Decision **DRAFT DECISION OF ALJ BARNETT** **(Mailed 1/25/2002)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

(See Appendix C for List of Appearances)

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OPINION DETERMINING THAT DIRECT ACCESS SHOULD BE SUSPENDED AS OF JULY 1, 2001, AND IMPLEMENTING THE SUSPENSION

I. Summary and Background

In 1995, this Commission issued a comprehensive decision for electric restructuring, which included the adoption and implementation of a direct access program. (Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation [Decision (D.) 95-12-063, as modified by D.96-01-009] (1995) 64 Cal. P.U.C.2d 1, 24 (Preferred Policy Decision).) The Legislature codified the Preferred Policy Decision in Assembly Bill No. 1890, Stats. 1996, ch. 854.

By "direct access" California customers are permitted to choose from whom they wished to purchase their electricity. Customers could subscribe to bundled service from the public utility or direct access service from an electric service provider (ESP). Customers who purchase bundled service from the utility pay an electricity charge to cover the utility's power supply costs. For those bundled service customers, their total bundled bill includes charges for all utility services, including distribution and transmission as well as electricity. A direct access customer receives distribution and transmission service from the utility, but purchases electricity from its ESP. (See D.01-09-060, p. 2.)

Recently, major events in the California electric market have caused a significant change in the area of direct access. On January 17, 2001, the Governor issued a proclamation declaring that an emergency existed in the electricity market in California, and stating that "the solvency of California's major public utilities" was threatened. In response to this emergency, the Legislature enacted Assembly Bill No. 1, First Extraordinary Session (AB1X), which, among other

things, required that the California Department of Water Resources (DWR) procure electricity on behalf of the customers of the California utilities. With respect to direct access, AB1X added Water Code § 80110,[1] which provides:

> "After the passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department [the Department of Water Resources] no longer supplies power hereunder." (Water Code, §80110 see also, AB1X, Stats. 2001 (1st Extraordinary Sess.), ch. 4, § 4, p. 10.)

AB1X was an urgency statute and was given effect as of February 1, 2001. The statute was necessary "to address the rapid, unforeseen shortage of electric power and energy available in the state and rapid and substantial increases in wholesale energy costs and retail energy rates, that endanger the health, welfare, and safety of the people of [California]." (AB1X, Stats. 2001 (1st Extraordinary Sess.), ch. 4, §7, p. 16.)

In compliance with the mandate concerning direct access in AB1X, we issued D.01-09-060, an interim order, effective September 20, 2001, which suspended the right to enter into new contracts or agreements for direct access after September 20, 2001. We reserved for subsequent consideration matters related to the effect to be given to contracts executed or agreements entered into on or before the effective date. We especially put all parties on notice "that we may modify this order to include the suspension of all direct access contracts

[1] All Water Code sections cited in this decision are collected in Appendix B.

executed or agreements entered into on or after July 1, 2001." (D.01-09-060, pp. 8-9.) We acted promptly in issuing D.01-09-060 to prevent the adverse cost-shifting impacts on bundled service customers caused by customers switching to direct access. (D.01-09-060, pp. 8-10.) Also, D.01-09-060 was issued to facilitate the transactions of the State of California, in the issuance of bonds at investment grade necessary to ensure the repayment of the expenditures made from the State's General Fund to procure power for the utilities' customers. These expenditures were made to help weather the energy crisis confronting California. (D.01-09-060, pp. 4, 8.)

In D.01-09-060, we specifically reserved for a subsequent decision any issues related to an earlier suspension date. As we said: "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, pp. 8, 9.) We concluded that "[t]he effect to be given to contracts 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 4] & p. 13 [Ordering Paragraph 9].)

In D.01-09-060, we recognized that merely suspending direct access was not enough. Many issues remained.

> "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. 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 agreements entered into before the

> effective date of this order, including renewals of such contracts or agreements, will be addressed in a subsequent decision. We put all those concerned about these matters on notice that we may modify this order to include the suspension of all direct access contracts executed or agreements entered into on or after July 1, 2001. Parties' comments regarding retroactive suspension, including the July 1, 2001 date, will be addressed by a subsequent decision. (D.01-09-060, pp 8-9.) (Emphasis added.)

In D.01-10-036, our order denying rehearing, we modified D.01-09-060 for purposes of clarification and added the following language:

> "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." (D.01-10-036, pp. 23-24.)

Further, we said that no "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 . . . ." (D.01-10-036, pp. 23-24.)

Following our directive the Presiding Administrative Law Judge (ALJ) set a prehearing conference on November 7, 2001, "to clarify the issues remaining to be resolved. . . ." (ALJ Ruling of October 11, 2001.) On October 23, 2001, an Assigned Commissioner's Ruling was issued by Commissioner Wood requesting written comments on various issues, including whether the Commission should consider a July 1, 2001, suspension date. At the prehearing conference of November 7, these matters were considered with particular emphasis on the issue of suspending direct access on a date prior to September 20, 2001.

On November 11, 2001, the Presiding ALJ issued a Ruling stating that:

> "Proposals to implement the Commission's September 20 Order (D.01-09-060) will be filed by the utilities on November 16, 2001; all parties may comment on or before November 28; all parties may respond to comments on or before December 4.
>
> "A prehearing conference to consider the implementation proposals, and issues regarding PX credits, will be held December 12, 2001 at 2 p.m. in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California."

On November 19, 2001, an Assigned Commissioner's Ruling stated that parties could file supplemental comments on January 4, 2002, to the comments filed in response to the Assigned Commissioner's Ruling of October 23, 2001.

At the prehearing conference on December 12, 2001, the matter of implementation of the order suspending direct access was submitted, subject to supplemental comments to be filed on January 4, 2002. (Tr. p. 133.)

On December 17, 2001, the Presiding ALJ issued a Ruling confirming submission.

> "The issues of implementation of the Commission's order suspending Direct Access (Decision 01-09-060) and whether to choose a date earlier than September 20, 2001 for the suspension to go into effect are submitted as of January 4, 2002, the date for filing supplemental comments."

Comments having been received, and argument at the prehearing conference considered, the matter of the suspension of direct access is ripe for decision.[2]

II. The Effective Date of Suspension

For the reasons set forth below, we find that direct access should be suspended as of July 1, 2001. Direct access contracts executed prior to July 1, 2001, pursuant to which electricity flowed prior to July 1, 2001, are not suspended, but are subject to the implementation restrictions imposed by this decision.

A. Facts

The Department of Water Resources has been buying electricity for the retail end use customers of the California utilities (Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E)) since January 17, 2001. It has spent

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[2] On January 9, 2002, this Rulemaking was issued to separate the issue of suspension of direct access, which was being considered in A.98-07-003, A.98-07-006, and A.98-07-026, from all other issues in those three dockets. Rather than have the parties re-submit in this docket their filings in those three dockets we took official notice of the pertinent information. (Rulemaking p.6.)

over $10 billion to date and is estimated to spend an additional $8 billion through December 31, 2002. DWR has entered into long-term contracts with various generators to supply electricity to the customers of the three utilities. All DWR purchases to date, including interest, plus the cost of future purchases under the long-term contracts and on the spot market, are the obligations of the ratepayers of the three utilities.[3] The undisputed facts show that between July 1, 2001 and September 20, 2001, approximately 11% of the total electric load of the utilities has shifted from bundled service to direct access service. This shift means that 11% of $18 billion ($1.98 billion) will become the obligation of the remaining bundled customers of the utilities should direct access suspension remain fixed at September 20. This result puts bundled customers at a disadvantage and is unfair, unreasonable, and violates Water Code §§ 80002.5 and 80104. Our power to regulate the collection and payment of DWR expenses is specifically authorized by Water Code §§ 80108 and 80104.

1. SCE

Uncontroverted information provided to the Commission by SCE shows that by the second quarter of 2001, the direct access load in its service territory had dropped to less than 1% of SCE's load from a high of 14.8% in December 1999. In June 2001, the direct access load was 1%; by July 31, it reached 3.1%; by October it reached 11.6%.

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[3] Water Code § 80104:

> Upon the delivery of power to them, the retail end use customers shall be deemed to have purchased that power from the department. Payment for any sale shall be a direct obligation of the retail end use customer to the department.

TABLE 1

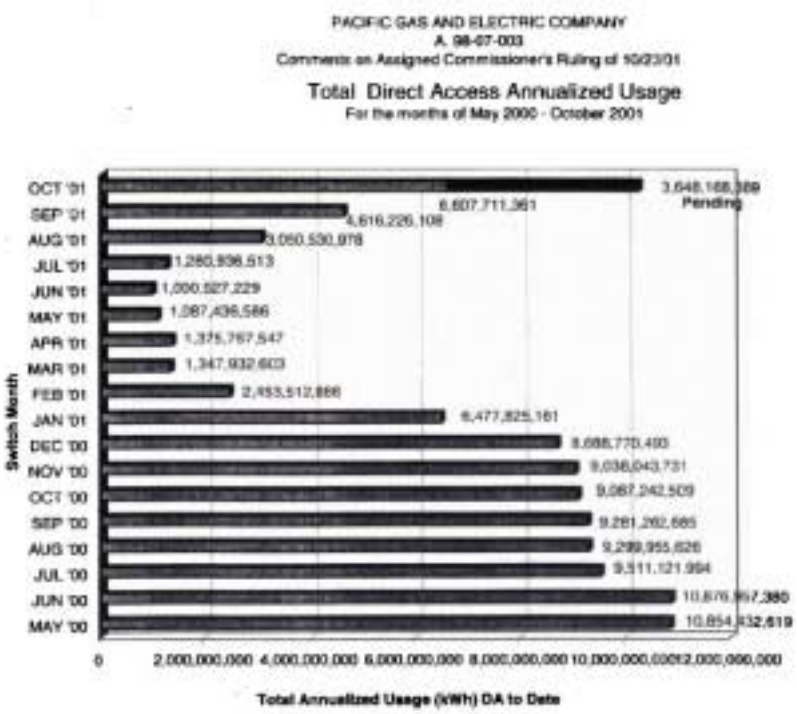
Date	Number of DA customers	% of SCE's Cumulative Load
5/31/98	26,761	0.1%
12/31/98	46,898	12.1%
12/31/99	81,883	14.8%
5/31/00	83,896	16.5%
12/31/00	65,965	10.7%
4/30/01	39,882	0.7%
6/15/01	37,774	1.0%
7/31/01	36,411	3.1%
9/21/01	39,789	6.5%
10/26/01	43,570	11.6%

SCE states that since October 2001, its direct access load has increased, and, because Direct Access Service Requests (DASRs) are still being processed and new load is added as customers add new facilities, it expects direct access load to exceed 15%.

2. PG&E

Uncontroverted information provided to the Commission by PG&E shows that in December 2000, PG&E's direct access load was 11.3% of its total load. In the period January 2001 to June 2001, the direct access load was reduced to 1.3% of total load. By October 2001 direct access load had reached 12% of total load and is expected to go as high as 16% when all pending DASRs are processed. The trend in direct access load between May 2000 and October 2001 is shown in Table 2.

TABLE 2



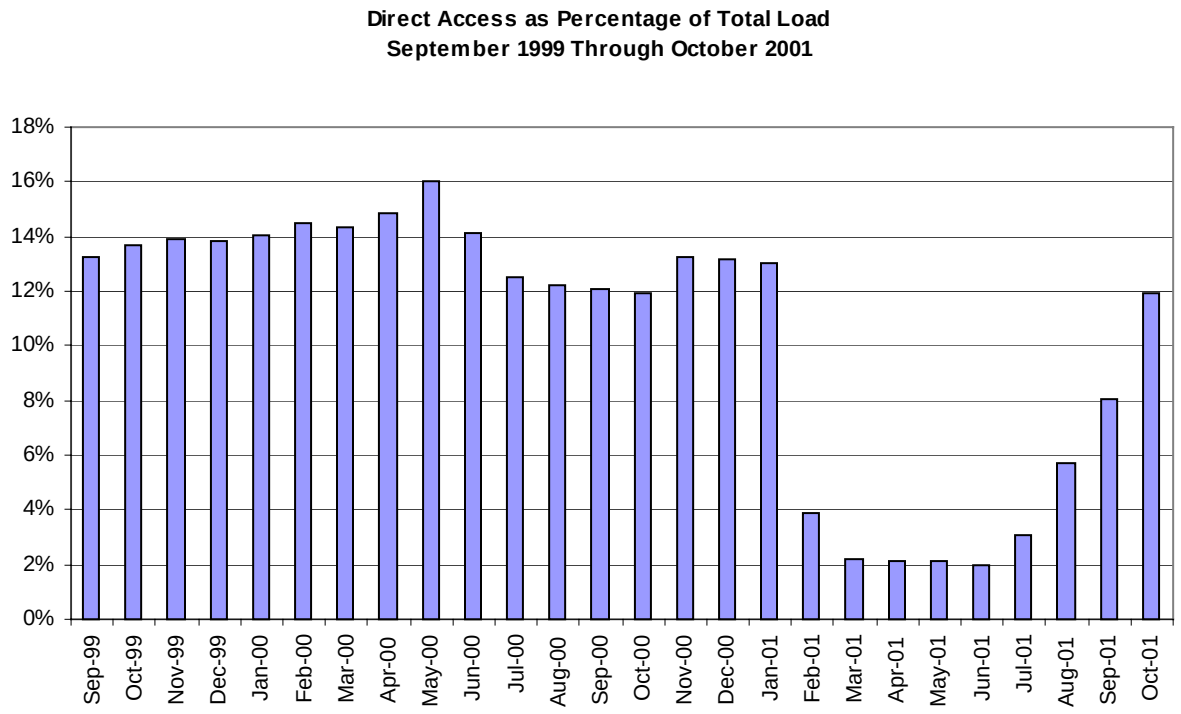
3. SDG&E

Uncontroverted information provided by SDG&E shows that as of November 2001, 50% of its largest customers take direct access service, accounting for 19.4% of its total load.

4. Staff Load Summary

The Commission staff has provided the following table showing the penetration of direct access on the loads of SCE, PG&E, and SDG&E through October 2001.

TABLE 3



We must also add to the departing load figures above an estimate of further increases in direct access load caused by increased usage by direct access customers, contract extensions, and new facilities added to existing contracts. Regardless of the precision of the estimate, a shift of the DWR revenue requirement from direct access customers to bundled customers will occur.

5. The Department of Water Resources (DWR)[4]

The California DWR has been purchasing power for the electric customers of PG&E, SCE, and SDG&E since January 17, 2001 and will continue to purchase power for the foreseeable future. In D.02-02-_____ in A.00-11-038, et al.,

[4] The information provided by DWR in this Rulemaking has been augmented by our findings in D.02-02-____ of which we take official notice pursuant to Rule 73 of the Commission's Rules of Practice and Procedure.

this Commission determined the method by which the DWR revenue requirement would be met. We allocated DWR costs "in relation to the relevant cost driver, namely the net short position by utility." (D.02-02-____ at p. 3.)

D.02-02-____ implements cost recovery of the revenue requirement of DWR relating to its power purchase program pursuant to AB1X. On November 5, 2001, DWR submitted to the Commission its most recent revenue requirement of $10,003,461,000, [5] representing the total to be collected from utility customers of the three major California utilities covering the period January 17, 2001 through December 31, 2002. In D.02-02-_____ we held that DWR will collect its revenue requirement through charges remitted from billings to retail customers of the three major electric utilities based on cents per-kWh charges.

The underlying events that caused the need for DWR to purchase power for the utilities are exactly the same events that caused the Legislature to suspend direct access and cause us to adopt July 1, 2001 as the effective date of suspension. In D.02-02-_____ we said:

> We note that the high DWR contract prices now in effect in California reflect the exorbitant wholesale electricity costs caused by the crisis manufactured by wholesale electricity sellers and traders over the past year. These rates measure, in part, the terrible price California has had to pay to restore stability. Individual Commissioners and Governor Gray Davis have previously endorsed contract renegotiations to reduce

[5] Water Code § 80110 authorizes DWR to determine its revenue requirement. This Commission makes no independent judgment concerning the reasonableness of the DWR revenue requirement.

> prices that were set when market prices were at or near their peak. (Exhibit 160, Weil, p. 4.) DWR now forecasts that from October 1, 2001 through the end of 2002, average DWR contract prices will be 3.3 times average residual net short prices. (Reference Item C, DWR, November 5 revenue requirement document, p. 16, Table 6; compare DWR contract costs to residual net short costs for Q4 2001 and all of 2002.) DWR assumes that residual net short energy will be purchased in spot markets. (D.02-02-_____ at p. 4.)

The action that we take today in regard to direct access follows the same statutory scheme enacted in response to emergency conditions confronting California's major electric utilities and their customers. On January 17, 2001, Governor Davis issued a Proclamation that a "state of emergency" existed within California resulting from unanticipated and dramatic increases in the wholesale price of electricity. The Governor's Proclamation stated that "unanticipated and dramatic increases in the price of electricity have threatened the solvency of California's major public utilities, preventing them from continuing to acquire and provide electricity sufficient to meet California's energy needs." Governor Davis therefore ordered DWR to assume responsibility for procurement of a major portion of electric power resources for customers of California's three major electric utilities in order to help stabilize market conditions. DWR commenced meeting the utilities' net short requirements[6] through a combination of contractual power purchases and spot market purchases, including purchases of ancillary services.

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[6] The term "net short" is used to describe the difference between utility retail demand and the supply resources provided by the utility's own generation and committed power purchase contracts with qualifying facilities (QFs) and other suppliers.

Water Code § 80002.5 states that "[i]t is the intent of the Legislature that power acquired under this division shall be sold to all retail end use customers served by electrical corporations, …." Water Code §80104 explains that "[u]pon the delivery of power to them, the retail end use customers shall be deemed to have purchased that power from the department. Payment for any sale shall be a direct obligation of the retail end use customer to the department."

Water Code § 80110 provides that DWR is entitled to recover in rates amounts sufficient to enable it to comply with Section 80134, which are the revenues that may be pledged for support of bonds that DWR is authorized to issue pursuant to Section 80130. Section 80134(a) provides:

> "The department shall, and in any obligation entered into pursuant to this division may covenant to, at least annually, and more frequently as required, establish and revise revenue requirements sufficient, together with any moneys on deposit in the fund, to provide all of the following:
>
> (1) The amounts necessary to pay the principal of and premium, if any, and interest on all bonds as and when the same shall become due.
>
> (2) The amounts necessary to pay for power purchased by it and to deliver it to purchasers. …"

In D.02-02-_____ we established charges to recover the revenue requirement for DWR. The revenue requirement includes forecasts and representations about future events, including issuance of bonds with estimates of reserve requirements and interest rates that may or may not reflect actual conditions at the time the bonds are sold. We made provision for adjustments of the DWR revenue requirement. In periodic updates, variances between forecast and actual results can be taken into account. An overcollection in one year would reduce the next year's revenue requirement and the charges needed to

recover it. In D.02-02-____ we adopted the DWR revenue requirement for the period January 17, 2001 through December 31, 2002, allocated it between the three utilities, and applied the allocation to each utilities' electric sales volumes on a cents-per-kWh basis, to produce the revenue to pay for DWR AB1X - authorized costs.

DWR's updated revenue requirement for all three utilities totals $10.003 billion, as summarized in Appendix A of this decision. The revenue requirement represents total expenditures of $18.014 billion, less the proceeds from external bond financing. The remaining balance of $10.003 billion is the DWR revenue requirement to be recovered from utility customers covering the period January 17, 2001 through December 31, 2002.

DWR's estimated administrative and general expenses of $99 million are summarized by quarter in Appendix A. Interim loan costs of $1.281 billion are included under "Financing Cost" in Appendix A. These loan costs represent principal and interest payments on a $4.3 billion interim financing entered into by DWR on June 26, 2001. The interim loan proceeds reduce the amount of revenues that would otherwise be required currently from customers. DWR plans to retire this interim financing from the proceeds of long-term bonds. AB1X authorizes DWR to issue up to approximately $13 billion in bonds to support its power purchase program. The bonds are projected to be issued at the end of June 2002 and to have a final maturity date of May 1, 2016. Until the bonds are sold, DWR is relying on the interim borrowing arrangements. Future ratepayers will be obligated to repay bond principal, together with accrued interest, in addition to paying for DWR power that they consume.

In D.02-02-_____ we described the need for annual revisions of DWR's revenue requirement as prescribed in Water Code § 80134(a), and we

scheduled June 1, 2002 as the date DWR would submit its revenue requirement forecast for the period January 1, 2003 through December 31, 2003. Recognizing that DWR's revenue requirement is based on forecasts that may prove incorrect over time, we requested DWR to make the necessary adjustments to reflect the variance between actual and forecasted costs. At the designated time for DWR to submit its revised forecast for the coming year, DWR will also submit its true-up of the prior periods' differences between forecasted and actual data. The difference between actual costs incurred and actual revenues collected by DWR will result in either an undercollection or overcollection, to be assigned to the bundled customers of each utility.

Appendix A to this decision sets forth the details of the DWR revenue requirement that was implemented in D.02-02-____. Appendix A to this decision is a duplicate of Appendix A in D.02-02-_____, of which we take official notice. For the purposes of this decision we are concerned (as was the Legislature) with the shift in costs as direct access customers leave the system. From Appendix A the following costs are fixed for the period January 17, 2001 through December 31, 2002:

	(millions)
1. Administrative and General (A&G)	$ 98.8
2. Demand Side Management (DSM)	288.9
3. Financing	1,281.0
	$1,668.7
use	$1.7 billion

DWR has based its revenue requirement forecast on its estimate that 11% of total load has left bundled service since July 1, 2001.[7] The UDCs have made a similar estimate. The cost shift of fixed overheads is $187,000,000 over two years ($1.7 billion x .11 = $187 million). This $187 million does not include the avoided responsibility for the excess costs portion of $5.2 billion in DWR contracts, nor the avoided responsibility for the repayment of the $8.5 billion in bonds to be issued later this year.

B. Modification of the Suspension Date

To comply with legislative intent, to fulfill the purpose of the applicable statutes, to form the broadest base upon which to build the repayment structure required to meet the DWR revenue requirement, to prevent a cost shift of over $187 million dollars between now and December 31, 2002, and to assure that amounts recovered from customers for DWR costs are just and reasonable, we determine that it is in the public interest to modify the date of suspension of direct access from September 20, 2001. Therefore, direct access is suspended as of July 1, 2001. Direct access contracts executed prior to July 1, 2001, pursuant to which electricity flowed prior to July 1, 2001, are not suspended, but are subject to the implementation restrictions imposed by this decision.

The increase in direct access load between July 1, 2001 and September 20, 2001 is extraordinary. Some refer to it as "the gold rush." From

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[7] The record in D.02-02-____ has DWR Reference Item B dated August 7, 2001, showing 116,084 gWh sales, assuming a July 1, 2001 suspension date; DWR Reference Item C dated November 5, 2001, showing 98,793 gWh sales, assuming a September 20, 2001 suspension date. This 15% decrease in gWh sales includes the decrease caused by the 11% increase in direct access.

2% of total utility load as of June 2001, the direct access load increased by 11% as of September 2001.

In addition to the shift in DWR fixed costs for the period January 17, 2001 – December 31, 2002, of $1.7 billion, reductions in electric loads due to direct access place burdens on the remaining electric customers of the investor-owned utilities in two ways. First, there are out-of-pocket costs, which have been incurred by DWR for electricity purchases since January 17, 2001, which have yet to be reflected on customers' bills. This uncollected amount is currently estimated to be approximately $8.5 billion. (This is expected to be financed through the issuance of DWR's revenue bonds.) If, for example, 11% of customer load leaves the system through direct access, the uncollected amount must be borne by the 89% of customer load remaining; an incremental $935 million (i.e., 11% of the $8.5 billion currently uncollected), as well as associated financing costs.

The second burden on the remaining customers results from the future costs of the "net short." Under AB1X, DWR is purchasing energy under long-term contracts to provide electric energy that cannot be met by utility generation, and purchasing energy on the spot market for demand in excess of its contracts. The cost of that purchased power is to be paid by the utilities' bundled customers. AB1X provided for the Commission to suspend direct access in recognition of the fact that DWR would be entering into long-term contracts and that bundled customers must pay the bill. Direct access customers are typically commercial and industrial customers with high load factors. The departure of their load, to the extent it had been covered by existing DWR power contracts, will increase DWR's per unit costs by either forcing DWR to sell its excess energy on the spot market or by reducing the average system load factor

on generating facilities subject to DWR contracts. In either event, DWR's per unit costs to its remaining customers increases. When spot market prices are generally lower than the DWR average per unit contract costs, reduction in load will result in an increase in the average cost of DWR energy (by resulting in less lower cost, spot market purchases).

The arguments of those who protest changing the suspension date of direct access from September 20, 2001, to July 1, 2001 fall into two broad categories: 1) customers have executed contracts with ESPs in reliance on our September 20 date, and 2) changing the suspension date to July 1, 2001 is an impairment of contracts entered into between July 1 and September 20. Both arguments are without merit.

1. Reliance

California Manufacturers & Technology Association (CMTA) and others argue that because the Commission never acted formally to suspend direct access until September 20, 2001, the Commission allowed the direct access program to remain effective and, accordingly, customers continued to execute direct access contracts up until September 20, 2001. Thus, those customers that executed direct access contracts during this period were doing exactly what the Commission allowed them to do.

As a matter of public policy, they believe it is critical that the Commission adhere to a stable set of rules which affect customers, ESPs, and the utilities. They claim it would be extremely disruptive at this juncture for the Commission to attempt to establish a direct access suspension date earlier than September 20, 2001. Customers have bargained for their direct access contracts and if those contracts were to be nullified by establishing an earlier suspension date, customers would lose the benefit of their bargain, primarily in the form of

lower electric costs. Moreover, in many cases an earlier suspension date would cause customers to incur substantial contract termination costs. Even in those instances where so-called "regulatory out" clauses exist, CMTA argues, customers nevertheless would be harmed by virtue of having to pay higher electric costs by returning to bundled utility service. An abrupt and possible retroactive increase in costs for many business customers would be extremely harmful to their business operations and overall viability.

CMTA's argument is not persuasive. The right to acquire direct access is a legislative and regulatory right. It was established in AB 1890 (Pub. Util. Code § 365(b)(1)) and was implemented through Commission decisions (*e.g.*, D.97-10-087, 76 CPUC 2d 294) and utility tariffs (Rule 22). All contracts made regarding direct access are subject to modification by the Commission.

The background of direct access is set forth in D.97-05-040 (72 CPUC 2d 441). In D.97-05-040, the Commission ordered the utility distribution companies (UDCs) to file their direct access implementation plans (DAIPs), along with their pro forma tariffs. Prior to the submission of the DAIPs, the UDCs were ordered to meet with interested parties in an attempt to reach agreement on the procedures needed to implement direct access. Workshops were scheduled, which resulted in the formation of the Direct Access Alliance (Alliance), represented diverse participants in the direct access market. The utilities began talks with representatives from the Alliance seeking consensus on direct access tariffs and service agreements for statewide use. The participants were able to reach a consensus on a set of proposed tariffs for statewide use. D.97-10-087 was the result.

In regard to the issue of modification of direct access, D.97-10-087 is specific and clear. It holds that the Commission has exclusive jurisdiction to resolve interpretations of, modification of, or compliance with any of the direct access tariff provisions or the ESP-UDC service agreement. (76 CPUC 2d at 310.) We ordered the following tariff provision to be included in the tariffs of the three UDCs:

> "The CPUC shall have initial jurisdiction to interpret, add, delete or modify any provision of this tariff or the ESP-UDC Service Agreement, and to resolve disputes regarding the UDC's performance of its obligations under the UDC's electric rules and tariffs, the ESP UDC Service Agreement and requirements related to Direct Access service, including any disputes regarding delays in the implementation of Direct Access." (D.97-10-087, 76 CPUC 2d at 310.)

A service agreement between the UDCs and ESPs was approved. (Appendix B to D.97-10-087), subject to terms and conditions (Appendix A of D.97-10-087) which "apply to both <u>UDC customers and electric energy service providers</u> who participate in Direct Access." (D.97-10-087, 76 CPUC 2d at 336.) (Emphasis added.)

Among those terms and conditions is that:

> "The CPUC shall have initial jurisdiction to interpret, add, delete or modify any provision of this tariff or the ESP-UDC Service Agreement and to resolve disputes regarding the UDC's performance of its obligations under the UDC's electric rules and tariffs, the ESP-UDC Service Agreement and requirements related to Direct Access service, including any disputes regarding delays in the implementation of Direct Access." (Id. at p. 340.)

In regard to direct access we provided that the ESP was subject to the UDCs tariffs and our jurisdiction.

> "The ESP must satisfy the following requirements before an ESP can provide Direct Access services in the UDC's service territory:
>
> "(1) All ESPs must submit an executed standard Energy Service Provider Agreement (UDC-ESP Service Agreement) in the form attached hereto." (Id. at p. 342.)

Finally, in regard to the UDC-ESP Service Agreement we provided that:

> "1.2 The form of this Agreement has been developed as part of the CPUC regulatory process, was intended to conform to CPUC directions, was filed and approved by the CPUC for use between UDC and ESPs and may not be waived, altered, amended or modified, except as provided herein or in the relevant direct access tariff, or as may otherwise be authorized by the CPUC." (Id. at p. 366.)
>
> "21.2 This Agreement may be subject to such changes or modifications as the CPUC may from time to time direct or necessitate in the exercise of its jurisdiction, and the Parties may amend the Agreement to conform to changes directed or necessitated by the CPUC." (Id. at p. 373.)

Direct access is authorized by statute, implemented by Commission decisions, and binds ESPs and UDC customers alike through Commission approved terms and UDC tariffs, both of which specifically provide for modification by the Commission.

Not only do Commission decisions and utility tariffs provide for modification of direct access agreements, but the issuance of a series of proposed decisions show that a July 1 suspension date was a distinct possibility.

1. On June 15, 2001, a draft decision was issued proposing a July 1, 2001, suspension date.
2. On August 15, 2001, a revised draft decision was issued proposing a September 1, 2001, suspension date.
3. On August 27, 2001, a revised draft decision was issued proposing a July 1, 2001, suspension date.
4. On September 20, 2001 a decision was issued suspending direct access as of September 20, 2001, and expressly stating that the suspension date would be revisited and, perhaps, be made effective on a date earlier than September 20, 2001.

Given the changes in various draft decisions, the specific reservation of authority to change the suspension date, and the prior decisions of the Commission reserving the right to modify the terms and conditions of direct access, we cannot accede to the view that electric customers relied on a permanent September 20 suspension date. Those customers want it both ways. They want the option to return to utility service at anytime, as many did in the first half of 2001 (*see* Table 3, above), but be able to choose direct access when it suits them. That 11% or more of load can switch back and forth between utility service and ESP service creates uncertainty for both DWR in its purchases and the UDCs in their service obligations, all to the detriment of the bundled customers. Direct access customers benefited when DWR entered into long-term contracts: the spot price of electricity came down, below DWR contract prices, making ESP contracts attractive, and a safety net of a return to UDC service was

provided should spot prices again run wild. Meanwhile, the bundled customer pays the freight. This free ride is unreasonable and discriminatory.

We choose July 1 because the showing in this proceeding is that 11% of electric load has shifted from the UDC retail load to direct access load during the period July 1 through September 20, resulting in a cost shift of over $187 million[8] to be recovered from the remaining retail end use customers: the customers taking bundled service. It is unjust and unreasonable to permit a substantial group of customers to avoid paying for costs incurred for their benefit.

Direct access is driven by economics. When consumers believe it is cheaper to buy electricity from an ESP they will enter into a direct access contract, rather than choose a UDC. Table 3, above, shows that clearly. DWR began stabilizing the California electric market in January 2001, by February the direct access market dropped 70%; by March another 50% was sliced from the direct access market. This figure (2% of total load) remained constant until the Assigned ALJ's Proposed Decisions proposed conflicting dates to suspend direct access. The uncertainty of the suspension date – July 1 or September 20, initiated the gold rush. But, what was clear to all parties was the reservation in D.01-09-060 of the Commission's intent to consider reverting the suspension to a date earlier than September 20, with July 1 being the likely date.

To accede to those who oppose the change of the suspension date to July 1, would be to permit them 1) to avoid paying their fair share of the DWR

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[8] This cost shift, only for costs incurred 1/17/01 – 12/31/02, does not include the anticipated cost shift of $935 million that will occur when DWR issues $8.5 billion in bonds, to be repaid by bundled customers.

costs to stabilize the California electric market, 2) to avoid paying for the excess costs of the DWR long term contracts, 3) to avoid paying for the costs of the bonds DWR is expected to issue shortly and, 4) to grant them the option to return to bundled service should the economics become favorable or their ESP fail. It should not be forgotten that the UDCs are the default provider of electric service for all in their service territory. To permit the September 20 date to stand is unfair to all bundled customers. It permits a fortuitous group of customers to benefit and at the same time avoid the cost of that benefaction.

2. Impairment of Contracts

Our authority to change the suspension date from September 20 to July 1 is well grounded in our statutory authority (Pub. Util. Code § 701, 1708), our decisions in this area, discussed above, UDC tariffs filed in conformance with our decisions,[9] and case law.

The constitutional restriction against impairment of contracts has no bearing here where a state is exercising its regular police power in the public interest. The contracts clause of the United States Constitution (Article 1, Sec. 10, cl. 1) prohibiting the government from impairing contracts is not to be read literally and does not bar legislation designed to further a significant public interest objective from impacting private contracts.[10]

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[9] *See* Section A.3 of Rule 22; Section A(3) of Appendix A to D.97-10-087 at p. 336. Section 1.2 of ESP Service Agreement; Section 1.2 of Appendix B to D.97-10-087 at p. 366.

[10] *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 1251, 94 L.Ed 2d 472 (1987) (Pennsylvania Subsidence Act which required that sufficient coat be left beneath the surface of certain areas in order to provide support for housing, while substantially impairing private contractual relationships, was amply justified by the

Footnote continued on next page

The purpose of AB1X is to ensure that the State of California is paid for the obligations incurred by DWR during the statewide electricity crisis on behalf of utility customers, including the recently switched direct access customers. Clearly the contractual rights of a subset of utility customers who have chosen direct access must yield to this larger purpose.

An analysis of Water Code § 80110 is instructive regarding the suspension date. First, the section specifically states that this Commission's authority "as set forth in Section 451 of the Public Utilities Code shall apply…." Pub. Util Code § 451 states that all charges "shall be just and reasonable." Second, rather than choosing a date to suspend direct access, the Legislature authorized the Commission to pick the date.[11] Had the Legislature suspended direct access on the date of enactment of Water Code § 80110 (February 1, 2001) the direct access load would have been approximately 13% of total load (Table 3, above). By authorizing this Commission to choose the date flexibility was

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public purposes served by the Act); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed 2d 186 (1984) (Hawaii Land Reform Act of 1967 which created a land condemnation scheme, whereby title was taken from lessors and transferred to lessees in order to reduce concentration of land ownership, does not violate due process or contract clauses.) (See 57 L Ed 2d 1279 and cases cited at 1284-87.)

[11] The section also prohibits the Commission from increasing "the electricity charges in effect on the date that the act that adds this section becomes effective for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities, until such time as the department has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division." Because residential ratepayers will not receive an increase in baseline rates the remaining ratepayers and rate categories will be responsible for the shortfall. This adds to the burden of bundled ratepayers and compels relief.

introduced into the process to assure maximum benefit to all ratepayers, that is, to produce just and reasonable rates. All who benefit from DWR purchases will bear the burden. To hold to the September 20 date with a total direct access load approaching 15%, not only would negate the Legislature's purpose in suspending direct access, but also would be a greater burden than if the Legislature had suspended direct access on February 1, 2001. Essentially, the proponents of September 20 (and assignments and add-ons) imply that the legislative interest was to provide a choice based on happenstance, the fortuitous choice of a date, rather than choice based on an analysis of the facts as applied to the purpose of the statute. The purpose of the statute is to recover the DWR revenue requirement from as broad a base of ratepayers as reasonably possible. July 1st does it; September 20th, does not.

We have been granted by the Legislature the power to determine the date upon which suspension of direct access is to occur (Water Code § 80110) and have determined that we are acting in our quasi-legislative capacity. (Rulemaking 02-01-011, Ordering Paragraph 5; Pub. Util Code § 1701.1.) In the exercise of the power granted to us by the Legislature we have determined that the effective date of the suspension should be July 1.

The argument that we have no authority to choose a date earlier than September 20 is not persuasive. We believe an analysis based on the holding in United States v. Sperry Corp. (1989) 493 US 52, 107 L Ed 2d 290, 110 S Ct. 387, is dispositive.

Congress in 1985 enacted a statute requiring reimbursement to the United States for government expenses incurred in connection with the arbitration of claims. The statute was made retroactive to June 7, 1982. Sperry

had been a successful claimant and had received its award prior to the enactment of the statute.

In upholding the statute, the Court said:

> "[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." Pension Benefit Guaranty Corporation v R. A. Gray & Co. 467 US 717, 730, 81 L Ed 2d 601, 104 S Ct 2709 (1984) (quoting Usery v. Turner Elkhorn Mining Co. 428 US 1, 16-17, 49 L Ed 2d 752, 96 S Ct 2882 (1976) (citation omitted).
>
> **[2b]** We agree with the United States that the retroactive application of § 502 is justified by a rational legislative purpose. Retroactive application of § 502 ensures that all successful claimants before the Tribunal are treated alike in that all have to contribute toward the costs of the Tribunal. If Congress had made the application of § 502 prospective only, the costs of the Tribunal would have fallen disproportionately on the claimants whose awards, for whatever reason, were delayed, and Congress might have had to increase the percentage charge on those claimants to recoup a sufficient portion of the Federal Government's costs. Claimants who were fortunate enough to obtain awards prior to the enactment of the statute would have obtained a windfall by avoiding contribution. It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are

> borne by the entire class of persons that Congress rationally believes should bear them. Cf. Pension Benefit Guaranty Corporation v R.A. Gray & Co., supra, at 730, 81 L Ed 2d 601, 104 S Ct 2709; Usery v Turner Elkhorn Mining Co., supra, at 18, 49 L Ed 2d 752, 96 S Ct 2882. (U.S. v Sperry 493 US at 64-65, 107 L Ed 2d at 304.)

The rationale of Sperry fits the facts of changing the date of direct access suspension from September 20, to July 1. The legislative purpose of Water Code § 80110 is to ensure that all ratepayers are treated alike in that all have to contribute to the DWR revenue requirement, which has benefited all ratepayers. If we suspend prospectively only, the DWR revenue requirement would have fallen disproportionately on those who, for whatever reason, chose not to switch to direct access. Direct access customers who were fortunate enough to sign contracts prior to September 20 would receive a windfall by avoiding contribution. It is surely proper for this Commission to regulate retrospectively to ensure that the costs of a program are borne by the entire class of persons that the Legislature believes should bear them.

3. Backbilling

SDG&E, and others, argue that to impose a suspension date prior to September 20 would require the utility to backbill for the period between the new suspension date and September 20. They say that a direct access transaction that occurred before September 20, 2001 contemplates that an ESP actually sold power to a customer, its customer incurred an obligation to pay for that power, and the customer paid the ESP for that power. The UDCs now cannot unwind that completed transaction and recast it into a bundled service transaction. The UDC cannot bill for service it did not provide.

We agree that the utility cannot bill for service it did not provide, and that backbilling would be an inappropriate result of our choosing a suspension date prior to September 20. Our purpose in choosing a suspension date is to obey the legislative direction and fix the time at which direct access and the direct access provisions of contracts are suspended "until the department no longer supplies power hereunder." (Water Code § 80110.) Backbilling simply is not an issue.

However, finding backbilling to be a nonissue does not eliminate the need to resolve the issue of cost responsibility of direct access customers for the DWR's revenue requirement. This issue is to be resolved in A.00-11-038, et al. (See ALJ Ruling of December 24, 2001, transferring the issue from A.98-07-003, et al., to A-00-11-038, et al.) As discussed elsewhere in this opinion, the purpose of direct access suspension is to assure that those who benefit from DWR's electricity purchases do not escape responsibility to pay for that benefit.

III. Implementation of the Suspension of Direct Access

In D.01-09-060 we said:

> "Accordingly, we issue this interim order in which we suspend the right to enter into new contracts or agreements for direct access effective today. 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 the effective date of this order.[1]. . .
>
> "We direct the utilities not to accept any direct access service requests (DASRs) for any contracts executed or agreements entered into after the effective date of this decision. Steps that the utilities might take to ensure compliance with this order may include obtaining from each energy service provider a list of relevant identifying

> information for those customers that have entered into timely contracts, but for whom DASRs have not been submitted."
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> "[1] All references in this order regarding the "suspension of the right to acquire direct access service" include the execution of any new contracts, agreements and arrangements for direct access service, or the verification of such contracts, agreements or arrangements pursuant to Public Utilities Code Sections 366 or 366.5." (D.01-09-060 at pp. 8-9.)

And we emphasized in Ordering Paragraph 8:

> "8. Within 14 days of the effective date of this order, PG&E, SDG&E and SCE, by letter, shall inform the Director of the Energy Division of the steps they have taken to ensure that no direct access service requests are accepted for any contracts executed or agreements entered into after September 20, 2001." (D/01-09-060 at p. 12.)

In D.01-09-060, we recognized that our order to suspend direct access was not self-executing and would have to be implemented by procedures to be developed by the utilities. On November 7, 2001, at a prehearing conference called to discuss implementation, the presiding ALJ requested the utilities to propose implementation measures. Their joint proposal was filed November 16, 2001, comments on the proposal were filed November 28, 2001,[12] and reply comments were filed December 4, 2001.

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[12] Comments from the following parties were filed: Alliance for Retail Energy Markets (AReM), Target Corporation, Laguna Irrigation District and ACWA-USA (LID), the University of California and California State University (UC/CSU), CMTA, Sempra Energy Solutions, City of Cerritos, and PowerSource.

The method by which a UDC is notified that one of its customers desires to be served by an ESP or desires to return to UDC bundled service is when the ESP (usually) or the customer (rarely) files a DASR with the serving utility. Similarly, a DASR is required to inform the utility that a contract has been assigned, or renegotiated, or terminated or extended, or has had additional locations incorporated. Merely suspending direct access on a date certain does not, by itself, notify interested parties how their contracts will be affected. Of course, when the Legislature suspended direct access and delegated to the Commission the duty to determine the effective date of the suspension, we had the discretion to suspend all direct access contracts as of a date certain, without exception. We did not do so. Rather, we permitted those contracts executed on or before the suspension date to remain in effect. However, to avoid substantial cost shifting, it would be unfair to bundled customers to permit direct access contracts to continue through renewals, assignments, and add-ons. Therefore, we find that direct access contracts executed on a before July 1, 2001 shall continue in force through their initial termination date and then be suspended until DWR no longer supplies power pursuant to Water Code § 80110.

The utilities shall implement the suspension as set forth below.

1. ESPs shall have provided by October 5, 2001 a list of names of all customers with direct access contracts in place as of July 1, 2001.

At the October 2, 2001 workshop, ESPs (including several AReM members) agreed that the October 5 date was reasonable for ESPs to submit names of eligible direct access customers, but that a longer period, until November 1, would be necessary to submit account specific details. Establishing a list of eligible customers within a reasonable time was suggested as an implementation

step by the Commission in D.01-09-060. The October 5 date is fair – it is based on what ESPs said they could meet, and each utility notified ESPs in advance in writing that failure to submit names as of the deadline would lead to later DASR rejection.

AReM proposes that an independent third party, such as a CPA, would submit a DASR verification to the UDC only for customers who were not on the October 5th list (but had a valid direct access contract) and for additional sites for customers already on the list. In turn, the UDC would be required, upon receipt of this verification, to process the associated DASR without delay in accordance with the standard procedures. A UDC would have no ability to delay the processing of a verified DASR.

AReM's suggestions for modifying the October 5 lists would render the use of customer lists practically meaningless. AReM's proposed exceptions for adding customers to the list invalidates the original purpose of the list – to establish a fixed pool of customers eligible to select direct access. In the UDCs' view it is simply not credible that any ESP's systems and records are so inadequate that a complete list of those customers who contracted for service prior to July 1, 2001 (let alone September 20, 2001) could not be provided in a timely manner.

2. To submit an ESP list, or to submit DASRs for its accounts, an ESP must (1) have in effect a valid ESP/UDC service agreement as of July 1, 2001, and (2) ESPs serving small customers must have in effect as of July 1, 2001 valid Commission registration as required by law.

The justification for a July 1 suspension date is discussed elsewhere; the need for valid service agreements and registration is not disputed.

3. Master agreements between ESPs and certain entities (other than the customers or end users of record) whose terms and conditions allow specific customers to elect direct access in the future (through execution of individual implementing agreements with customers), entered into on or before July 1, 2001 do not qualify as agreements for direct access service with end use customers.

LID/ACWA object strenuously to this rule. LID/ACWA argues for the eligibility of a master agreement executed September 5, 2001[13] between LID and ACWA-USA (an association of water agencies), under which ACWA-USA members can elect direct access service with LID acting as the ESP. Each member must execute a further participation agreement before taking service under the terms of the master agreement.

Water Code § 80110 provides that "the right of retail end use customers . . . shall be suspended. . . ." The utilities argue that master agreements between ESPs and associations to provide service at the election of member retail end users do not meet the requirements of the statute since such agreements are not with the retail end users. We agree. A master agreement with an association is nothing more than a proposal to provide service to retail end users and is not a valid contract with any end user until the proposal is presented to the end user, and the end user accepts the offer by signing a participation agreement (required under the master agreement.) Any election by a member of an association to

[13] This master agreement was executed after July 1, 2001, and, therefore, is totally ineffective for direct access purposes. We have discussed it because the principles apply to master agreements, if any, executed prior to July 1.

acquire direct access service under the master agreement after June 30, 2001, is therefore prohibited.

> **4. No customer is allowed to switch from one ESP to another after June 30, 2001. Such a switch would be a "new arrangement" for direct access service prohibited by D.01-09-060.**

AReM and other commenters object to this requirement. They argue that it is onerous and does not promote the objectives of AB1X. According to AReM allowing customers unlimited switching between ESPs is consistent with AB1X since it doesn't increase direct access load. These commenters miss the point. The issue is not whether the switch increases or decreases direct access load. The issue is whether there is a new contract or agreement after the cut-off date. For a new ESP to serve a customer formerly with another ESP a contract is required by the new ESP to serve the customer. If that occurs after June 30, it is prohibited. We deal with a related issue – assignments – below:

> **5. No customer is allowed to add a new location to its direct access contract after June 30, 2001.**

This would be a new arrangement prohibited by the suspension.

> **6. No direct access contract may be extended beyond its termination date as fixed prior to July 1, 2001.**

This would be a new arrangement prohibited by the suspension.

> **7. Direct access residential and small commercial customers may move from one address to another within the UDC service area and continue to be served by the ESP serving them prior to the move.**

No party objects to this condition.

8. Direct access contracts may not be assigned after June 30, 2001, to either a new ESP or a new retail end use customer.

The direct access contracts which we have reviewed have clauses which permit assignment to another ESP or to another retail end use customer. AReM, and others, argue that if the contract permits assignment it must be honored even if the assignment takes place after the suspension date. We do not agree. First, the new ESPs agreement to serve the customer is a new arrangement for direct access service in violation of Ordering Paragraph 7 of D.01-09-060.

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

An ESP is barred from signing a new customer after the suspension date. From the ESP's perspective it matters not whether the customer was a direct access customer, a bundled customer, or a customer new to the territory. For the ESP this is a new contract.

Second, to permit assignment would frustrate the statutory imperatives to assure recovery of DWR costs from end use customers and to assure that those costs are recovered without discrimination between end use customers. This is essentially a zero-sum paradigm. The more load that leaves the UDC system the less load remains to cover DWR costs. When DWR long-term contract costs are above spot market the remaining UDC load absorbs those excess costs. Should DWR's long-term contract costs fall below spot market, direct access customers have every incentive to return to bundled service. In the first instance bundled customers lose and direct access customers win; in the second instance only direct access customers win. The Legislature recognized this inequitable result

and so do we. Our obligation to secure for ratepayers the benefits of a reasonable cost recovery program without discrimination should not be defeated by direct access. The fluctuations in direct access load shown in the tables above are the clearest evidence that when California suffered an electricity crisis direct access customers abandoned ESPs and fled to the comparative safety of the UDC. Now that the crisis has subsided because of DWR purchases and contracts they seek to return to the now lower rates of the ESP, leaving, as we said earlier, the bundled customer to pay the freight. To protect the bundled customer we must adhere to our holding in D.01-09-060, that new agreements after the suspension date are prohibited: assignments are new agreements.

To permit the assignment of direct access contracts between customers has the same, if not greater infirmities, as assignment between ESPs. If a small commercial customer (a hamburger stand) can assign its direct access contract to a large industrial user (a cement factory) the direct access load would dramatically increases, the burden on bundled customers would dramatically increase, and the value of the contract to the small commercial customer would dramatically increase.

A hypothetical example illustrates the following results:

A small commercial customer with a valid (pre-July 1) direct access contract expiring in 2004, has an average usage of 1000 kWh/mo. It assigns its contract to a large bundled customer with an average usage of 10,000 kWh/mo. The results of the transaction are 1) the value of the small commercial customer's contract increases substantially; 2) 9,000 kWh/mo. go from bundled service to direct access service thereby shifting costs from the large user to the remaining bundled customers; and 3) the forecasts upon which DWR and the UDCs base

their electric purchases are skewed, further increasing costs to be paid by bundled customers.

Some parties argue that the amount of direct access use is fixed by contract and will not increase other than by normal fluctuations in monthly usage. We do not agree. Contracts may be modified by consent of the parties and, although it might be unusual for a small commercial customer to become a large user overnight, it would not be unusual for a large commercial user assignee to renegotiate a direct access contract to cover increased load.

9. A customer who had direct access prior to July 1, 2001, but who became a bundled customer cannot return to direct access after June 30, 2001.

This would be a new arrangement, prohibited by D.01-09-060.

10. A direct access customer can change its identity (i.e., Jones Company to Acme Electronics) provided no other implementation restriction applies.

This is permitted.

11. Community Choice Aggregation Programs

Community aggregators shall serve only direct access customers who chose community aggregation prior to July 1, 2001.

Under the Public Utilities Code Section 366(b), community aggregation programs require an "opt-in" by the interested customers. The UDCs believe that the act of opting in after the suspension date constitutes a new arrangement for direct access service prohibited by D.01-09-060, and propose that customers who attempt to opt into a community aggregation program after the suspension date be rejected.

Community aggregators claim that because they had an existing community aggregation program prior to the suspension date, customers should be able to opt-in to direct access service even after the suspension date. Municipalities that are community aggregators assert that because the potential amount of load is small and because they have the legal authority to provide electric service to their inhabitants, they should have the right to switch their inhabitants to direct access after the suspension date.

We disagree. A customer who requests direct access service after June 30, is seeking a new arrangement prohibited by D.01-09-060. Whether the request is made to a community aggregator or directly to an ESP the result is the same: a shift of costs to the remaining bundled customers. The community aggregation program has been in effect since 1997. A community aggregator is part of direct access and should not be permitted to acquire new customers after June 30.

What we have done by the restrictions placed on direct access contracts is to limit direct access to those customers who had valid direct access contracts prior to July 1, 2001 and to permit those customers to retain their right to receive

electricity under their contracts through the contract's first termination date. The contracts cannot be extended, assigned, or have separate facilities added on. In taking these actions, we have tried to assure a stable customer base.

One issue that requires special attention is that of the UDCs' ability to determine the termination date of the direct access contract. The utilities have proposed an elaborate mechanism which includes the services of an independent certified public accountant to certify to the terms of the direct access contracts. (See Joint Proposal of Utilities dated November 16, 2001, Attachment A.) All ESPs and customers who commented on this proposal objected on the grounds that it is unnecessary, costly, and violates confidentiality restrictions of individual contracts.

The utilities recognize the cumbersomeness of their proposal but claim it is necessary because the economic stakes are so high for the ESPs and their customers. They argue that third party verification will give comfort to the utilities (and the Commission) that the contract is being performed in accordance with Commission standards. The utilities do not wish to be placed in the position of reviewing ESP contracts. In our opinion, the third party verification progress is excessive, costly, and cumbersome. We prefer a simple affidavit to be signed by both the ESP and its customer stating under penalty of perjury the termination date of their contract.

Because of the large number of direct access contracts subject to this order, it is reasonable to allow sufficient time for the utilities, the ESPs, and the direct access customers to modify their electric service arrangements. Therefore, for those direct access contracts executed after June 30, 2001 and prior to September 20, 2001, under which electricity is flowing, the utilities are given

90 days from the effective date of this order to return the affected direct access customers to bundled service.

IV. Comments on Draft Decision

Generally, we issue draft decisions for comment and review pursuant to Section 311(g)(1), which requires that the draft decision be subject to at least 30 days of public review and comment prior to Commission action. However, pursuant to Section 311(g)(3) and Rule 77.7(f)(9) the Commission may waive the 30-day period if required by public necessity. In this case, we find that public necessity requires that we promptly act on the effective date of suspension of direct access, as well as issues associated with implementing such suspension. We therefore reduce the 30-day period for public review and comment. Comments shall be filed and served by February 1, 2002. Parties should ensure that the ALJ is served by electronic mail at rab@cpuc.ca.gov.

Findings of Fact[14]

1. DWR has submitted to us, pursuant to its authority under Water Code § 80110, a revenue requirement of $10.003 billion for the three major California utilities, covering the period January 2001 through December 2002.

2. Timely implementation of DWR's revenue requirement cost recovery is necessary to support the sale of bonds as prescribed under California Water Code § 80130.

3. Up until the present time, DWR has been relying on interim borrowings as its funding source pending the sale of bonds, currently expected to occur in the second quarter of 2002.

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[14] Findings of Fact 1-8 reflect Findings of Fact in D.02-02-_____.

4. DWR's revenue requirement represents the amounts to be collected from customers in the service territories of the three major electric utilities covering the 2001-2002 time period, after deducting the proceeds from interim loans.

5. Pursuant to a FERC Order issued on November 7, 2001, the ISO sent $956 million in invoices to DWR for transactions with third party power suppliers for the period January 17 through July 31, 2001.

6. The sales that DWR has presented in its revenue requirement model for purposes of computing charges for remittance purposes do not include sales to direct access customers.

7. DWR's contracts have served to stabilize the power market, to the benefit of all California ratepayers.

8. The DWR cents per kWh charges are computed by dividing the allocated DWR revenue requirement assigned to each utility's service territory by the applicable kWh sales to the utility's bundled customers provided by DWR.

9. Between July 1, 2001 and September 20, 2001, approximately 11% of the total electric load of the utilities has shifted from bundled service to direct access service. This shift means that 11% of $18 billion ($1.98 billion) will become the obligation of the remaining bundled customers of the utilities should direct access suspension remain September 20. This result puts bundled customers at a disadvantage and is unfair, unreasonable, and violates Water Code §§ 80002.5 and 80104.

10. By the second quarter of 2001, the direct access load in SCE's service territory had dropped to less than 1% of SCE's load from a high of 14.8% in December 1999. In June 2001, the direct access load was 1%; by July 31, it reached 3.1%; by October it reached 11.6%.

11. In December 2000, PG&E's direct access load was 11.3% of its total load. In the period January 2001 to June 2001, the direct access load was reduced to 1.3% of total load. By October 2001 direct access load had reached 12% of total load and is expected to go as high as 16% when all pending DASRs are processed.

12. As of November 2001, 50% of SDG&E's largest customers take direct access service, accounting for 19.4% of its total load.

13. DWR has based its revenue requirement forecast on its estimate that 11% of total load has left bundled service since July 1, 2001. The UDCs have made a similar estimate. These estimates are reasonable and are adopted.

14. The cost shift of fixed overheads is $187,000,000 over two years ($1.7 billion x .11 = $187 million). This $187 million does not include the avoided responsibility for the excess costs portion of $5.2 billion in DWR contracts.

15. There are out-of-pocket costs, which have been incurred by DWR for electricity purchases since January 17, 2001, which have yet to be reflected on customers' bills. This uncollected amount is currently estimated to be approximately $8.5 billion. (This is expected to be financed through the issuance of DWR's revenue bonds.) Should 11% of customer load leave the system through direct access, the uncollected amount must be borne by the 89% of customer load remaining; an incremental $935 million (i.e., 11% of the $8.5 billion currently uncollected), as well as associated financing costs.

16. Direct access customers benefited when DWR entered into long-term contracts: the spot price of electricity came down below DWR contract prices, making ESP contracts attractive, and a safety net of a return to UDC service was provided should spot prices again run wild.

17. We choose July 1 because the showing in this proceeding is that 11% of electric load has shifted from the UDC retail load to direct access load during the period July 1 through September 20, resulting in an immediate cost shift of over $187 million dollars to be recovered from the remaining retail end use customers. This cost shift does not include the anticipated cost shift of $935 million that will occur when DWR issues $8.5 billion in bonds, to be repaid by bundled customers.

18. To permit the September 20 date to stand is unfair to all bundled customers. It permits a fortuitous group of customers to benefit and at the same time avoid the cost of that benefaction.

19. The highlighted sections under "Implementation of the Suspension of Direct Access" are reasonable and adopted.

Conclusions of Law

1. Direct access contracts executed after June 30, 2001, are suspended until DWR no longer supplies power under AB1X, Stats. 2001 (1st Extraordinary Session), ch. 4 (Water Code §§ 80000 et seq.).

2. Direct access contracts executed prior to July 1, 2001, pursuant to which electricity flowed prior to July 1, 2001, are not suspended, but are subject to the implementation restrictions imposed by this decision, until DWR no longer supplies power under AB1X, Stats. 2001 (1st Extraordinary Session), ch. 4 (Water Code §§ 80000 et seq.)

3. The action that we take today in regard to direct access follows the same statutory scheme enacted in response to emergency conditions confronting California's major electric utilities and their customers.

4. For the purposes of this decision we are concerned (as was the Legislature) with the shift in costs as direct access customers leave the system.

5. Given the changes in various draft decisions, the specific reservation of authority to change the suspension date, the prior decisions of the Commission reserving the right to modify the terms and conditions of direct access, electric customers were on notice that they could not rely on a permanent September 20 suspension date.

6. To comply with legislative intent, to fulfill the purpose of the applicable statutes, to form the broadest base upon which to build the repayment structure required to meet the DWR revenue requirement, to prevent a significant cost shift of over $187 million dollars between now and December 31, 2002, and to assure that charges are just and reasonable, we modify the date of suspension of direct access from September 20, 2001; direct access is suspended as of July 1, 2001.

7. AB1X provided for the Commission to suspend direct access in recognition of the fact that DWR would be entering into long-term contracts and that bundled customers must pay the bill.

8. In regard to the issue of modification of the suspension date of direct access, D.97-10-087 is specific and clear. It holds that the Commission has exclusive jurisdiction to resolve interpretations of, modification of, or compliance with any of the direct access tariff provisions or the ESP-UDC service agreement.

9. In regard to direct access D.97-10-087 provided that the ESP was subject to the UDCs tariffs and our jurisdiction.

10. Direct access is authorized by statute, implemented by Commission decisions, and binds ESPs and UDC customers alike through Commission approved terms and UDC tariffs, both of which specifically provide for modification by the Commission.

11. To permit direct access customers to avoid payment of the DWR revenue requirement is unreasonable and discriminatory.

12. The reservation in D.01-09-060 of the Commission's intent to consider reverting the suspension to a date earlier than September 20, with July 1 being the likely date, was clear to all parties.

13. Our purpose in choosing a suspension date is to obey the legislative direction and fix the time at which direct access and the direct access provisions of contracts are suspended "until the department no longer supplies power hereunder." (Water Code § 80110.)

14. The implementation provisions we set forth in this decision are reasonable, consistent with our action in suspending direct access as of July 1, 2001, and protect bundled customers

15. This decision is made effective today to allow the suspension provisions to be implemented expeditiously. Thus, it is reasonable to reduce the period for comment and review of the draft decision, pursuant to Rule 77.7(f)(9).

O R D E R

IT IS ORDERED that:

1. This order shall apply to Southern California Edison Company (SCE). Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E).

2. The execution of any new contracts, or the entering into, or the verification of any new arrangements for direct access service pursuant to Public Utilities Code Sections 366 or 366.5, after June 30, 2001, is prohibited.

3. SCE, PG&E, and SDG&E shall implement the conditions set forth in this decision which affect those direct access contracts not suspended.

4. SCE, PG&E, and SDG&E shall not accept any direct access service requests for any contracts executed or agreements entered into after June 30, 2001.

5. SCE, PG&E, and SDG&E shall notify their customers that the right of retail end users to acquire direct access service from other providers, except the Department of Water Resources, is suspended effective July 1, 2001.

6. SCE, PG&E, and SDG&E shall modify any information disseminated to customers that describes direct access service, subject to review by the Public Advisor's office and Energy Division, to explain that the right to acquire direct access service has been suspended.

7. Within 14 days of the effective date of this order, SCE, PG&E, and SDG&E by letter, shall inform the Director of the Energy Division of the steps they have taken to ensure that no direct access service requests are accepted for any contracts executed or agreements entered into after June 30, 2001.

8. SCE, PG&E, and SDG&E shall within 90 days after the effective date of this order, terminate all direct access contracts not in conformity with this order.

9. This Rulemaking is closed.

This order is effective today.

Dated _____, at San Francisco, California.

DRAFT

Appendix A

Table 1

DWR Revenue Requirement

For the Period January 17, 2001 through December 31, 2002

($000s)

Quarter	Retail Sales (GWhs)	A&G	Other	DSM	Contract Power	Residual Net Short	Ancillary Services	Total Commitments	(Lag) Lead Accrual to Cash	Total Operating Expenditures	Financing Cost	Total Expenditures	Revenue Lead (Lag)	Spot Sales Revenue	Estimated Quarterly Fund Balance	Total DWR Revenues Needed	Net Borrowed Proceeds	Customer Revenue Requirement
		A	B	C	D	E	F	G (Sum of A thru F)	H	I (= G + H)	J	K (= I + J)	L	M	N	O (=K – L – M + N)	P	Q (=O – P)
Q1, 2001	12,360	7,848	-	-	-	3,581,465	367,847	3,957,160	(1,619,382)	2,337,778	-	2,337,778	(544,097)	-	293,176	3,175,051	2,400,000	775,051
Q2, 2001	19,620	10,162	-	482	627,601	3,884,229	419,215	4,941,690	6,302	4,947,991	-	4,947,991	(1,030,866)	-	4,239,624	9,925,305	7,908,729	2,016,576
Q3, 2001	16,054	11,346	3,734	226,446	888,404	1,135,727	57,667	2,323,324	(55,479)	2,267,845	(10,481)	2,257,364	(329,133)	-	3,182,822	1,529,696	(116,300)	1,645,996
Q4, 2001	10,365	8,998	4,008	61,968	670,470	248,590	43,889	1,037,923	550,427	1,588,350	-	1,588,350	223,483	20,884	2,963,069	1,124,230	-	1,124,230
Q1, 2002	9,313	15,104	3,667	-	652,644	169,756	51,551	892,722	1,543,844	2,436,567	(45,976)	2,390,591	879,565	24,819	2,499,879	1,023,017	-	1,023,017
Q2, 2002	7,957	15,104	3,211	-	665,651	129,830	42,678	856,474	(19,771)	836,703	471,932	1,308,635	20,355	39,279	2,128,890	878,012	-	878,012
Q3, 2002	12,312	15,104	4,895	-	946,735	220,184	64,080	1,250,998	(25,251)	1,225,748	400,807	1,626,555	(257,440)	45,879	1,643,471	1,352,697	-	1,352,697
Q4, 2002	10,812	15,104	4,249	-	832,758	164,417	54,752	1,071,280	20,493	1,091,773	464,959	1,556,732	194,995	26,043	1,495,658	1,187,882	-	1,187,882
Total	98,793	98,771	23,764	288,896	5,284,264	9,534,199	1,101,678	16,331,571	401,184	16,732,755	1,281,242	18,013,997	(843,139)	156,903		20,195,890	10,192,429	10,003,461

Notes

1. **Total Commitments** equals sum of **A&G**, **Other (Uncollectables)**, **DSM**, **Contract Power**, **Residual Net Short**, and **Ancillary Services**
2. **Total Operating Expenditures** equals **Total Commitments** plus **(Lag) Lead Accrual to Cash**
3. **Total Expenditures** equals **Total Operating Expenditures** plus **Financing Cost**
4. **Total DWR Revenues Needed** equals **Total Expenditures** minus **Revenue Lead (Lag)**, minus **Spot Sales Revenue**, plus **Estimated Quarterly Fund Balance**
5. **Customer Revenue Requirement** equals **Total DWR Revenues Needed** minus **Net Borrowed Proceeds**

(END OF APPENDIX A)

Appendix B
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Water Code Sections

80000. The Legislature hereby finds and declares all of the following:

(a) The furnishing of reliable reasonably priced electric service is essential for the safety, health, and well-being of the people of California. A number of factors have resulted in a rapid, unforeseen shortage of electric power and energy available in the state and rapid and substantial increases in wholesale energy costs and retail energy rates, with statewide impact, to such a degree that it constitutes an immediate peril to the health, safety, life and property of the inhabitants of the state, and the public interest, welfare, convenience and necessity require the state to participate in markets for the purchase and sale of power and energy.

(b) In order for the department to adequately and expeditiously undertake and administer the critical responsibilities established in this division, it must be able to obtain, in a timely manner, additional and sufficient personnel with the requisite expertise and experience in energy marketing, energy scheduling, and accounting.

80002.5. It is the intent of the Legislature that power acquired by the department under this division shall be sold to all retail end use customers being served by electrical corporations, and may be sold, to the extent practicable, as determined by the department, to those local publicly owned electric utilities requesting such power. Power sold by the department to retail end use customers shall be allocated pro rata among all classes of customers to the extent practicable.

80104. Upon the delivery of power to them, the retail end use customers shall be deemed to have purchased that power from the department. Payment for any sale shall be a direct obligation of the retail end use customer to the department.

80108. The commission may issue rules regulating the enforcement of the agency function pursuant this division, including collection and payment to the department.

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80110. The department shall retain title to all power sold by it to the retail end use customers. The department shall be entitled to recover, as a revenue requirement, amounts and at the times necessary to enable it to comply with Section 80134, and shall advise the commission as the department determines to be appropriate. Such revenue requirements may also include any advances made to the department hereunder or hereafter for purposes of this division, or from the Department of **Water** Resources Electric Power Fund, and General Fund moneys expended by the department pursuant to the Governor's Emergency Proclamation dated January 17, 2001. For purposes of this division and except as otherwise provided in this section, the Public Utility Commission's authority as set forth in Section 451 of the Public Utilities **Code** shall apply, except any just and reasonable review under Section 451 shall be conducted and determined by the department. The commission may enter into an agreement with the department with respect to charges under Section 451 for purposes of this division, and that agreement shall have the force and effect of a financing order adopted in accordance with Article 5.5 (commencing with Section 840) of Chapter 4 of Part 1 of Division 1 of the Public Utilities **Code**, as determined by the commission. In no case shall the commission increase the electricity charges in effect on the date that the act that adds this section becomes effective for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities, until such time as the department has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division. After the passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities **Code** to acquire service from other providers shall be suspended until the department no longer supplies power hereunder. The department shall have the same rights with respect to the payment by retail end use customers for power sold by the department as do providers of power to such customers.

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80130. The department may incur indebtedness and issue bonds as evidence thereof, provided that bonds may not be issued in an amount the debt service on which, to the extent payable from the fund, is estimated by the department to exceed the amounts estimated to be available in the fund for their payment. The department may authorize the issuance of bonds (excluding notes issued in anticipation of the issuance of bonds and retired from the proceeds of those bonds) in an aggregate amount up to the greater of thirteen billion four hundred twenty-three million dollars ($13,423,000,000) or the amount calculated by multiplying by a factor of four the annual revenues generated by the California Procurement Adjustment, as determined by the commission pursuant to Section 360.5 of the Public Utilities **Code**; provided, such aggregate amount shall not exceed thirteen billion four hundred twenty-three million dollars ($13,423,000,000). Nothing in this section shall prohibit the department from issuing bonds prior to the effective date of this bill based upon the authorization granted to the department by the provisions of Chapter 4 of the Statutes of 2001-02 First Extraordinary Session. Refunding of bonds to obtain a lower interest rate shall not be included in the calculation of the aggregate amount. In addition, before the issuance of bonds in a public offering, the department shall establish a mechanism to ensure that the bonds will be sold at investment grade ratings and repaid on a timely basis from pledged revenues. This mechanism may include, but is not limited to, an agreement between the department and the commission as described in Section 80110.

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80134. (a) The department shall, and in any obligation entered into pursuant to this division may covenant to, at least annually, and more frequently as required, establish and revise revenue requirements sufficient, together with any moneys on deposit in the fund, to provide all of the following:

(1) The amounts necessary to pay the principal of and premium, if any, and interest on all bonds as and when the same shall become due.

(2) The amounts necessary to pay for power purchased by it and to deliver it to purchasers, including the cost of electric power and transmission, scheduling, and other related expenses incurred by the department, or to make payments under any other contracts, agreements, or obligations entered into by it pursuant hereto, in the amounts and at the times the same shall become due.

(3) Reserves in such amount as may be determined by the department from time to time to be necessary or desirable.

(4) The pooled money investment rate on funds advanced for electric power purchases prior to the receipt of payment for those purchases by the purchasing entity.

(5) Repayment to the General Fund of appropriations made to the fund pursuant hereto or hereafter for purposes of this division, appropriations made to the Department of **Water** Resources Electric Power Fund, and General Fund moneys expended by the department pursuant to the Governor's Emergency Proclamation dated January 17, 2001.

(6) The administrative costs of the department incurred in administering this division.

(b) The department shall notify the commission of its revenue requirement pursuant to Section 80110.

(END OF APPENDIX B)

Appendix C

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(END OF APPENDIX C)