive -- and incorrect -- reading of Section 454 and the implementing requirements of GO 96-A. As noted in the draft decision, those rules provide that a utility may not change a practice that results in an increase in a tariff schedule without a

finding by the Commission that such increase is justified. SCE is incorrect in its contention that Section 454 does not apply to the facts of this case.” (D.01-03-051, p. 10.)

Edison also argues that the Commission would be creating a dangerous precedent if it ruled that Rule 15 is ambiguous merely because it is silent as to billing options, even though the tariff language is very clear about SCE’s right to collect monthly ownership charges:

“SCE urges the Commission to reject CBIA’s recommendations and not find that there is an ambiguity in Rule 15 as to the payment obligations of Applicants with respect to ownership fees. A finding suggesting an ambiguity given the clear language in the tariff would create a dangerous precedent[,] as it would require utilities to make advice letter filings whenever they find it necessary to change an internal policy and would unduly burden the Commission with excessive and unnecessary filings.” (Edison Reply Brief, p. 4.)

The short answer to this contention is that we doubt there are very many situations in which Edison or any other utility has changed a decades-long practice by which it accounts for the charges required by one of its tariffs. If a utility wishes to make such a change to a well-established practice, it is required by Pub. Util. Code § 454 to seek our approval through the advice letter process (or, if necessary, an application).

In attempting to distinguish *Barratt American*, Edison also argues that what CBIA is seeking to do here is establish its right to a large subsidy at ratepayer expense:

“CBIA would like the Commission to believe that Rule 15 was deliberately set up to give developers a large subsidy at the expense of ratepayers. The most basic analysis of Rule 15’s history contradicts CBIA’s theory. Applicants have always been liable for the payment of ownership fees in both the refund and no-refund context under Rule 15. Rule 15 simply does not provide a ‘subsidy’

or ‘credit’ to developers that are not eligible for a refund because they have not provided the revenue necessary to justify the construction costs of the line extension. A Commission-approved ‘credit’ or ‘subsidy’ to developers does not exist under Rule 15 and should not be adopted by the Commission as it would be in contravention of Rule 15 and would violate the Commission’s long-standing policy of having the cost-causer pay line extension costs.” (*Id.* at 3.)

Although this argument has some appeal from a policy perspective, we agree with CBIA that in making it, Edison has misstated the key issue in this proceeding:

“Even if the Commission eventually agrees with SCE’s interpretation of Rule 15 . . . that issue must be resolved in a separate proceeding than this one in which CBIA will have the opportunity to present its full case for its interpretation that Rule 15 requires SCE to deduct ownership charges from the remaining refundable balance[,] as it and the other major IOUs have been doing for the last 35 years. *Here, CBIA only asks that the Commission acknowledge that SCE has unilaterally changed its practice and procedure which has resulted in an increased charge on CBIA members in violation of § 454 and GO 96-A.*” (CBIA Reply Brief, p. 5; emphasis supplied.)

Finally, we agree with CBIA⁶ that despite Edison’s argument that its 2006 change of interpretation merely corrected SCE’s internal accounting process for a charge SCE had long been entitled to collect, in fact Edison had an incentive to change its interpretation of Rule 15. As noted in CBIA witness Lower’s testimony, a developer applicant is eligible for refunds only for 10 years on the advance it has paid; after that time any remaining balance that has not been

⁶ See CBIA Opening Brief, p. 5; CBIA Reply Brief, pp. 3-4.

refunded reverts to Edison. (Ex. 1, p. 3.)⁷ During cross-examination, Edison witness Reeves acknowledged that when SCE receives an unrefunded balance because of this 10-year limit, it is applied to reducing the amount of the ratebase on which the company's future rates are set. Thus, although she could not quantify it, Reeves acknowledged that the practical effect of the 2006 change would be that eventually, larger amounts of unrefunded balances would become available to reduce Edison's ratebase.⁸

⁷ A provision to this effect also appears in the form contract Edison enters into with developers, which is attached to the Answer as Appendix A. The paragraph entitled "Refund Period" in Section 3.7 of the contract provides in full:

"The total refundable amount is subject to refund for a period of ten (10) years after the Distribution Line Extension is first ready to serve. Any unrefunded amount remaining at the end of the ten-year period shall become the property of SCE."

⁸ The testimony on this issue was as follows:

"Q: And what happens to the remaining refundable amount after ten years if the customers does not receive the full refund because the line extension is not being fully utilized enough to justify that full refund?

A: That remaining refundable balance becomes an offset to our plant account to calculate the rate base going forward.

Q: So is it right to characterize that to say it goes back to SCE, back to the utility?

A: No. It goes back to the ratepayers. It reduces the amount of the rate base that the rates are going to be subsequently calculated on.

Q: Would you agree that in many cases there is some remaining refundable amount that has not been refunded to SCE's customer?

A: I cannot say many. I do not have those figures in front of me.

Q: But it does happen?

A: It does happen, yes.

Q: In those cases where there is some remaining refundable amount left in ten years, would you agree that it is to the ratepayers' advantage . . . to have a higher remaining refundable amount?

Footnote continued on next page

5. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner for this proceeding, and A. Kirk McKenzie is the assigned ALJ and presiding officer for this proceeding.

6. Submission of Proceeding

This case was deemed submitted on December 14, 2007, when CBIA and Edison both submitted reply briefs on the issues litigated at the hearings.

Findings of Fact

1. Under Edison's Electric Rule 15.E.6, SCE is permitted to recover monthly ownership charges from developers who have paid for a line extension in those situations where the load on the extension is insufficient to cover its costs.
2. Versions of a rule allowing Edison to recover monthly ownerships charges from developers on line extensions with insufficient load have been in existence since at least the 1930s.
3. From the late 1960s until 1985, predecessor versions of SCE Rule 15.E.6 expressly provided that "payment of [monthly] ownership charges will normally be made by deduction from the developer's advance."
4. The language quoted in FOF 3 was understood by Edison and everyone in the building industry to mean that monthly ownership charges would be deducted from the developer's remaining refundable balance, even in those months for which no refund was due to the developer.
5. Under the contracts that Edison enters into with developers pursuant to SCE Rule 15, any portion of the advance paid by a developer that has not been

A.: Yes." (Transcript, p. 60.)

refunded to the developer within 10 years after the date SCE first gives notice of its readiness to serve reverts to Edison.

6. Edison uses moneys that revert to it pursuant to the policy described in FOF 5 to reduce the amount of the rate base on which SCE's future rates are calculated.

7. The January 2006 change of policy that CBIA is challenging in this case is likely to increase the amounts that revert to Edison pursuant to the contract provision described in FOF 5, although the amount of the increase is difficult to quantify.

8. In 1995, the predecessor of Rule 15.E.6 was amended to state that "monthly ownership charges are in addition to the refundable amount."

9. SCE Electric Rule 15 and contracts entered into pursuant to this rule are administered by Edison's Ledgers Department.

10. Despite the 1995 addition of the language quoted in FOF 8, Edison's Ledgers Department continued to deduct monthly ownership charges from the remaining refundable balances of developers, whether or not a refund was due to a developer for a particular month.

11. The SCE Ledgers Department did not update its in-house LAS computer program, which calculates remaining refundable balances, to reflect the 1995 change of language quoted in FOF 8.

12. Pursuant to advice received from Edison's RP&A Department, the SCE Ledgers Department changed its practice in January 2006 and began to bill developers separately for monthly ownership charges for those months in which a refund was not due on the developer's remaining refundable balance.

13. Since January 2006, the SCE Ledgers Department has made no change to its practice of deducting monthly ownership charges from the refund due to the developer for those months in which a refund is owed to the developer.

14. The total amount that SCE has billed to developers pursuant to the change of policy described in FOF 12 totaled approximately \$1,451,100 as of the date of hearings in this case.

15. Of the total amount billed to developers pursuant to the change of policy described in FOF 12, approximately \$730,700 has been paid.

16. Of the total amount billed to developers pursuant to the change of policy described in FOF 12, approximately \$720,400 has not been paid.

Conclusions of Law

1. Because it results in developers having to pay additional funds to cover charges for which they are liable, the change of policy described in FOF 12 constitutes an alteration of a practice that has resulted in a new rate within the meaning of Pub. Util. Code § 454.

2. Because it results in developers having to pay additional funds to cover charges for which they are liable, the change of policy described in FOF 12 constitutes a change that results in “lesser service or more restrictive conditions at the same rate or charge” within the meaning of Section VI of GO 96-A.

3. The change of billing policy described in FOF 12 is violative of both Pub. Util. Code § 454 and GO 96-A because Edison did not seek Commission approval before instituting this policy change.

4. Edison should be required to refund with interest the \$730,714 that, as of the date of hearings in this case, had been collected from developers pursuant to the change of policy described in FOF 12.

5. Edison should be required to cancel the \$720,405 in bills that were based upon the change of policy described in FOF 12 and that, as of the date of hearings in this case, had not been paid by developers.

6. If Edison wishes to bill developers separately for monthly ownership charges owing for those months in which no refund is due to the developer on the advance the developer has paid, Edison should seek the Commission's permission to do so either by application or through the Commission's advice letter process.

7. This order should be made effective immediately to prevent further improper billings and to refund as soon as possible the improperly collected charges.

O R D E R

IT IS ORDERED that:

1. The complaint herein is granted.
2. Within 30 days after the effective date of this decision, Southern California Edison Company (Edison) shall issue refunds, with interest, to those developers that have paid bills issued on or after January 1, 2006 for monthly ownership charges assessed for months in which no refund was due to the developer under Edison's Electric Rule 15 and related contracts.
3. Within 30 days after the effective date of this decision, Edison shall cancel the outstanding bills that have not been paid by developers who, after January 1, 2006, were billed by Edison for monthly ownership charges assessed for months in which no refund was due to the developer under Edison's Electric Rule 15 and related contracts.
4. Prior to issuing any bills for monthly ownership charges assessed for months in which no refund is due to a developer on the advance the developer

has paid pursuant to Edison's Electric Rule 15, Edison shall seek, either by advice letter or application, Commission authority for the issuance of such bills.

5. Case 07-03-026 is closed.

This order is effective today.

Dated July 31, 2008, at San Francisco, California.