Decision _____

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)

ORDER GRANTING PETITION FOR MODIFICATION

By this decision, we grant the February 5, 2004 SBC Services Inc (SBC) Petition for Modification of Decision (D.) 03-05-034, the "Switching Decision." SBC seeks modification to correct or clarify what it believes to be an inequity between the Commission's Switching Decision and its implementation by San Diego Gas & Electric Company (SDG&E). Specifically, we modify D.03-05-034 to authorize SDG&E to refund the Direct Access Cost Responsibility Surcharge (DA CRS) paid by SBC accounts which represent "continuous" direct access (DA) customers.[1]

Background

In the "Switching Decision," the Commission adopted rules by which customers could return temporarily to bundled service without losing their DA status (*i.e.*, safe harbor). In that decision, the Commission also considered whether the safe harbor could be applied retroactively to eligible temporary switches that occurred prior to the effective date of the Switching Decision. In

D.03-05-034, the Commission held that if a customer switched between bundled service and DA prior to the effective date of the Switching Decision, but satisfied the safe harbor conditions retroactively, the customer was entitled to remain a DA customer. In addition, if it otherwise met the requirements to be a continuous DA customer prior to entering safe harbor, the customer remained a continuous DA customer.

Continuous DA customers do not pay the DA CRS, since the California Department of Water Resources (DWR) did not procure power for them. Even though the "Switching Decision" specifically provides that continuous DA status applied to eligible customers retroactively (the retroactive safe harbor provision), SBC claims that SDG&E refused to refund the DA CRS paid by eligible SBC accounts while the Commission was formulating the switching rules.

On December 4, 2003, the Commission issued Resolution E-3843, generally accepting for filing the tariffs submitted by the utilities to implement the Switching Order. SDG&E filed tariffs in compliance with Resolution E-3843 on December 11, 2003. There is no question that most of SBC's DA accounts in SDG&E's service territory qualified for the retroactive safe harbor. As of December 4, 2003, SDG&E is no longer collecting the DA CRS for those accounts.

SDG&E, however, refused to refund the DA CRS that it had collected from those accounts beginning in the summer of 2002, when the accounts were temporarily returned to bundled service while SBC changed ESPs (and thus in the safe harbor), until December 4, 2003, the effective date of Resolution E-3843.

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[1] A "continuous" DA customer is one that was on DA prior to February 1, 2001, and continued on DA subsequent to that date.

SBC believes that D.03-05-034 is clear, and that no authorizing language is required for SDG&E to refund the CRS that SBC paid while a continuous DA customer. SBC petitions for modification of D.03-05-034, however, to remove any doubt that it is entitled to a refund of the DA CRS that it paid during the time the Commission formulated the switching rules which determined SBC's status as a continuous DA customer.

Position of SDG&E

SDG&E filed a response to SBC's Petition on March 8, 2004. SDG&E agrees generally that D.03-05-034 should be modified to permit SDG&E to refund any DA CRS to a continuous DA customer that retroactively qualified for the safe harbor. SDG&E, however, disagrees with any implication in SBC's Petition that SDG&E acted improperly in not issuing refunds to such customers previously. SDG&E explains that because the Commission did not expressly direct or authorize the utilities to refund such charges in Resolution E-3843, despite written comments and Commission deliberations, SDG&E was not inclined to draw the inference that the Commission intended such refunds to take place as of the date E-3843 was issued. When SBC pursued the refund issue, SDG&E referred SBC to text in E-3843, at Ordering Paragraph 8, that states that the IOUs were to modify their proposed tariffs "to provide continuous DA status, <u>as of the effective date of this resolution</u>, for DA eligible customers." E-3843 at 19, emphases added. SDG&E states that out of caution and deference to the Commission's language in D.03-05-034 and E-3843, it did not issue the refunds since the Commission had not authorized them. Nonetheless, SDG&E agrees that the Commission should now clarify the matter once and for all, and expressly authorize the remittance of such refunds.

Discussion

The modification sought in SBC's Petition is straightforward, uncontested, and appropriate in order to resolve any uncertainty concerning the intent of the Commission with respect to refunds to continuous DA customers that retroactively qualified for the safe harbor. We hereby expressly affirm that continuous DA customers who paid a DA CRS prior to the December 4, 2003 effective date of Resolution E-3843 should be refunded any DA CRS amounts that they may have remitted during that period. We shall accordingly grant SBC's petition to modify D.03-05-034 for the purpose of clarifying and directing that a utility shall issue a refund to such continuous DA customers who qualify retroactively for the Switching Decision's safe harbor.

Comments on Draft Decision

This is uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Carl Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Decision 03-05-034 permitted a customer, in certain circumstances, to switch between DA and bundled service.

2. As part of the switching rules in D.03-05-034, the Commission determined that a continuous DA customer was entitled to receive the benefit of the "safe harbor" provision retroactively during the time that the Commission was deliberating regarding the Switching Decision.

3. On December 4, 2003, in Resolution E-3843, the Commission approved SDG&E's switching exemption tariff implementing the provisions of D.03-05-034.

4. Since December 4, 2003, SDG&E has no longer collected the DA CRS from any DA customer qualifying retroactively for the safe harbor provision.

5. The Commission did not expressly state in either D.03-05-034 or E-3843 that utilities should refund to qualifying continuous DA customers any portion of the DA CRS they already paid prior to the effective date of Resolution E-3843.

6. Absent express authorization from the Commission, SDG&E did not infer that the Commission clearly intended such refunds to take place as of the date Resolution E-3843 was issued, and thus declined to issue refunds.

7. SDG&E agrees with SBC's requested modification to D.03-05-034.

Conclusions of Law

1. Resolution E-3843, at Ordering Paragraph 8, required IOUs to modify their proposed tariffs to provide continuous DA status, as of the effective date of this resolution, for DA eligible customers.

2. It is the intent of the Commission that those DA customers who entered into the safe harbor provision retroactively be refunded any DA cost responsibility surcharge (CRS) remittances that they might have paid before the Commission finally resolved the safe harbor rules by approving the relevant utility tariffs.

3. The modifications to D.03-05-034 proposed by SBC provide appropriate clarification and direction concerning the requirements for refunding DA CRS remittances made by continuous DA customers that were paid before the Commission finally resolved the safe harbor rules by approving the relevant utility tariffs.

4. The SBC Petition for Modification of D.03-05-034 should be granted.

O R D E R

IT IS ORDERED that:

1. The SBC Services, Inc. (SBC) Petition for modification of Decision (D.) 03-05-034 is hereby granted.

2. The following modifications to D.03-05-034 are hereby adopted:

   (a) In the last paragraph of Section B.2 "Temporary "Safe Harbor" Return to Bundled Service While Switching ESPs on page 19, the following sentence is hereby added at the end: "Continuous DA customers who paid a DA CRS prior to December 4, 2003 should be entitled to a refund of the DA CRS."

   (b) Following ordering paragraph 16, the following additional ordering paragraph is added: "Continuous DA customers who paid a DA CRS prior to December 4, 2003 shall promptly be given a refund of such DA CRS."

   This order is effective today.

   Dated _____, at San Francisco, California.