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Decision 03-06-035 June 5, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 03-05-034 ON THE USE OF THE CAL-ISO HOURLY PRICE, AND DENYING REHEARING OF THE DECISION ON ALL OTHER ASPECTS

I. SUMMARY

In Decision (D.) 03-05-034, we adopted rules that permit direct access customers to return to bundled service and subsequently switch back to direct access service. The rules are applicable to what has been termed as the "switching exemption." The decision provided for a 60 days "safe harbor" for direct access customers while waiting to switch to a new ESP. (D.03-05-034, pp. 16-17.) Direct access customers returning to bundled service for only a temporary period were required to pay for the costs of short-term power, whether those costs are above or below the bundled rate. (D.03-05-034, p. 17.) Also, we determined that the California Independent System Operator hourly ex-post incremental price ("Cal-ISO hourly price") would be used as a pricing index or proxy for the short-term power charged to "safe harbor" customers. The Cal-ISO hourly price was used in lieu of using a price that was calculated based on actual short-term commodity costs on an hour-by-hour basis incurred to serve "safe harbor"

customers because it would have been unduly complex and impractical to require such a calculation. (D.03-05-034, p. 18.)

D.03-05-034 requires a direct access customer to provide a six-month advance notice to the utility prior to becoming eligible for the bundled portfolio rate. (D.03-05-034, p. 35.) During the six-month waiting period, the direct access customer will be permitted to return to bundled service, but will continue to pay the applicable spot price, whether higher or lower than the bundled rate. Once the six-month waiting period has elapsed, the direct access customer will begin to pay the bundled portfolio rate, whether it is higher or lower than spot prices. (D.03-05-034, p. 35.) D.03-05-034 requires that these customers will have to remain on bundled service for a minimum of three years. (D.03-05-034, p. 35.) We declined to require direct access customers returning to bundled service under the three-year commitment to pay the higher of spot price or bundled portfolio rate, as some parties proposed. (D.03-05-034, p. 35.)

The Utility Reform Network ("TURN"), Southern California Edison Company ("Edison") and Pacific Gas and Electric Company ("PG&E") timely filed applications for rehearing of D.03-05-034. TURN argues that the decision violates Water Code Section 80110 by permitting the switching exemption. Edison raises the same argument, and further states that the "standstill principle" is not authorized by Assembly Bill No. 1 of the First Extraordinary Session of 2000-2001 ("AB 1X"), Stats. 2001 (1st Extraordin. Sess.), ch. 4, and thus, it is not a proper measure of whether the switching exemption violates AB 1X. PG&E asks for the reconsideration of the determination to use Cal-ISO hourly price as a proxy for the short term price for the commodity cost of electric power. PG&E and Edison allege that the record is lacking concerning the adoption of the Cal-ISO hourly price as a proxy.

San Diego Gas and Electric Company ("SDG&E") and the Alliance for Retail Energy and the Western Power Trading Form (jointly, "AREM") filed responses to the rehearing applications. SDG&E opposes TURN's and Edison's

applications for rehearing, but supports PG&E's rehearing application on the issue concerning the use of the spot market pricing. AREM opposes all three rehearing applications.

The instant decision resolves all the applications for rehearing of D.03-05-034. We have carefully reviewed each and every allegations raised in the applications for rehearing filed by TURN, Edison and PG&E, and the responses to these rehearing applications. As specified below, we will grant a limited rehearing on the issue of using the Cal-ISO hourly price as a proxy for the short-term commodity price of electricity. However, the other allegations raised in the applications for rehearing do not establish good cause for rehearing. Accordingly, the applications for rehearing are denied with respect to these other allegations.

II. DISCUSSION

1. The Legality of the Switching Exemption

In their rehearing applications, TURN and Edison claim that the Commission has no legal authority to permit the switching exemption. Both argue that Water Code Section 80110 prohibits the switching exemption. This section provides, in relevant part:

> "After the passage or 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." (Pub. Util. Code, §80110.)

Both TURN and Edison argue that because Water Code Section 80110 suspended the right to acquire service from other providers, the switching exemption permitted by the Commission in D.03-05-034 is unlawful. (TURN's Application

for Rehearing, pp. 3-5; Edison's Application for Rehearing, pp. 3-4.) Both TURN and Edison take a limiting and literal interpretation of this statute. Edison further argues that the "standstill principle" is not the proper measure of whether the "switching exemption" violates AB 1X. (Edison's Application for Rehearing, pp. 4-6.) The arguments set forth by TURN and Edison about the lawfulness of the switching exemption and the adopted rules are without merit for the reasons discussed below.

A fundamental task in statutory interpretation is to determine the intent of the Legislature. (See City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 90.) "Courts must ascertain legislative intent so as to effectuate a law's purpose. (Neumarkel v. Allard (1985) 163 Cal.App.3d 457, 461, citing Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658.) This is to be accomplished first by turning to the language of the statute. (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798; see also, California Teachers Association v. San Diego Community College District (1981) 28 Cal.3d 692, 698; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230-231.) Unless it is demonstrated that the natural and customary import of a statute's language is repugnant to the general purview of the statute, effect must be given to the statute's plain meaning. (Tiernan v. Trustees of California State University and Colleges (1982) 33 Cal.3d 211, 218-219.) However, the literal interpretation of the words of a statute should not prevail if it defies common sense, creates absurd results or results demonstrably at odds with the intention of the Legislature. (People v. Pieters (1991) 52 Cal.3d 894, 898.)

Pursuant to Water Code Section 80110, the Commission has the authority to determine the date of suspension and the authority to make the necessary determinations to implement the suspension effective on the date chosen by the Commission. In D.01-09-060, as affirmed in D.02-10-036, the Commission

selected the suspension as being effective on and after September 21, 2001. (See DA Suspension Order [D.01-090-060] and Order Denying Rehearing of D.01-09-060 [D.01-10-036], supra.)

Adopting an overly limiting interpretation of the statute would mean that the Commission's authority ended with the determination of the date of suspension. However, the suspension was not self-executing and we were required as part of our regulatory duties to make further determinations. (See Re Pacific Gas and Electric Company ("DA Suspension Order") [D.01-09-060, p. 14] (2001) ___ Cal.P.U.C.2d ____, which left the proceeding open for consideration of implementation issues; see also, Order Instituting Rulemaking Regarding Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("Opinion Rejecting Earlier DA Suspension Date") [D.02-03-055, p. 17 (slip op.)] (2002) ___ Cal.P.U.C.2d ___, as modified by Order Granting Limited Rehearing on the Switching Exemption Issue, Modifying Decision (D.) 02-03-055 to Clarify Certain Issues Related to Cost-Shifting and To Make Minor Corrections, and Denying Rehearing of the Decision, as Modified, On All Other Respects ("Order Disposing of Rehearing of D.02-03-055") [D.02-04-067] (2002) ___ Cal.P.U.C.2d ___.) The authority to make future determinations is derived from Water Code Section 80110. A literal interpretation would not have made sense in light of the legislative intent as explained below.

In implementing Water Code Section 80110, the Commission has been consistent with what it believes was the purpose for the Legislature's enactment of the statute that suspended direct access.[1] Although there is no clear statement from the Legislature when it passed Water Code Section 80110, we

[1] The Commission observed: "[S]uspending the right to acquire direct access service will help ensure the recovery of DWR's costs and, thus, successful issuance of the bonds as currently contemplated by the Administration and the State Treasurer." (DA Suspension Order [D.01-090-060], supra, at p. 4 (slip op.); Order Modifying Decision (D.) 01-09-060, and Denying Rehearing. As Modified ("Order Denying Rehearing of D.01-09-060")

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believe that the Legislature enacted the statutory provision to prevent cost-shifting between direct access customers and bundled service customers due to the significant increases in direct access load. There was a concern that bundled service customers would be left to pay the full bill for costs including those that direct access customers helped to incur. (See generally, Order Denying Rehearing of D.01-09-060 [D.01-10-036], supra, at pp. 9-10 (slip op.).)

Since the issuance of D.02-03-055, as modified and affirmed by D.02-04-067, the Commission has acted consistently with this intent. In D.02-03-055, the Commission reaffirmed the suspension date and determined that cost-shifting would be prevented through the equitable allocation of a "fair share" of costs to direct access customers through a surcharge. (Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at pp. 7 & 16 (slip op.).) This surcharge, which is termed the cost responsibility surcharge ("CRS") was adopted and implemented in D.02-11-022, as modified and affirmed in D.02-12-027. (Order Instituting Rulemaking Regarding Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("DA CRS Decision") [D.02-11-022] (2002) ___ Cal.P.U.C.2d ___; Order Modifying Decision (D.) 02-11-022 for Purposes of Clarification and Correction of Typographical Errors, and Denying Rehearing of the Decision, As Modified ("Order Denying Rehearing of D.02-11-022") [D.02-12-027] (2002) ___ Cal.P.U.C.2d ___.) The prevention of cost-shifting was also defined as "bundled customer indifference." (Order Disposing of Rehearing of D.02-03-055 [D.02-04-067], supra, at p. 5 (slip op.).) In order to prevent cost-shifting and thus, ensure

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[D.01-10-036, pp. 9-10 (slip op.) (2001) ___ Cal.P.U.C.2d ___.) There were serious concerns that the repayment of the bonds might be jeopardized if there was less of a customer base to repay the bonds, especially if the direct access customers escape responsibilities for costs they helped to incur. (Id.)

bundled customer indifference, the Commission adopted the "standstill" approach in D.02-03-055. (See Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at pp. 16 & 18 (slip op.).) This "standstill" approach is referred to in Edison's rehearing application as the "standstill principle."

In enacting Public Utilities Code Section 366.2(d), the Legislature confirmed the correctness of the Commission's interpretation of the legislative intent. This statutory provision states:

> "(1) It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the Department of Water Resources' electricity purchase costs, as well as electricity purchase contract obligations incurred as of the effective date of the act adding this section, that are recoverable from electrical corporation customers in [C]ommission-approved rates. It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers.
>
> (2) The Legislature finds and declares that this subdivision is consistent with the requirements of Division 27 (commencing with Section 80000) of the Water Code and Section 360.5, and therefore declaratory of existing law."

(Pub. Util. Code, §366.2, subds. (1) & (2), as codified by Assembly Bill No. 117 ("AB 117"), Stats. 2002 (Reg. Sess.), ch. 838, §4.) Thus, the above language demonstrates that the Legislature did not intend Water Code Section 80110 be given the limited and literal interpretation advocated by TURN and Edison.

Public Utilities Code Section 366.2(d) was enacted after the issuance of D.02-03-055 and D.02-04-067. Thus, the Legislature is presumed to be aware of both the Commission's AB 1X suspension of direct access, and the determinations implementing the suspension, including the manner specified in D.02-03-055, as modified by D.02-04-067. In fact, the Legislature employed

language in Public Utilities Code Section 366.2(d) that is similar to that used in D.02-03-055 and D.02-04-067, including references to "fair share" and to the concept that the "shifting" of costs should be prevented. (See generally, Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at pp. 14, 16-17 & 33 (slip op.); Order Disposing of Rehearing Applications of D.02-03-055 [D.02-04-067], supra, at pp. 4-5, 8, 13, & 22 (slip op.).) Thus, it is logical to presume that the Legislature was both aware of and approved of the Commission's implementation of AB 1X. (See Moore v. California State Board of Accountancy (1992) 2 Cal.4th 999, 1018.) Therefore, the Legislature appears to have agreed with the Commission's interpretation of Water Code Section 80110, especially regarding the "fair share" and the objective of preventing cost-shifting and achieving bundled customer indifference, through a "standstill" approach.

In addition, the legislative history demonstrates that the "fair share" can be zero, if the Commission "determines that a party bears no share of costs and that costs are not shifted." ((See Letter from Assembly Member Carole Migden to Speaker Herb Wesson, dated August 28, 2002, in Assembly Daily Journal for the 2001-2002 Regular Session (September 1, 2002), pp. 8797-8798.) This legislative history expressing legislative intent is published, and thus, entitled to consideration in the interpretation of the statute. (See Waters v. Weed (1988) 45 Cal.3d 1, 10.) Thus, the determination of what constitutes "fair share" and "cost-shifting" is left to Commission.

In D.03-05-034, we acted lawfully in permitting direct access customers who switched to utility service on or after September 21, 2001 to return or resume direct access service subsequently. It was a proper exercise of our discretion pursuant to Water Code Section 80110 and Public Utilities Code Section 366.2(d), as well as our broad regulatory authority under the California Constitution and the Public Utilities Code. So long as there is no cost-shifting and bundled customer indifference is preserved, the switching exemption is lawfully permitted. Therefore, adopting a switching exemption is consistent with the

"standstill" approach we adopted in our previous decisions. There is no evidence of disapproval by the Legislature in subsequent legislation.

Further, there is no prohibition in Water Code Section 80110 or elsewhere that prohibits us from permitting the switching exemption provided for in D.03-05-034. Water Code Section 80110 provides for the suspension on a date chosen by the Commission and the implementation of this suspension has been left to the Commission. Also, there is no specific language in this statutory provision that covers the situation whereby customers who acquired direct access prior to the suspension date, and maintain such service on or after September 21, 2001, but who return to the utility to purchase their electricity thereafter resume direct access service. Thus, the statute requires interpretation. Therefore, in D.03-05-034, we properly determined that such switching was permissible so long as there was no adverse impact on bundled service customers, and we adopted rules to prevent any cost-shifting. (See D.03-05-034, pp. 9 & 17-19.)

In its rehearing application, TURN takes issue with our determination that the return or resumption of direct access service did not constitute "acquiring" new service. TURN argues because the return or resumption would require new contracts or agreements, such contracts fell within the suspension mandated in Water Code Section 80110. (TURN's Application for Rehearing, pp. 3-5.) As discussed above, the implementation of the suspension was left to the Commission, including determining the lawful meaning of the word "acquire" in the statute. In light of the legislative intent to prevent cost-shifting and achieve bundled customer indifference, it was reasonable for us to interpret Water Code Section 80110 as only suspending the right of a retail end-use customer who did not have direct access service after the suspension date from "acquiring" such service. (D.03-03-034, p. 7.) There is nothing in AB 1X that prohibits this interpretation.

Moreover, permitting switching was consistent with our policy to maintain the economic viability of direct access. In D.03-05-034, we noted the

importance for the viability of direct access, including the diversification of the California electric power market, and therefore found that direct access helped to protect California against uncertainty. (D.02-05-034, p. 8.) In this decision, we further observed "the growth of [direct access] load in summer 2001 contributed to a substantial reduction in the level of the DWR revenue requirement estimate for the period through December 31, 2001." (D.03-05-034, citing Opinion Rejecting Earlier DA Suspension Date [D.02-03-055], supra, at pp. 14-15 (slip op.).) It is noted that AB 1X did not limit the Commission authority to preserve the viability of existing direct access after the mandated suspension date. There is no language in AB 1X to that effect.

Also, Edison's assertion that the "standstill principle" is not a proper measure of whether the "switching exemption" violates AB 1X is wrong. As we discussed above, the "standstill principle" was based on the legislative intent that there should be no cost-shifting and the bundled service customer should be left indifferent. If the amount of the direct access load did not increase or decline, there would be no cost-shifting and bundled customers would be indifferent. Thus, we did not err in using the "standstill principle" as a proper measure for determining whether to permit the switching exemption.

Moreover, as previously discussed, the Legislature appears to have been aware of the approach adopted by us in the implementation of the suspension, including the "standstill principle" adopted in D.02-03-055. There is no evidence of disapproval by the Legislature in its enactment of AB 117, which clarified the Water Code Sections enacted by AB 1X, including Water Code Section 80110.

2. The Use of the Spot Market Price

During the proceeding, PG&E and others had urged the Commission to require direct access customers returning to bundled service to pay the higher of the otherwise applicable rate paid by bundled service customers, or a rate

reflecting the short-term price of power if the resulting rate would be higher. We declined to adopt this proposal. (D.03-05-034, p. 35.) Rather we adopted the spot market price for the customers in the "safe harbor" and six-month waiting period. (D.03-05-034, pp. 18 & 35.)

In its rehearing application, PG&E argues that D.03-05-034 unfairly permits direct access customers who are returning to bundled service to pay a rate that is lower than what is paid by other bundled service customers. Thus, PG&E alleges that the Commission has acted arbitrarily and capriciously in not adopting the proposal. (PG&E's Application for Rehearing, pp. 2-3.)

We disagree with PG&E's allegation. Our determination to use the spot market price rather to adopt a proxy of the higher of the spot market price or the bundled portfolio rate is reasonable. As we stated in D.03-05-034, we believed that the spot market would compensate "the utility for its incremental short-term purchases of power incurred to serve returning [direct access] load" whether in the "safe harbor" or during the 60 days waiting period. (D.03-05-034, pp. 17 &. 35.) Further, we observed that "bundled customers [would] not be harmed or put at risk for higher costs, and [direct access] customers [would] not be getting a 'free' benefit." (D.03-05-034, p. 36; see also, p. 17, assigning the risks associated with short-term power costs to direct access customers on whose behalf the power was purchased.) Accordingly, we had a reasonable basis for adopting the spot market price, and thus, we acted neither unfairly nor arbitrarily and capriciously.

In its response to PG&E's application for rehearing, SDG&E argues that using the spot market price would encourage gaming. (SDG&E's Response, pp. 7-10.) In D.03-05-034, we were not persuaded by this argument (D.03-05-034, p. 35.) Rather, we observed that the restrictions that were adopted in D.03-05-034 would preclude direct access customers returning to bundled service from "skimming the cream" off of the bundled portfolio." (D.03-05-034, p. 35.) We further noted: "The advance notice and minimum term commitment requirements together [would] guard against arbitrage or other gaming practices that could be

detrimental to bundled customers." (D.03-05-034, p. 35.) We were convinced that the use of the spot market price, whether it was above or below the bundled rate, would not cause any cost-shifting because the [direct access] customers [would] reimburse the utility for any incremental costs incurred on their behalf," and thus bundled service customers were left indifferent. (D.03-05-034, pp. 18 & 36.)

However, we note that should these concerns of the gaming raised by SDG&E can be demonstrated as fact, parties can file a petition for modification of D.03-05-034 to propose any remedies that may be justified. At that time, parties will have an opportunity to establish that the use of the spot market price has resulted in gaming behavior whereby costs have been shifted to bundled service customers. Otherwise the assertion is speculative, and remains unconvincing.

3. The Use of the Cal-ISO Hourly Price As A Proxy

In their rehearing applications, PG&E and Edison argue that the Cal-ISO hourly price should not be used as the proxy for the short-term commodity price. (PG&E's Application for Rehearing, p. 3.) PG&E alleges that price was not part of the record. (PG&E's Application for rehearing, p. 3.) Edison also makes the same allegation. (Edison's Application for Rehearing, p. 6.) The price was initially proposed by AREM in its comments to the proposed decision. SDG&E agreed with the use of the Cal-ISO hourly price as a proxy in its reply comments.

PG&E and Edison are correct that there is insufficient evidence in the record to support the adoption of the Cal-ISO hourly price as a proxy. Thus, a limited rehearing should be granted on this issue as to the suitable proxy for the short-term commodity cost of electricity. However, we note that whether the Cal-ISO hourly price is or is not an appropriate proxy is a matter for further

consideration, and thus, our granting of the limited rehearing is not intended as a prejudgment of its suitability as proxy.

Thus, the determination of a suitable proxy for purposes of the limited rehearing granted herein will be addressed in the Rule 22 working group meetings that were ordered in D.03-05-034 to address implementation issues. In the meanwhile, the Cal-ISO hourly price may be used as an interim proxy, as needed, but cost recovery for electricity purchased using this price is subject to adjustment depending on the outcome of the limited rehearing.

III. CONCLUSION

Therefore, based on the above discussion, we will grant a limited rehearing on the issue related to the use of the Cal-ISO hourly price as a proxy for the short-term commodity price of electricity. As to the other issues raised in the applications for rehearing, good cause does not exist for the granting of rehearing. Accordingly, the applications for rehearing are denied with respect to these other allegations.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.03-05-034 is granted on the issue of using the Cal-ISO hourly price as a proxy for the short-term commodity price of electricity.

2. Except as provided above, the applications for rehearing of D.03-05-034, filed by TURN, Edison and PG&E, are denied in all other respects.

This order is effective today.

Dated June 5, 2003 at San Francisco, California.

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

I dissent.

/s/ LORETTA M. LYNCH
Commissioner

I dissent.

/s/ CARL W. WOOD
Commissioner