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Decision 99-02-044 February 4, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Approval of Valuation and Categorization of Non-Nuclear Generation-Related Sunk Costs Eligible for Recovery in the Competition Transition Charge.	Application 96-08-001 (Filed August 1, 1996)
Application of San Diego Gas & Electric Company to Identify and Value the Sunk Costs of its Non-Nuclear Generation Assets.	Application 96-08-006 (Filed August 1, 1996)
Application of Southern California Edison Company to Identify and Value the Sunk Costs of its Non-Nuclear Generation Assets, in Compliance with Ordering Paragraph No. 25 of D.95-12-063 (as modified by D.96-01-009 and D.96-03-022).	Application 96-08-007 (Filed August 1, 1996)
Application of Pacific Gas and Electric Company To Establish the Competition Transition Charge.	Application 96-08-070 (Filed August 30, 1996)
In the Matter of the Application of Southern California Edison Company to estimate its Transition Costs as of January 1, 1998 in Compliance with Ordering Paragraph 26 of D.95-12-063 (as modified by D.96-01-009 and D.96-03-022), and related changes.	Application 96-08-071 (Filed August 30, 1996)
Application of San Diego Gas & Electric Company to Estimate Transition Costs and to Establish a Transition Cost Balancing Account.	Application 96-08-072 (Filed August 30, 1996)

ORDER GRANTING LIMITED REHEARING TO MODIFY DECISION (D.) 97-11-074 AND DENYING REHEARING OF MODIFIED DECISION

I. INTRODUCTION

Decision (D.) 97-11-074 constitutes our interim opinion on transition cost eligibility. In this decision, we determined the eligibility of various categories of non-nuclear costs for transition cost recovery, consistent with the mandates of Assembly Bill ("AB") 1890 (Stats. 1996, ch. 854) and our decision in Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation ("Preferred Policy Decision") [D.95-12-063, as modified by D.96-01-009] (1996) 64 Cal.P.U.C.2d 1 and 64 Cal.P.U.C.2d 288. We also established the net book value of various generation assets currently owned by Pacific Gas and Electric Company ("PG&E"), San Diego Gas and Electric Company ("SDG&E") and Southern California Edison Company ("Edison").

Specifically, in D.97-11-074, we determined that the reduced rate of return would be applied to generation assets currently in rate base and eligible for transition cost recovery, as of the date which the utilities established the memorandum accounts provided for in Order Instituting Rulemaking on Commission's Proposed Policies Governing Restructuring California's Electric Services Industry, Etc. ("Interim Opinion Establishing Memorandum Account") [D.97-07-059] (1997) ___ Cal.P.U.C.2d ___. We also ordered that the reduced rate of return for non-nuclear generating assets shall be based on the embedded cost of debt adopted in D.96-11-060. (D.97-11-074, p. 208 [Ordering Paragraph Nos. 11 and 12.) Further, we determined that for transition cost purposes, PG&E's reduced rate of return is 7.13 percent; Edison's reduced rate of return is 7.22 percent; and SDG&E's reduced rate of return is 6.75 percent. (D.97-11-074, p. 208 [Ordering Paragraph No. 12].)

PG&E, SDG&E and Edison ("applicants") jointly filed an application for rehearing, which focuses on three aspects related to our determinations in D.97-11-074. These three aspects are: (1) the application of the

reduced rate of return to hydroelectric and geothermal assets; (2) the application of the reduced rate of return for fossil, hydroelectric, and geothermal plants effective July 1997 rather than January 1, 1998; and (3) the computation of the reduced rate of return based on 90 percent of the 1997, rather than the 1995, embedded cost of debt. (Joint Application for Rehearing, p. 5.)

The rehearing applicants allege numerous legal errors, including allegations that: the determination for a reduced rate of return is contrary to AB 1890 and the Preferred Policy Decision; the reasons for reducing the return was not supported by the record; the Commission in reducing the utilities' rate of return in the decision was erroneously changing D.96-11-060, the 1997 Cost of Capital Decision, in violation of Public Utilities Code Section 1708; the Commission incorrectly permitted ORA to reopen a past proceeding due to "changed circumstances," and reduced the rate of return without evidentiary hearings; the Commission violated the rule against retroactive ratemaking; and D.97-11-074 erred in concluding that the parties in this proceeding did not have notice of D.96-04-059, involving Edison's 1995 General Rate Case.

Responses were filed by the Office of Ratepayer Advocates ("ORA"), Enron, and the Utility Reform Network and Utility Consumers Action Network (jointly, "TURN/UCAN"). The responses oppose the rehearing application. However, in its response, ORA states that it would not object to the modification of D.97-11-074 to apply a reduced return based on the 1995 cost of debt from the period July 28, 1997 to December 31, 1997. (ORA's Response, p. 2, 46-47.)

We have reviewed each and every allegation of error raised by the joint application for rehearing. We are of the opinion that, except for modifying D.97-11-074 to permit the utilities to use the 1995 cost of debt in calculating the reduced rate of return for the period between July 28, 1997 and November 21, 1997, good cause does not exist for granting a rehearing of the issues raised in the

rehearing application. Therefore, we will grant a limited rehearing to modify D.97-11-074 for the reason explained below, and we will deny rehearing of D.97-11-074, as modified. We also offer a discussion below about the main issues raised in the rehearing application.

A. AB 1890 and the Preferred Policy Decision does not preclude the Commission from reducing the rate of return of hydroelectric and geothermal assets for purposes of transition cost recovery.

In their application for rehearing, Applicants rely on language in Conclusions of Law Nos. 61, 64 and 66 in the Preferred Policy Decision and Public Utilities Code Section 367(d) to argue that this decision and statutory provision in AB 1890 preclude the Commission from applying the reduced rate of return to hydroelectric and geothermal assets. (Application for Rehearing, pp. 7-12.) It also claims that the return only applies to uneconomic costs. (Application for Rehearing, p. 10.) Further, Applicants assert that D.97-11-074 fails to provide a rational basis for application of the reduced rate of return to hydroelectric and geothermal assets. (Application for Rehearing, pp. 11-12.)

Applicants' argument that the Preferred Policy Decision and AB 1890 precludes the Commission from applying the reduced rate of return to hydroelectric and geothermal assets is incorrect. (Application for Rehearing, pp. 7-12.) Although the Preferred Policy Decision applies the reduced rate of return to fossil fueled units, and AB 1890 adopts this rate of return "provided for" in this decision, (see Preferred Policy Decision, supra, 64 Cal.P.U.C.2d at pp. 92-93 [Conclusions of Law Nos. 61 and 66]; Pub. Util. Code, § 367, subd. (d))[1], there is nothing in either this decision or the statute that expressly precludes the application of this reduced rate of return to hydroelectric and geothermal assets. In fact, AB

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1 Public Utilities Code Section 367(d) provides: "Recovery of costs prior to December 31, 2001, shall include a return as provided for in Decision 95-12-063, as modified by Decision 96-01-009, together with associated taxes." (Pub. Util. Code, § 367, subd. (d).)

1890 left the Commission with the authority to determine which assets shall receive transition cost recovery, including fossil and non-fossil assets. As Public Utilities Code Section 367 provides:

> "The [C]ommission shall identify and determine those costs and categories of costs for generation-related assets and obligations, consisting of generation facilities, generation-related regulatory assets, nuclear settlements, and power purchase contracts, . . . that were being collected in [C]ommission-approved rates on December 20, 1995, and that may become uneconomic as a result of a competitive generation market, in that these costs may not be recoverable in market prices in a competitive market, ..." (Pub. Util. Code, § 367.)

Thus, we had the authority to regulate these assets, including hydroelectric and geothermal, for purposes of transition cost recovery, if the utilities chose to request such recovery for those types of assets. (See Pub. Util. Code, § 367.)

Applicants' reliance on Conclusion of Law No. 64 in the Preferred Policy Decision is misplaced. This conclusion of law states: "[h]ydroelectric and geothermal generating units should remain subject to rate of return regulation and provide their output to the distribution function of the utility through the [Power] Exchange, and will be subject to PBR." (Preferred Policy Decision, supra, 64 Cal.P.U.C.2d at p. 92 [Conclusion of Law No. 64].) Subjecting these units to rate of return regulation does not mean that the Commission has foreclosed itself from lawfully reducing the rate of return for these types of assets. Neither AB 1890 nor the Preferred Policy Decision support Applicants' argument.

Applicants also claim that after the issuance of the Preferred Policy Decision and the enactment of AB 1890,the Commission itself concluded in subsequent decisions that the reduced rate of return approved in AB 1890 could not be applied to hydroelectric and geothermal assets. (Application for Rehearing, p. 20.) They cite to the following decisions: Order Instituting Rulemaking on

Commission's Proposed Policies Governing Restructuring California's Electric Services Industry, Etc. ("Roadmap 2 Decision") [D.96-12-088, pp. 31-33 (slip op.)] (1996) ___ Cal.P.U.C.2d ___; Order Modifying and Denying Rehearing of Decision 95-12-063 as Modified by Decision 96-01-009 [D.97-02-021, p. 63 (slip op.)] (1997) ___ Cal.P.U.C.2d ___; Order Denying Rehearing of Decision (D.) 97-02-021 [D.97-11-086, p. 4 (slip op.)] (1997) ___ Cal.P.U.C.2d ___.

Applicants are wrong. We did not conclude in D.96-12-088, D.97-02-021 and D.97-11-086 that we were foreclosed from applying the reduced rate of return to hydroelectric and geothermal assets. In these decisions, we determined that AB 1890 precluded us from changing the specific reduced rate of return for fossil fueled units that was "provided for" in the Preferred Policy Decision. We made no determinations regarding reducing the rate of return for fossil assets, including hydroelectric and geothermal assets. Thus, Applicants' reading of these decisions is overly broad and results in an incorrect interpretation of our determinations in these decisions.

Accordingly, we had the authority to determine the rate of return for these assets for purposes of transition cost recovery. (See Pub. Util. Code, § 367.) When the utilities themselves asked for such recovery, they presented us with the issues about whether, when and how these hydroelectric and geothermal assets could receive transition cost recovery. These transition cost issues necessarily included the question about whether to apply the same reduced rate of return adopted by the Preferred Policy Decision and approved by AB 1890 to these assets. Therefore, we acted in accordance with AB 1890, the Preferred Policy Decision, D.96-12-088, D.97-02-021, and D.97-11-086, when we determined in D.97-11-074, p. 196 [Finding of Fact No. 85] that "[t]he reduced rate of return should apply to hydroelectric and geothermal assets which will be recovered in the transition cost balancing account."

Applicants also claim that AB 1890 specifies that the reduced rate of return applies only to uneconomic costs, and to the extent hydroelectric and geothermal facilities are economic, the full rate of return should apply. (Application for Rehearing, p. 10.) We disagree.

Neither AB 1890 and the Preferred Policy Decision limits the application of the reduced rate of return to uneconomic costs. Although the statute provides only for transition cost recovery for uneconomic costs of generation related assets and obligations (Pub. Util. Code, § 367), this does not prohibit us from applying the reduced rate of return to facilities that are economic. In fact, AB 1890 provides that transition costs "[be] based on a calculation mechanism that nets the negative value of all above market utility-owned generation-related assets against the positive value of below market utility-owned generation related assets." (Pub. Util. Code, § 367, subd. (b).) Therefore, in the Commission's calculation of transition costs, there is a factor which includes the assets that are economic as well. As to what this factor entails, including the possible reduction in the rate of return, AB 1890 left it to the Commission to decide. (See Pub. Util. Code, § 367.) We made such a determination in D.97-11-074.

Finally, Applicants argue that the decision fails to provide a rational basis for applying the reduced rate of return to hydroelectric and geothermal assets. (Application for Rehearing, pp. 10.) We reject this argument as being without merit.

In D.97-11-074, we reasoned that "[b]ecause these assets [were] afforded transition cost treatment, the reduced rate of return should be earned." (D.97-11-074, p. 136.) Applicants are claiming that this rationale was legally incorrect because we had already contemplated "transition cost treatment" for hydroelectric and geothermal assets in the Preferred Policy Decision, but did not find this sufficient grounds to apply the reduced rate of return to those assets.

Applicants refer to the following language from the Preferred Policy Decision, supra, 64 Cal.P.U.C.2d at p. 66, to demonstrate that the Commission had ruled on transition cost recovery for hydroelectric and geothermal generating assets: "These assets will remain subject to rate-of-return regulation. . . . Any surplus revenues from these sales (above the revenue requirement associated with these units) will be credited toward reducing transition costs. Each utility will be encouraged to submit an appropriate generation-related PBR for these assets."

However, Applicants err in their interpretation of the language in the Preferred Policy Decision. This language does not support the argument that we had already made a determination regarding the hydroelectric and geothermal assets on the reduced rate of return issue. There is no discussion about the reduced rate of return. Rather, in the Preferred Policy Decision, we noted that the ownership of these particular assets would likely be retained by the "distribution utility." (Id.) Based on this, it was our belief that the utility would likely not request transition cost treatment at that point. Thus, there was no need to determine the transition cost recovery treatment and the reduced rate of return issue for these assets at the time we issued the Preferred Policy Decision. When the utilities did ask for transition cost recovery for these assets as part of their applications addressed in the instant proceeding, this triggered the issue of whether to apply the same reduced rate of return for these particular facilities. Thus, we did not preclude ourselves in the Preferred Policy Decision from applying the reduced rate of return to hydroelectric and geothermal assets. Accordingly, our rationale for addressing the issue in D.97-11-074 was consistent with the Preferred Policy Decision.

B. AB 1890 and the Preferred Policy Decision does not preclude application of the reduced rate of return until accelerated recovery commenced on January 1, 1998.

Applicants claim that AB 1890 and the Preferred Policy Decision precludes the application of the reduced rate of return until the accelerated recovery commenced on January 1, 1998. (Application for Rehearing, pp. 18-23.) Thus, Applicants argue that the Commission committed legal error when it concluded that the rate of return should have applied as of the date of the rate freeze on January 1, 1997.[2]

Applicants mistakenly claim that the AB 1890 and the Preferred Policy Decision linked the reduced rate of return with the beginning of the accelerated recovery. Both the statute and the policy decision are silent as to when the reduced rate of return would commence. AB 1890 left this to our determination (see Pub. Util. Code, § 367), and this determination was assigned to the instant proceeding by us in Interim Opinion Establishing Memorandum Account [D.97-07-059, p. 7 (slip op.)] (1997) ___ Cal.P.U.C.2d ___. In D.97-11-074, p. 167, we made this determination.

Applying the reduced rate of return earlier than January 1, 1998, i.e. at the start of the rate freeze, was consistent with the one of the goals we set in our policy decision, which was to "complete the recovery of transition costs in the shortest possible amount of time, consistent with our goal of not increasing electricity prices." (Preferred Policy Decision, supra, 64 Cal.P.U.C.2d at p. 69.)[3] Further, our objective in applying a reduced return on investment-related transition

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[2] Although the rate freeze commenced January 1, 1997, the Commission did not apply reduced return until after the effective date of memorandum accounts that were ordered in D.97-07-059. The effective date was July 28, 1997. (See D.97-11-074, p. 175.)

[3] This is consistent with the legislative mandate expressed in AB 1890, for a "transition to a competitive general market" to "be completed as expeditious as possible." (Pub. Util. Code, § 330, subd. (t).)

costs was to provide "benefits for ratepayers and proper incentives for utilities" to minimize transition costs. (Id. at p. 61.)

Furthermore, in the Preferred Policy Decision, we stated that "[t]he total level of transition cost compensation each year will depend on the amount in this account and the level of the rate cap." (Id. at 68.) Thus, there is a logical connection between the rate cap (i.e. rate freeze) and the claim for transition costs, and in turn, the reduced rate of return. (See id. at pp. 68-69.) Accordingly, our determination to apply the reduced return on the date of the rate freeze was consistent with AB 1890 and the Preferred Policy Decision. As we noted above, because the memorandum accounts ordered in D.97-07-059 were not effective until July 28, 1997, we did not apply the reduced rate of return until that date. (D.97-11-074, p. 175.)

C. The Commission's reasons for reducing the rate of return are supported by the record, and by previous Commission decisions involving Electric Restructuring.

Applicants argue that the Commission erred when it reasoned that by starting the rate freeze on January 1, 1997, the Commission has allowed utilities to accrue revenues to offset transition costs, and that absent the rate freeze, utility customers would have experienced lower rates. They assert that these statements are unsupported by the record.[4] (Application for Rehearing, pp. 39-42.)

The record for this proceeding consisted of ORA's Motion,[5] the responses to the motion filed on February 24, 1997 in the Electric Restructuring Docket, R.94-04-031/I.94-04-032, ORA's reply to the responses of February 24,

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[4] Applicants raises this as a "substantial evidence" argument. However, the standard of review for the instant proceeding is the "any evidence" rule. (See Yucaipa Water Co. No. 1 v. Public Utilities Com. (1960) 54 Cal.2d 823, 828.)

[5] Motion of ORA for a Ruling Implementing the Provisions of D.96-12-088, Regarding a Reduction In Return on the Equity for Assets Subject to CTC Recovery ("ORA's Motion"), R.94-04-031/I.94-04-032, filed February 7, 1997. This motion resulted in the reduced rate of return adopted in D.97-11-074.

1997, filed on March 31, 1997, the supplemental opening briefs filed on August 8, 1997 in docket for the instant proceeding, A.96-08-001, et al., and the supplemental reply briefs filed also in A.96-08-001 on August 18, 1997. This record supports our reasoning for reducing the rate of return in D.97-11-074.

The record shows that under the rate freeze, any delay in reducing the rate of return would result in "a windfall to the utilities." (Response of TURN in Support of the ORA Motion for Immediate Implementation of the Reduced Return on Equity for Assets Subject to CTC Recovery ("TURN's February 24, 1997 Response"), R.94-04-031/I.94-04-032, filed February 24, 1997, p. 7.) The record establishes that "[u]nder the rate freeze, the reduced rate of return will increase the amount of revenue available for stranded asset recovery, as less revenue will be required for the return on those assets during the recovery period," and this would result in "a 'win-win' situation for the utilities and their customers. (TURN's February 24, 1997 Response, p. 7.)

Further, the finding that absent the rate freeze, utility customers could have had lower rates is supported by our policy determinations in our recent decisions on electric restructuring. For example in Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry, Etc. ("Cost Recovery Plan Decision") [D.96-12-077, p. 6 (slip op.)] (1996) ___ Cal.P.U.C.2d ___, the Commission stated:

> "Authorized revenue requirements are expected to decline in the near future for various reasons, including the acceleration of the depreciation of . . . [SONGs] Units 2 and 3 owned by Edison and SDG&E, the end of the fixed priced period for many power purchase agreements with qualifying facilities (QFs), the availability of inexpensive purchased power available for import, and the continuation of low inflation rates. . . . With collected revenues stabilized by the rate freeze, the forecasted decrease in revenue requirements creates headroom revenues that may be used to offset transition costs."

Further, in Interim Opinion Establishing Memorandum Account [D.97-07-059], supra, at p. 6 (slip op.), the Commission noted that:

> "Although accelerated amortization of certain transition costs has not yet begun, the rate freeze commenced on January 1, 1997, pursuant to D.96-12-077. The utilities are using the interim period to accrue revenues to offset transition costs. Thus, while we have not yet finally determined which assets and costs are eligible for transition cost recovery, we have allowed the utilities to accrue headroom revenues prior to such findings and the beginning of the transition period."

Therefore, the record, along with our policy determinations in previous decisions on electric restructuring, supports our reasoning that absent a rate freeze, utility customers might have benefited from lower rates, because the rate freeze stabilized the possible decline in revenue requirements.[6]

D. Since there was no modification of the 1997 Cost of Capital Decision, D.96-11-060, or reopening of the 1997 Cost of Capital Decision, evidentiary hearings were not required.

Applicants in their application for rehearing accuse the Commission of impermissibly changing Application of Pacific Gas and Electric Company for Authority, Etc. ("1997 Cost of Capital Decision") [D.96-11-060] (1996) ___ Cal.P.U.C.2d ___. They assert that because there was no evidentiary hearings,

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[6] Applicants attempt to introduce information regarding the year-end 1997 cumulative balance in the Energy Cost Adjustment Clause and Electric Revenue Adjustment Mechanism which is not part of the record in the instant proceeding. (Application for Rehearing, p. 41.) Since it is not part of the record in this proceeding, we will not consider this information in our review of the application for rehearing. Further, there is a pending petition for modification filed by Edison on July 9, 1998, which uses this information to challenge the rationale underlying the Commission's findings for the reduced rate of return. Our order today does not prejudge this petition.

Public Utilities Code Section 1708[7] was violated. (Application for Rehearing, pp. 4-36.) Further, they allege that the Commission violated Public Utilities Code Section 728[8] by not having evidentiary hearings when it allegedly reduced the 1997 rate of return adopted in D.96-11-060. (Application for Rehearing, pp. 37-38.). Moreover, Applicants argue that ORA's Motion, which resulted in the reduced rate of return adopted in D.97-11-074, constituted an improper reopening of the 1997 Cost of Capital proceeding, and amounted to a late-filed application for rehearing of D.96-11-060. (Application for Rehearing, pp. 24-33.) In addition, Applicants argue that the Commission erred in not assessing the financial consequences in changing the 1997 Cost of Capital Decision. (Application for Rehearing, pp. 26-27.)

Applicants are mistaken that D.97-11-074 changed the 1997 Cost of Capital Decision. In D.97-11-074, we were looking at the assets receiving transition cost treatment and deciding whether to apply a reduced return on those assets. Thus, we were addressing particular issues surrounding the rate of return on investment related specifically to transition costs, including those involving hydroelectric and geothermal generation assets. (D.97-11-074, pp. 167-175.) A

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7 Public Utilities Code Section 1708 provides:

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

8 Public Utilities Code Section 728 provides:

> "Whenever the [C]ommission, after a hearing, finds that the rates . . . demanded, observed, charged, or collected by any public utility for or in connection with any service . . . are . . . unreasonable, . . . the [C]ommission shall determine and fix, by order, the just, reasonable, or sufficient rates . . . to be thereafter observed and in force." (Pub. Util. Code, §728.)

It is noted that although Public Utilities Code Section 728 provides for a "hearing," this does not necessarily mean an evidentiary hearing, as generally provided for in Public Utilities Code Section 1708.

review of D.96-11-060 shows that the 1997 Cost of Capital Decision did not address such issues, and thus, made no determinations for us to change in D.97-11-074. Accordingly, since D.97-11-074 did not modify, rescind or alter D.96-11-060, the evidentiary hearing requirements set forth by Public Utilities Code Section 1708 and allegedly by Public Utilities Code Section 728 were not triggered.

Further, since D.97-11-074 did not change the 1997 Cost of Capital Decision, there obviously was no reopening of the 1997 Cost of Capital proceeding, and the motion did not constitute an improper rehearing application of D.96-11-060. Accordingly, the Commission did not commit legal error when it did not conduct evidentiary hearings.

E. D.97-11-074 should be modified to permit the utilities to use the 1995 cost of capital for calculating the reduced rate of return for the period between July 28, 1997 and November 21, 1997, and the Commission may lawfully used the 1997 cost of debt for the period after November 21, 1997.

Applicants argue that the Commission erroneously applies the reduced rate of return retroactively to July 1997.[2] They assert that because in D.97-07-059, the Commission ordered each utility to file Advice Letters for establishing memorandum accounts for tracking the rate of return differentials and use the 1995 cost of debt figures as a basis for this calculation, the

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2 It is noted that this retroactive ratemaking issue involves the non-nuclear assets, and not the nuclear assets. D.97-11-074 found that: "[t]he calculation of the reduced rate of return for non-nuclear generating assets should be based on the cost of debt adopted in the 1997 cost of capital decision, D.96-11-060," and "[f]or the nuclear generating plants, the reduced rate of return should be consistent with the adopted in D.96-01-011 and D.96-04-059 for SONGS 2 &3, D.96-12-083 for Palo Verde, and D.97-05-088 for Diablo Canyon. (D.97-11-074, p. 200 [Finding of Facts Nos. 130 & 131].) Public Utilities Code Section 367(d) provides: "Recovery of costs prior to December 31, 2001, shall include a return as provided for in Decision 95-12-063, as modified by Decision 96-01-009, together with associated taxes." (Pub. Util. Code, § 367, subd. (d).)

Commission was prohibited from retroactively using the 1997 cost of debt for the transition period. (Application for Rehearing, pp. 46-47.)

Public Utilities Code Section 728 sets forth the prohibition against retroactive ratemaking. This statutory provision provides in relevant part:

> "Whenever the [C]ommission, after a hearing, finds that the rates . . . demanded, observed, charged, or collected by any public utility for or in connection with any service . . . are . . . unreasonable, . . . the [C]ommission shall determine and fix, by order, the just, reasonable, or sufficient rates . . . to be thereafter observed and in force." (Pub. Util. Code, § 728, emphasis added.)

The California Supreme Court has held that the Commission has the power to fix rates prospectively only. (Pacific Tel. & Tel. Co. v. Public Util. Com. (1965) 62 Cal. 2d 634, 652; see also, Southern Cal. Edison Co. v. Public Utilities Commission (1978) 20 Cal.3d 813; 816.)

We did not err when we applied the reduced rate of return based on the 1997 cost of debt adopted for the time period after November 21, 1997, which is after the issuance of D.97-11-074. The 1997 cost of debt is applied prospectively. The fact that D.97-07-059 provides a memorandum account that uses the 1995 cost of debt is not relevant, and does not prohibit us from lawfully adopting the 1997 cost of debt for this time period. D.97-07-059 did not rule on the merits of ORA's motion, which included a proposal to use the embedded cost of debt authorized in the most recent cost of capital decision. (Interim Opinion Establishing Memorandum Account [D.97-07-059], supra, at p. 7 (slip op.); see also, ORA's Motion, R.94-04-031/I.94-04-032, filed February 7, 1997, p. 10.) This would have been the 1997 cost of debt adopted in the 1997 Cost of Capital Decision [D.96-11-060], supra.

With respect to the time frame between July 28, 1997 (effective date of the memorandum accounts) and November 21, 1997 (the date of issuance of

D.97-11-074), there is some question about fairness in basing the reduced rate of return on the 1997 cost of debt. This is in light of the fact that we did order the utilities in D.97-07-059 to use the 1995 cost of debt figures as a basis for the calculations of the amounts in the memorandum accounts, for the period before the issuance of D.97-11-074. (Interim Opinion Establishing Memorandum Account [D.97-07-059], supra, at pp. 7-9 (slip op.).) Since we did not subject these amounts in the memorandum accounts to any adjustments as result of D.97-11-074, we believe that it would be appropriate to permit the utilities to calculate their reduced rate of return for the period between July 28, 1997 and November 21, 1997 on the 1995 cost of debt. From ORA's response, it appears that at least one party would not have an objection to this modification. (ORA's Response, pp. 2, 46-47.)

Therefore, in the interest of fairness, we will grant a limited rehearing to modify D.97-11-074 to permit the utilities to use the 1995 cost of debt in calculating the reduced return for the period between July 28, 1997 and November 21, 1997.

F. The Commission did not commit legal error by concluding that the parties in this proceeding did not have proper notice of D.96-04-059.

During the instant proceeding, Applicants asserted that the reduced rate of return should have been based on the 1995 embedded cost of debt, rather than based on the 1997 embedded cost of debt. They argued that when we adopted a reduced rate of return for SONGS 2 & 3 based on the 1995 embedded cost of debt in D.96-04-059 (which involved Edison's 1995 GRC proceeding), we also applied this reduced rate of return for all utilities and all assets. In D.96-04-059, we stated:

> "Our electric industry restructuring decision, D.95-12-063, as modified in D.96-01-009, does not specifically address the issue from when the utilities'

> 9embedded cost of debt should be measured, and whether it should change over time. We take this opportunity to clarify these points. Our determination of these issues here for SONGS is broadly applicable, and should be viewed as precedential, in calculating the return on uneconomic sunk capital costs that may be included in the competitive transition charge for all the utilities in our electric restructuring proceeding." (Re Southern California Edison Company [D.96-04-059] (1996) 66 Cal.P.U.C.2d 11, 15.)

Because D.97-04-059 involved Edison's 1995 general rate case ("GRC"), and was not a proceeding to specifically address the issue for all utilities and for all capital costs, we concluded in D.97-11-074:

> "While D.96-04-059 addressed the broad applicability of the fixed 1995 cost of debt for purposes of the reduced return on equity, proper notice of this action was not provided and the parties' rights were impacted." (D.97-11-074, p. 205 [Conclusion of Law No. 53].)

Applicants challenge Conclusion of Law No. 53, and allege that we committed legal error in reaching this conclusion. (Application for Rehearing, pp. 43-46.) They argue that since almost all of the active parties were parties to both the transition cost proceeding and the electric restructuring rulemaking, all the parties had at least constructive knowledge of the rate of return issues in Edison's 1995 GRC proceeding. Also, applicants assert that since all three utilities, ORA and TURN took a position on the reduced rate of return issues in this GRC proceeding, they had actual knowledge of D.96-04-059. Applicants further state that because none of the affected parties filed an application for rehearing, the matter is now binding. In addition, they argue that even if all the parties to this proceeding had not also been parties to the Edison's 1995 GRC proceeding, that

under a theory of administrative common law development, constitutional due process is not offended.

Applicants miss the point. We had some due process concerns since not all the parties had proper notice, and thus properly decided to treat the language quoted from D.96-04-059 on pages 45 to 46 of the rehearing application merely as dicta. Obviously, if we had indeed made such a final determination in D.96-04-059, there would have been no need to address the issue during the instant phase of the CTC proceedings. More importantly, it was not legal error for the Commission to interpret its own decision so as to comport with the mandates for due process. The Commission acted appropriately and lawfully to avoid any potential due process problems.

Further, it appears that PG&E and SDG&E also interpreted the "precedential" language in D.96-04-059 as dicta. PG&E stated in its opening brief that it understood the reduced rate of return to be based on whatever the currently authorized cost of debt was at the time it was being applied. (Phase 2 Opening Brief of PG&E, filed July 21, 1997, p. 136.) SDG&E stated in its brief that except for sunk investment in SONGS, it utilized the 1997 embedded cost of debt. (SDG&E's Opening Brief – Phase 2 Transition Cost Proceeding, filed July 21, 1997, p. 46.) Also, neither PG&E nor SDG&E contested ORA's use of the 1997 cost of debt for those utilities.

G. The issue concerning the transition cost recovery eligibility of the costs of non-must run hydroelectric and geothermal facilities need not be address.

Applicants raise an issue concerning the transition cost recovery for non-must-run hydroelectric and geothermal facilities, based on an interpretation of D.97-11-074 set forth by ORA in a December 19, 1997 workshop. In raising this issue, applicants merely explain why the interpretation is wrong and then reserves the right to file a timely application for rehearing if the Commission's adopts

ORA's interpretation in the future. (Application for Rehearing, pp. 48-49.) Thus, applicants are alleging no legal error for the us to address for purposes of resolving the application for rehearing of D.97-11-074. We also note that we express no opinion about this issue in today's order.

THEREFORE IT IS ORDERED that:

1. A limited rehearing of D.97-11-074 is granted to modify the decision to permit the utilities to use the 1995 cost of debt in calculating their reduced rate of return for the period between July 28, 1997 and November 21, 1997.

2. Finding of Fact No. 131 in D.97-11-074, on page 200, is modified to state the following:

> "130. Except for the period between July 28, 1997 and the issuance date of today's decision, the calculation of the reduced rate of return for non-nuclear generating assets should be based on the cost of debt adopted for each utility in the 1997 Cost of Capital Decision, D.96-11-060. For the time period between July 28 and the issuance of today's decision, the calculation of the reduced rate of return for non-nuclear generation assets should be based on the cost of debt ordered in D.97-07-059."

3. Ordering Paragraph No. 12, on page 208, is modified to state the following:

> "12. For the time period between July 28 and the date of issuance of today's decision, the calculation of the reduced rate of return for non-nuclear generation assets should be based on the cost of debt ordered in D.97-07-059. For the time period after the issuance of today's decision, the calculation of the reduced rate of return for non-nuclear generating assets should be based on the cost of debt adopted for each utility in the 1997 cost of capital decision, D.96-11-060. For transition cost purposes, PG&E's reduced rate of return is 7.13%; Edison's reduced rate of return is 7.22%, and SDG&E's

reduced rate of return is 6.75% for the period after the issuance of today's decision and until the termination of the rate freeze.

4. Application for Rehearing of D.97-11-074, as modified, is denied.

This order is effective today.

Dated February 5, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners