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Decision 00-03-058 March 16, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority to Establish Post-Transition Period Electric Ratemaking Mechanisms (U-30-E)	Application 99-01-016 (Filed January 15, 1999)
Application of San Diego Gas & Electric Company for Authority to Implement Post Rate Freeze Ratemaking Mechanics. (U 902-E)	Application 99-01-019 (Filed January 15, 1999)
Application of Southern California Edison Company (U 338-E) to: (1) Propose a Method to Determine and Implement the end of the Rate Freeze; and (2) Propose Ratemaking Mechanisms which would be in place after the end of the Rate Freeze Period.	Application 99-01-034 (Filed January 15, 1999)

ORDER GRANTING LIMITED REHEARING OF DECISION 99-10-057 TO MODIFY PROVISIONS REGARDING INTEREST RATES AND DENYING REHEARING IN ALL OTHER RESPECTS

I. SUMMARY

This order modifies and denies an application for rehearing of Decision (D.) 99-10-057, referred to as the "Rate Freeze Termination Decision." The application for rehearing was filed by Pacific Gas and Electric Company (PG&E). It was opposed by The Utility Reform Network (TURN) and this Commission's Office of Ratepayer Advocates (ORA). The modification affects the interest rate charged on overcollected CTC. In all other respects, the application for rehearing is denied.

II. BACKGROUND

In D. 99-10-057, Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination) (1999) __ Cal.P.U.C.2d __, we established how each utility's AB 1890-mandated rate freeze would end. On an industry-wide basis, the California electricity market is in the "transition period" established by Assembly Bill No. (AB) 1890 of the 1995-1996 Regular session (Stats. 1996, ch. 854). San Diego Gas and Electric Company completed its recovery of transition costs and ended its rate freeze on July 1, 1999. (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination) [D.99-10-057] (1999) __ Cal.P.U.C.2d __, __, at p. 4 (mimeo.).) However, Pacific Gas and Electric Company (PG&E) and Southern California Edison Co. (Edison) are each in their respective transition periods. (E.g., Re: Proposed Policies Governing Restructuring, etc. (Preferred Policy) [D.95-12-063 as modified by D.96-01-009] (1996) 64 Cal.P.U.C.2d 1, 228.)

AB 1890 instituted generation competition as the basic structure of California's electric utility industry. (Pub. Util. Code, §§ 330, subds. (l)(1), (e)(4), 355, 345-350, 367, subd. (c).) However, each utility had the opportunity to freeze regulated rates for generation temporarily, so it could make changes that would allow it to recover uneconomic costs. (Pub. Util. Code, §§ 368, subd. (a), 367, subd. (a), 330, subd. (d), 330, subd. (l)(2).) In simple terms, the utility uses its this period to pay off its "uneconomic" costs. A particular utility's transition costs are defined as the generation-related costs that may become uneconomic due to competition. The frozen rates recognize that the regulated price of electricity is higher than the competitive market price (Pub. Util. Code, § 367.) and this above-market price generally reflects the "sunk" costs of building generation facilities. Traditionally, part of the regulated price of electricity was allocated to pay off the fixed costs of generation plants over time.

During a utility's transition period total revenue is limited by a rate freeze. When a utility writes down its sunk costs during this period, it accelerates recovery

of the amounts written down through the "CTC," the non-bypassable charge that is the key element of frozen rates. (Pub. Util. Code, § 367.) CTC is calculated residually. That is, the amount of money available to write down uneconomic costs is the amount of revenue that remains after the utility's "authorized costs" have been deducted from frozen rates. Even if a utility is not able to write off enough of its sunk costs to make its plants "economic," the rate freeze period gives it an opportunity to recover an appropriate amount of sunk costs.[1] In addition, above-market operating costs of "non-fossil" plants incurred during the transition period may be paid off with revenue earned through CTC. (Pub. Util. Code, § 367, subd (c).) As a "non-fossil" plant, Diablo Canyon "fixed costs ... and transition period operating costs" are eligible for transition cost recovery. (Re: Pacific Gas and Electric Company (Rehearing Denied) [D.98-11-067] (1988) __ Cal.P.U.C.2d __, __, p. 3 (mimeo).)

Nevertheless, the goal of a utility's transition period is not simply cost recovery. It is to facilitate that utility's transition to generation competition. The transition should be "orderly" and "completed as expeditiously as possible." (Pub. Util. Code, § 330, subd. (t).) For plants that a utility retains, once it has recovered those plants' uneconomic fixed costs, those plants should be able to generate electricity at market prices, and that utility should enter the competitive market. For utility-retained plants that cannot be made economic, investors will have recovered a proper amount of fixed costs, and those plants should be subject to market discipline at that point. Moreover, if a utility cannot complete cost recovery in a reasonable time, that utility should begin competing in the market in any event. Thus, Public Utilities Code sections 367 and 368 terminate each electric

[1] AB 1890 determined that utilities should be "at risk" for some transition costs. (Pub. Util. Code, § 368, subd. (a).) AB 1890 only allows each utility to recover those transition costs that could be paid for with revenue generated by frozen rates during that utility's transition period. Utilities were thus responsible for "costs not recovered during that time period." (Pub. Util. Code, § 368, subd. (a).)

utility's rate freeze period as soon as that utility recovers its transition costs, or on March 31, 2002, whichever is earliest. Similarly, recovery of most transition costs must end on December 31, 2001, or sooner if a utility completely recovers its transition costs before then.

The Rate Freeze Termination Decision, which is the "Phase One" decision in this proceeding, sets out how each utility will determine when its rate freeze is over, and resolves relevant rate issues. The Rate Freeze Termination Decision accounts for the fact that utilities may collect all of their transition costs in advance of the statutory deadlines by establishing mechanisms that determine when transition costs have been recovered. The Rate Freeze Termination Decision also specifies how the rate freeze will end, indicating which elements of transition period ratemaking will not be continued. It also provides for refunds of CTC that are collected after the rate freeze ends.

III. DISCUSSION

The application for rehearing disputes three of the Rate Freeze Termination Decision's holdings. The application claims that the Commission must allow PG&E to recover the full "ICIP" price of Diablo Canyon electricity, even if it is above-market, until December 31, 2001, no matter when PG&E's transition period ends. PG&E also claims that it can carry in regulatory accounts costs incurred during its rate freeze period for the purpose of collecting those amounts with non-rate-freeze revenue. Finally, PG&E asserts that the interest rate applicable to refunds of overcollected CTC is not supported by the record, and is inappropriate for other reasons. We have carefully considered and reviewed the claims made in the application for rehearing, and, other than the matter of interest rates, we conclude they have no merit. The details of our conclusion are discussed below.

A. PG&E May Not Recover Above-Market Costs Reflected in the ICIP After PG&E's Transition Period Ends.

The Commission adopted ICIP pricing for Diablo Canyon in the "Pricing Modification Decision," Re: Pacific Gas and Electric Company (Pricing Modification) (1997) [D.97-05-088] __ Cal.P.U.C.2d __. That decision changed a settlement-based Diablo Canyon rate scheme that was incompatible with transition cost recovery[2] "to accommodate electric restructuring. . . ." (Re: Pacific Gas and Electric Company (Rehearing Denied) (1998) [D.98-11-067] __ Cal.P.U.C.2d __, __, p. 4 (mimeo.).) The Pricing Modification Decision accomplished this change by voiding the Diablo settlements and setting up a rate scheme based on the recovery of fixed costs ("sunk costs") and operating costs (the ICIP). (Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at pp. __, __, pp. 84, 86 (mimeo.) (Ordering Paragraphs 2, 3, 10).)

In the transition cost recovery proceeding, the Commission held that the Diablo Canyon ICIP would be used to calculate the above-market portion of operating costs that would be recovered with CTC. ((Re: Proposed Policies Governing Restructuring, etc. (Transition Cost Eligibility) [D.97-11-074] (1997) __ Cal.P.U.C.2d __, __, p. 104 (mimeo.).) Specifically, "Power Exchange revenues from Diablo's output would be used to offset [the] . . . ICIP price . . . [T]o the extent Power exchange revenues are greater or less than ICIP, the difference would result in a debit or credit to the transition cost balancing account." (Id., __ Cal.P.U.C.2d at p. __, p. 103 (mimeo.).)

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[2] Prior to the Pricing Modification Decision, Diablo Canyon operated under a unique rate scheme established by negotiation between the utility and customer advocates. These settlements excluded Diablo Canyon from rate base. As a result, the Commission neither reviewed PG&E's expenses nor determined a price based on those costs that were properly recoverable from ratepayers. However, the transition period rate mechanism was designed to accommodate electricity plants that were being regulated under traditional principles. The transition cost recovery mechanism required that a known amount of "sunk costs" associated with each plant be written down over the transition period.

The Rate Freeze Termination Decision concludes that PG&E cannot continue to collect the above-market portion of the ICIP once PG&E's transition period ends. The decision explains, "when uneconomic generation costs are paid off, the regulatory protection provided by the statute in the form of the CTC is eliminated." (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination) [D.99-10-057] (1999) __ Cal.P.U.C.2d __, __, at p. 27 (mimeo.).) This result correctly implements AB 1890's transition cost recovery scheme. AB 1890 strictly limits the collection of PG&E's transition costs to PG&E's rate freeze period. (Pub. Util. Code, § 368, subd (a).) As a result, AB 1890 provides no legally valid mechanism to collect the above-market portion of ICIP once PG&E's rate freeze ends. (Pub. Util. Code, § 368, subd. (a).) PG&E can only recover those costs listed in Section 367, subdivision (a), items (1) through (6) once its rate freeze ends. This holding makes sense. No rationale supports continuing rate regulation to subsidize above-market Diablo Canyon operating costs once PG&E's transition period is over. Once investors have recovered their sunk costs, the fact that a plant has above-market operating costs should be handled with a market-based response, not by resorting to further regulation.

The Rate Freeze Termination Decision's holding is also consistent with past Commission decisions addressing how the ICIP should work, and the mechanics of transition cost recovery. The Pricing Modification Decision appears to indicate that the above-market portion of the ICIP would be eligible for transition cost recovery only as long as PG&E was allowed to accelerate recovery of sunk costs. (Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 81 (mimeo.).) The decision establishing the details of transition cost recovery does not contradict this conclusion, and the decision approving PG&E's cost recovery plan addresses issues at a level of generality that does not include this issue. (Re: Pacific Gas and Electric Company (Transition Cost Eligibility), supra, __ Cal.P.U.C.2d at p. __, p. 103 (mimeo.); Re: Proposed

Policies Regarding Electric Restructuring, etc. (Cost Recovery Plans) [D.96-12-077] (1996) 70 Cal.P.U.C.2d 207, 219.)

However, the application for rehearing bases its allegations of error on the claim that certain parts of both the decision approving PG&E's cost recovery plan and the Pricing Modification Decision must be construed to require continuation of ICIP pricing despite the requirements of AB 1890. These claims do not demonstrate error. PG&E ignores the requirements of AB 1890, instead asserting that other requirements override the statute's mandate. In addition, we do not find in the documents relied upon by the application—the "Restructuring Rate Settlement" and the Pricing Modification Decision—the requirements that PG&E relies upon to make its clains. We explain these conclusions below, as well as explaining why the application's claims regarding section 1708 and CTC refunds are inaccurate.

1. The Restructuring Rate Settlement.

The application asserts that the precursor of PG&E's cost recovery plan, the "Restructuring Rate Settlement" requires this Commission to continue ICIP pricing until December 31, 2001. The Restructuring Rate Settlement is an agreement made prior to the enactment of AB 1890. Consumer groups such as TURN and ORA were not parties to the agreement, and it was never filed for formal Commission approval as a settlement under Rule 51. PG&E did provide copies of the document to Commissioners and proposed to use the settlement as a starting point for its filings in a "number of pending or upcoming" proceedings relating to electric restructuring. (Letter of PG&E, dated June 12, 1996 transmitting Restructuring Rate Settlement to Commissioners.)

After the Restructuring Rate Settlement was agreed to, AB 1890 established the transition cost recovery mechanisms that would be used for electric restructuring. Public Utilities Code section 368 requires the Commission to

approve "cost recovery plans" that meet the criteria set out in subdivisions (a) through (f) of that section. Section 368(g), states that the Restructuring Rate Settlement is "an example" of a plan that meets those criteria. In Re: Proposed Policies Regarding Electric Restructuring etc. (Cost Recovery Plans) [D.96-12-077] (1996) 70 Cal.P.U.C.2d 207, the Commission approved a cost recovery plan for PG&E closely based on the Restructuring Rate Settlement.

However, the existence of the Restructuring Rate Settlement and its arguable value as a cost recovery plan do not clearly establish a requirement that ICIP pricing must extend until December 31, 2001. First of all, the terms of the Restructuring Rate Settlement are not as unequivocal as the application for rehearing claims. The Restructuring Rate Settlement indicates that "ICIP rates would be in effect for the period from 1997 to 2001." However, as TURN forcefully points out, the Restructuring Rate Settlement also states that Diablo Canyon electricity "would be priced at market no later than January 1, 2001." (Compare, Restructuring Rate Settlement, p. 8, p. 7.) As a result, even if the Restructuring Rate Settlement were to have some effect, we would still need to interpret it to determine when ICIP pricing should end.

More importantly, the Restructuring Rate Settlement is not "statutory authority" that controls how we must act. The Restructuring Rate Settlement is merely an agreement between PG&E and some (but not all) of its customers and workers that was subsequently designated by the legislature as an example of a plan that would meet the requirements of section 368 with regard to transition period ratemaking. As we have made clear in the past, even following its approval, a cost recovery plan does not compel this Commission to override statutory and other authority. When we approved the utilities' cost recovery plans, we rejected the contention that our role under section 368 was to simply "stamp our approval" and then implement the contents of a cost recovery plan. Rather, we stated that cost recovery plans were to be used as broad outlines. They would be coordinated

with relevant statutory and Commission determinations so that specific holdings on transition cost recovery issues could be made in subsequent, more focused decisions, which were to be determinative.[3] (Re: Proposed Policies Regarding Electric Restructuring etc. (Cost Recovery Plans), supra, 70 Cal.P.U.C.2d at pp. 218-219.)

Thus, questions about transition cost recovery rate issues are to be resolved by reference to "the goals expressed in AB 1890," the Preferred Policy Decision, and the specific implementation decisions that are launched by the approval of a cost recovery plan. The fact that PG&E's Restructuring Rate Settlement is cited as an "example" of a cost recovery plan does not give the Restructuring Rate Settlement overriding authority. The Restructuring Rate Settlement should be seen as a transition cost recovery mechanism that successfully implements section 368, not as a document whose every detail is enshrined into law by section 368.

In the context of Diablo Canyon ratemaking, we previously made clear that elements of the Restructuring Rate Settlement involving matters other than the criteria set out in (a) through (f) will not be considered mandatory (Re: Pacific Gas and Electric Company (Rehearing Denied) (1998) [D.98-11-067] __ Cal.P.U.C.2d __, __, p. 19 (mimeo.).) We specifically concluded that we were not required to follow terms contained the Restructuring Rate Settlement if they conflicted with the Public Utilities Code:

> . . . the Commission does not "violate[] AB 1890" when it reaches a result different from the Restructuring Rate Settlement in this one aspect. The Restructuring Rate Settlement was not enacted as law

[3] We explained that approval of a cost recovery plan "covers only the general framework for recovery and the details necessary to launch the program for cost recovery." We specifically indicated that actual "implementation details" of cost recovery would be established in ongoing proceedings," such as the proceeding to modify Diablo Canyon rates. (Id., 70 Cal.P.U.C.2d at pp. 218-219.) We also pointed out that the approval of a cost recovery plan did not "dispose of or prejudge" questions "under consideration in those proceedings." (Id., 70 Cal.P.U.C.2d 219.)

> and we cannot be required to disregard an existing statute on that basis.

Moreover, both Re: Proposed Policies Regarding Electric Restructuring etc. (Cost Recovery Plans), supra, and PG&E's own description of the Restructuring Rate Settlement indicate that details worked out in subsequent implementation proceedings would determine the specifics of PG&E's transition cost recovery scheme. Thus, the specifics of transition period ratemaking govern here, not the "broad outline" of the Restructuring Rate Settlement. (Re: Proposed Policies Regarding Electric Restructuring etc. (Cost Recovery Plans), supra, 70 Cal.P.U.C.2d at p. 218.) Importantly, PG&E's specific application for Diablo Canyon ratemaking in the transition period proposed an ICIP that "would be replaced by market pricing at the earlier of the completion of Diablo Canyon sunk cost recovery or the end of 2001." (PG&E Response to ORA Data Request quote in TURN's Response to Application for Rehearing, p. 5.)

Finally, the claims that contractual obligations exist requiring the ICIP to continue are inapposite. The Restructuring Rate Settlement is not a "nuclear settlement" whose "value" must be recovered under section 367. As noted above, that document is a "settlement" in name only. Also, we have already established that Diablo Canyon transition costs must be calculated based on sunk costs and the ICIP. (Re: Pacific Gas and Electric Company (Transition Cost Eligibility), supra, __ Cal.P.U.C.2d at p. __, p. 104 (mimeo.).) We specifically rejected the claim that even PG&E's previous Diablo settlement should form the basis of Diablo Canyon transition cost recovery. (Re: Pacific Gas and Electric Company (Pricing Modification) [D.98-11-067], supra, __ Cal.P.U.C.2d at p. __, p. 19 (mimeo).) The application's claim that an unidentified "compact" requires us to follow the terms of the Restructuring Rate Settlement also does not demonstrate error. It is doubtful that a separate source of law exists outside of the Public Utilities Code requiring the Commission to take a particular approach to transition cost recovery, especially

an approach that contradicts the Preferred Policy Decision, AB 1890 and the Pricing Modification Decision. Since we have consistently taken the position that details of cost recovery plans are not binding, the claim that an implied contract was created is equally inapposite. (Cf., U.S. v. Winstar Corp. (1996) 135 L.Ed.2d 964.) As a result, we turn to a discussion of the Pricing Modification Decision, the decision in the specific proceeding whose terms are most relevant here.

2. The Pricing Modification Decision.

The Pricing Modification Decision created a new rate scheme for Diablo Canyon. It specified a dollar amount of sunk costs and per kilowatt hour price for ICIP so that Diablo Canyon ratemaking would be compatible with electric restructuring. (Re: Pacific Gas and Electric Company (Rehearing Denied) (1998) [D.98-11-067] __ Cal.P.U.C.2d __, __, p. 4 (mimeo.).) The Pricing Modification Decision at times refers to the period it covers as being "the next five years", i.e. 1997-2001. (E.g., Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 74 (mimeo.).) It also makes determinations about how regulation will occur in the period "[a]fter 2001" or "post-2001." (E.g., Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 80 (mimeo.).) These references to specific dates imply that the Pricing Modification Decision assumes that the electric-restructuring-specific sunk costs and ICIP will not be fully collected until the statutory end of PG&E's transition cost recovery period, i.e., until December 31, 2001. The application for rehearing, on the other hand, claims that these phrases create a requirement that ICIP, at least, last until December 31, 2001, no matter when PG&E's transition period ends.

The application's claim over-interprets the Pricing Modification Decision. The use of phrases referring to a specific date on which PG&E's transition period will end does not create a holding requiring either Diablo Canyon sunk cost

recovery or the Diablo Canyon ICIP to continue until that date. These phrases especially do not create a requirement that the Diablo Canyon revenue requirement based on sunk cost recovery and ICIP extend past the end of PG&E's transition period. In fact, when the Pricing Modification Decision considers the more narrow question of when above-market ICIP prices can be recovered from CTC, its language contradicts the interpretation PG&E draws from the isolated references to "post-2001." According to the Pricing Modification Decision, ICIP pricing is only appropriate "during the period of accelerated sunk cost recovery." (Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 73, 81 (mimeo.) [Finding of Fact 2, Conclusion of Law 1].) Similarly, the decision denying rehearing of the Pricing Modification Decision, states that the costs that are eligible for transition cost recovery are "fixed costs . . . and transition period operating costs." (Re: Pacific Gas and Electric Company (Rehearing Denied), supra, __ Cal.P.U.C.2d at p. __, p. 3 (mimeo.).)

The sensible reading of the Pricing Modification Decision's use of phrases like "post-2001" is that the Pricing Modification Decision uses the legislated end date of transition cost recovery as shorthand for the concept of the end of PG&E's transition period.[4] Apparently, the Pricing Modification Decision assumes transition cost recovery would end on December 31, 2001, and, therefore, post-transition ratemaking would be "post-2001." This reading is supported by the fact that the Pricing Modification Decision uses the term "after 2001" interchangeably with the references to the post-transition period, which it called the "post-sunk cost recovery period." Finding of Fact 48 refers to "Post-2001" tax benefits that are to

[4] This conception properly reflects the legislative compromise inherent in AB 1890: utilities were not provided guaranteed 100% transition cost recovery. Instead they were given a time period in which to accomplish that recovery utility would be "at risk" for any amount not collected. (Pub. Util. Code, § 368, subd (a), (c).) The Pricing Modification Decision appears to have assumed that this would be the case. That is, the decision assumes that not all transition costs would be recovered by December 31, 2001 and the transition period would end with a sharing of transition costs between shareholders and

be allocated 100% to ratepayers, but the corresponding Conclusion of Law refers to "post-sunk cost recovery period tax benefits," as does Ordering Paragraph 6.

Thus, PG&E's arguments based on its interpretation of the Pricing Modification Decision are not persuasive. The language that the application for rehearing quotes consists of sentence fragments in portions of the Pricing Modification Decision that do not address ICIP pricing. In light of the Pricing Modification Decision's actual holdings on ICIP pricing, language taken out of context cannot be read as creating a firm rule establishing that ICIP pricing will last past the end of PG&E's transition period. Moreover, the mere fact that the ICIP price schedule spans the period 1997-2001 does not indicate it must be in effect the entire time. (E.g., Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 84 (mimeo.).) In 1997, we needed to determine what the ICIP would be for each year that could have been in PG&E's transition period. The Pricing Modification Decision also establishes a sunk cost recovery schedule and a revenue requirement schedule that lasts until December 31, 2001, but it is clear that sunk cost recovery can end before that date. (Pub. Util. Code, § 367.)

The claim that Finding of Fact 2 and Conclusion of Law 1 should be ignored because they "are of dubious accuracy" is equally unpersuasive. The application claims the inaccuracy is caused by the fact that the Finding and Conclusion do not adhere strictly to the details of SONGS ratemaking. This ignores the point the finding and conclusion are making: the Commission "can adopt an outcome that varies from the specifics of the ICIP and sunk cost recovery mechanisms adopted for SONGS, and still meet the standard of SONGS comparability" in broad terms. (Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p. 16 (mimeo.).) Similarly, the

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ratepayers.

application's reference to the Preferred Policy Decision is misplaced. That decision does not require the Commission to continue ICIP pricing until December 31, 2001. It assumed that Diablo Canyon transition costs would be calculated using a mechanism that somehow referred to the Diablo settlements. However, the Pricing Modification Decision clearly establishes that Diablo Canyon transition costs would be determined using sunk costs and a measure of operating costs. The Rate Freeze Termination Decision properly refers to the Preferred Policy Decision for the principle that transition cost rate schemes should end when transition cost recovery ends.

Thus, the application's claim that the "plain meaning" of the Pricing Modification Decision is relevant here, referring to principles of statutory construction, fails to show error. What PG&E calls the "plain meaning" of the decision is in fact a strained interpretation that contradicts one of the decision's clear determinations. As a result, the claim that case law requires the "plain meaning" rule of statutory construction to be applied here misses the point.[5] Without the ability to claim that the PMD clearly establishes the ICIP will last until December 31, 2001, the application's other assertions fail. The contention that the Rate Freeze Termination Decision completely re-writes the PMD when it seeks to understand the meaning of its contradictory statements is obviously without merit. The Commission explained that now-incorrect assumptions led to poor word choice in 1997, not that changed assumptions produced the need to construe a past decision differently. (Re: Pacific Gas and Electric Company (Rate

[5] This assertion is also troubling. Given that the Pricing Modification Decision approves an application submitted by PG&E that PG&E clearly intended to provide for the termination of the ICIP price when the transition period ended, we question PG&E's claim that the accidental use of words to a different effect is fully controlling. Both TURN and ORA rightly point out that PG&E's position on ICIP pricing has changed completely from the time when it sought Commission approval to the time that it sought implementation. In such circumstances, a hyper-narrow reading of the mere text of the Pricing Modification Decision is not appropriate.

Freeze Termination) [D.99-10-057], supra, __Cal.P.U.C.2d at p. __, p. 25 (mimeo).)

3. Section 1708.

Our discussion of the meaning of the Pricing Modification Decision, above, indicates why the application is incorrect when it claims that section 1708 requires the Commission to give notice and hold a trial-type hearing before it can conclude that ICIP pricing should not extend past the end of the transition period. Public Utilities Code section 1708 states:

> The commission 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 made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

This code section allows the Commission to retroactively change its orders, and then to have the Commission's new order "have the same effect as an original order or decision." However, the Rate Freeze Termination Decision does not act under the authority of section 1708. It does not retroactively "rescind, alter or amend" any order or holding made in the Pricing Modification Decision. Rather, it addresses—prospectively—issues relating to the termination of the rate freeze. In order to do this, the Rate Freeze Termination Decision is required to understand the Pricing Modification Decision's holdings. Doing so does not "re-interpret" the Pricing Modification Decision in an attempt to overrule a previous holding. Rather, it determines what the actual rationale of the Pricing Modification Decision was. It is also relevant that the Pricing Modification Decision explicitly limits the scope of its holding to determining the dollar value of Diablo Canyon sunk costs and the appropriate per kilowatt/hour price of the ICIP. (Re: Pacific Gas and Electric Company (Pricing Modification), supra, __ Cal.P.U.C.2d at p. __, p.

59 (mimeo.).) The Rate Freeze Termination Decision interferes with none of the actual holdings of the Pricing Modification Decision.

PG&E's further claim, that it was not given the opportunity to litigate this issue, is not supported by the record. PG&E addressed the question of ICIP pricing in its Opening Brief, dated June 10, 1999, and its Reply Brief, dated June 21, 1999. The proposed decision of the assigned administrative law judge, addressing this issue, was also distributed to PG&E for its comments. (Pub. Util. Code, § 311, subd. (d).)

4. Refund of Overcollected CTC.

The Rate Freeze Termination Decision holds that if the rate freeze ends before a utility's rates are changed, overcollected CTC will be refunded to customers. (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination) [D.99-10-057] (1999) __ Cal.P.U.C.2d __, __, p. 16 (mimeo.).) Since above-market Diablo Canyon operating costs are recovered as transition costs, the revenue collected to pay the above-market portion of the plant's operating costs (if any) will have to be refunded. That is, when the TCBA is closed, debits entered in the TCBA to pay for the post-transition above-market portion of the ICIP must be written off, and all CTC collected in the post-transition must be refunded.

The application for rehearing mistakes this provision for a holding that PG&E would be required to refund the entire amount of ICIP it collected after the transition period ended but before new rates became effective. This allegation of error is an overstatement. The whole point of transition cost recovery for Diablo Canyon operating costs is that it only deals with the above-market portion of those costs. The ICIP price is not used to determine the actual selling price of Diablo Canyon electricity. The PX price is used. (Re: Pacific Gas and Electric Company (Transition Cost Eligibility), supra, __ Cal.P.U.C.2d at p. __, p. 103 (mimeo.).) The economic portion of the ICIP will have been recovered from the PX and will

not be affected by the Rate Freeze Termination Decision. Contrary to PG&E's claims, Diablo Canyon is placed in exactly the same position as a "deregulated power plant" by the Rate Freeze Termination Decision.

This result is not unlawful under the constitutional provisions relevant to utility regulation. Here, PG&E is—at most—in the position of suffering a loss of the above-market portion of Diablo Canyon operating costs over a short period of time in exchange for the ability to recover a guaranteed 100% of the fixed costs associated with building Diablo Canyon[6] and the ability to operate Diablo Canyon in an unregulated generation market where it can charge, for the indefinite future, whatever price the market will bear. It is highly unlikely that this regulatory scheme will cause PG&E the "deep financial hardship" required to produce a violation of the Fifth Amendment.[7] (20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 299.) Further, the application for rehearing alleges no facts indicating any overall harm to PG&E, which it must in order to meet the "heavy burden" required of those alleging Fifth Amendment violations. (20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th at p. 319.) This hardship must be demonstrated in an application for rehearing because the rehearing process is the last chance the Commission has to correct its decisions before they can be challenged in court. (Pub. Util. Code., §§ 1731, subd. (b), 1732.)

Moreover, financial hardship is a "necessary—but not sufficient—condition" for demonstrating that a rate structure is unconstitutional. (20th Century Ins. Co. v. Garamendi, supra, 8. Cal.4th at p. 296.) It also must be shown that financial hardship is unavoidable. As TURN points out, there is no indication that

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[6] The transition period will only end before December 31, 2001, if PG&E has recovered 100% of its fixed costs, including all Diablo Canyon's sunk costs.

[7] A rate structure does not even fail the test if it prevents a company from making a profit; something close to insolvency and an inability to operate must be demonstrated. (Duquesne Light Co. v. Barasch (1989) 488 U.S. 229 at p. 310.) Moreover, utilities are not entitled to be protected against losses resulting from competition. (Market Street R. Co. v. Railroad Com. (1945) 324 U.S. 528, 566.)

any regulatory problems interfering with the collection of a market price for Diablo Canyon that might arise at the end of the transition period will not be resolved. PG&E has a number of procedural vehicles available to it to avoid the result it fears. It can use forecasting to accurately determine when its rate freeze will end, as the Rate Freeze Termination Decision encourages it to do. (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination) [D.99-10-057] (1999) __ Cal.P.U.C.2d __, __, p. 9 (mimeo.).) PG&E can also file a petition to modify to suggest a method for avoiding the result that it fears might occur. Given that there are methods for avoiding the result the application predicts, the application fails to demonstrate that an unacceptable result is unavoidable. Cf., Re: Application of PacifiCorp [D.98-12-088] (1998) __ Cal.P.U.C.2d __, __, pp. 10-11 (mimeo.).)

B. Frozen Rates are the Only Revenues From Which Expenses Incurred During the Rate Freeze May Be Recovered.

The Rate Freeze Termination Decision holds that only revenue from frozen rates may be used to pay off costs incurred during the rate freeze. As a result, when it determines how the rate freeze will end, the Rate Freeze Termination Decision rejects proposals to carry over costs PG&E incurred during the rate freeze into the PG&E's post-transition period. Specifically, the decision states: "No utility may carry over any costs from the TRA or the TCBA or any other account from [sic.] costs incurred during the rate freeze period into the post rate freeze period. The TRA need not be zero or overcollected for the rate freeze to end."[8] (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination), supra, __ Cal.P.U.C.2d at p. __, p. 15 (mimeo.).)

[8] We will correct the misprint in this sentence through modification.

This holding prevents a result that would be contrary to sections 368, subdivision (a) and 367, subdivision (a). Section 368 requires PG&E's rates to be frozen at 1996 levels and that the amount of PG&E's transition cost recovery be calculated based on those frozen rates. Transition costs may only be paid off with headroom—revenue earned through frozen rates that is not allocated to paying off "authorized costs." (Re: Proposed Policies Regarding Electric Restructuring, etc. (Cost Recovery Plans) [D.96-12-077] (1996) 70 Cal.P.U.C.2d 207, 219.) Thus, using non-rate-freeze revenue to pay authorized costs would increase headroom in violation of section 367's limitation on transition cost recovery. It would also contravene the explicit statutory directive that rates remain frozen by adding revenue earned after the rate freeze to revenue earned during the rate freeze to increase the total revenue available to PG&E during the rate freeze.

The Rate Freeze Termination Decision, however, only speaks to "costs" in recorded in the TRA, TCBA "or any other account" because they were incurred during the rate freeze. It is those costs that may not be carried over into the post rate freeze period. (Re: Pacific Gas and Electric Company (Rate Freeze Termination), supra, __ Cal.P.U.C.2d at p. __, p. 15 (mimeo.).) Revenue that is being earned "through forward looking revenue requirements" will continue to be recovered. (Id., __Cal.P.U.C.2d at p. __, p. 12 (mimeo.).) In addition, the Rate Freeze Termination Decision does not require costs that are being tracked in balancing and other regulatory accounts to be written off. They can be recovered, so long as Commission approval is obtained and those costs are paid off with revenue from frozen rates.

Thus, the Rate Freeze Termination Decision does not create any new requirements. It simply follows principles set out in a number of past decisions. Re: Pacific Gas and Electric Company (Unbundling) [D.97-11-073] (1997) __ Cal.P.U.C.2d __, holds that "costs incurred during the rate freeze period must be recovered during that period by changing the 'headroom' available. . . ." Re:

Proposed Policies Governing Restructuring, etc. (Streamlining) [D.97-10-057] (1997) __ Cal.P.U.C.2d __ prohibited utilities from accumulating "balances associated with various costs or ratemaking mechanisms through the rate freeze period and then collect[ing] them at a later date." For example, ECAC or ERAM undercollections may not be "accumulated for later collection." (Re: Proposed Policies Governing Restructuring, etc. (Transition Cost Eligibility) [D.97-11-074] (1997) __ Cal.P.U.C.2d __.)

Nevertheless, the application for rehearing asserts that the Rate Freeze Termination Decision applies this rule too strictly. It asserts that we are required to find an exception that would allow PG&E to pay off costs incurred during the rate freeze using non-rate-freeze revenue by tracking those costs in certain regulatory accounts and then deferring the balances in those accounts to the post rate freeze period. The application asserts this is permissible so long as the costs carried over are not transition costs, arguing that AB 1890 should be understood to require only that transition costs be paid off with frozen rate revenue and that other costs can be paid off with revenue from any source. Thus, the application contends that a category of costs exists that it calls "non-transition costs" which can be paid off with post transition period revenue. According to the application rules that apply to transition costs need not be applied to so-called "non-transition" cost.

This analysis starts with a correct premise but reaches a incorrect conclusion. The rate freeze, and the way frozen rates are allocated, may be designed to implement AB 1890's transition cost recovery mechanism. However, the way that mechanism is set up, there is no way to separate out a category of costs that can be collected from revenue earned after the transition period has ended without changing "headroom" and effectively increasing the amount of revenue for transition cost recovery. AB 1890 strictly limits the amount of revenue available for transition cost recovery: only revenue left over after all authorized costs are paid off is available for that purpose. The Commission cannot sever the

relationship between the amount of headroom collected and the amount of authorized costs that must first be deducted from frozen rate revenue. As TURN points out, this would make the transition cost recovery mechanism ineffective, since "the risk the statute indisputably assigns to the utility only exists to the extent that the freeze applies to both transition costs and non-transition costs." (Response of TURN at p. 11) This analysis also fails to address the fact that a rate increase that does not produce a corresponding increase in the amount of transition costs collected is a rate increase nonetheless. The rate freeze is mandatory and it makes no sense to say that rates can be raised so long as transition cost recovery is not affected.

The application asserts that unless we adopt PG&E's theory of "non-transition" costs, the Rate Freeze Termination Decision will err by requiring a departure from "normal" ratemaking. However, AB 1890's transition period rate mechanism is clearly not a "normal" ratemaking scheme. Although many rate elements are preserved in the costs collected as authorized revenue, this does not create a requirement that those rate treatments supersede the transition cost recovery mechanism. The quotation from Re: Proposed Policies Governing Restructuring, etc. Streamlining [D.97-10-057], supra, indicates exactly how we are to treat recovery of these costs: normal ratemaking occurs so long as utilities "do not increase or decrease total rates." It is the mechanics of transition cost recovery that trump "normal" ratemaking, and not the other way around.

In its attempt to characterize transition cost recovery ratemaking as unusual, the application also overstates the effect of the Rate Freeze Termination Decision on rates charged once the transition period ends. The application appears to claim that the prohibition on carrying over balances in regulatory accounts into PG&E's post rate freeze period is so broad that it would prevent recovery of Commission approved revenue requirements in PG&E's post-transition period. For example, the application claims that rates established in PG&E's 1999 General Rate Case

would be invalid to the extent they allowed depreciation of capital costs incurred in the rate freeze period.

However, the Rate Freeze Termination Decision explicitly provides for the recovery though "going forward revenue requirements" once the rate freeze ends (Re: Pacific Gas and Electric Company (Rate Freeze Termination), supra, __Cal.P.U.C.2d at p. __, p. 12 (mimeo).). The Rate Freeze Termination Decision's prohibition on post-rate freeze cost recovery applies only to the carrying over of costs (as opposed to charging approved rates) and only to costs that are carried in regulatory accounts, such as balancing and memorandum accounts. Our holding is, in fact, based on the nature of costs that are booked into such regulatory accounts. Those accounts track discrete, identifiable costs for (potential) later recovery. (We often review those costs after they have been recorded. And amounts tracked in regulatory accounts are often passed through to ratepayers after any necessary approval.

The nature of these costs suggests that if they are booked during the rate freeze period they should be reviewed and collected before the end of the rate freeze. They are discrete, and readily attributable to events that occurred during the rate freeze. It is only because costs have been placed in these accounts that recovery does not occur more or less contemporaneously with their being incurred. If those costs should be recovered with a forward looking revenue requirement, it is proper to require that determination to be made before the rate freeze ends. Similarly, if those costs are truly attributable to discrete rate-freeze period events, it is reasonable to prohibit their collection unless they are approved by the Commission (if necessary) and paid off with revenue earned from frozen rates.

Thus it is clear why the Rate Freeze Termination Decision's holding on regulatory account balances does not affect PG&E's general rates, such as the rates established in the 1999 General Rate Case (GRC). General rate revenue provides an ongoing revenue stream for the utility. Costs are not tracked and then recovered

from ratepayers at a later time. Rather, we have approved such a revenue requirement as representing a fair compensation for the utility's expenses and its business risk. The utility assumes the risk for the difference between its costs and its authorized revenue. That is, general rates do not change when a utility's costs increase. As a result, PG&E's distribution revenue requirement represents a generalized determination that PG&E should be authorized to charge a certain amount to ensure it achieves a fair return. Thus, for example, PG&E's revenue requirement for 1999 is intended to be an estimate for all of the expenses[9] (including the cost of capital) to be incurred during 1999, except for those expenses recorded in regulatory accounts. In other words, general rates do not involve any delayed recovery of expenses but recovery from ratepayers on a going forward basis the estimated expense as they occur.

Those "rates" and "accounts" we do approve for collection after the end of the rate freeze are analogous to costs recovered through the GRC's "forward looking revenue requirements." Nuclear Decommissioning costs are approved by the Legislature and the Commission and collected on an on-going basis. Public Purpose Programs similarly have a forward-looking revenue requirement. Costs approved in the 1999 RAP became part of the distribution revenue requirement, which is collected on a going forward basis. According to the Rate Freeze Termination Decision, allowing their recovery in the post-transition period does not "change ... PG&E's risk or existing Commission ratemaking orders." (Re: Pacific Gas and Electric Company (Rate Freeze Termination) [D.99-10-057], supra, __ Cal.P.U.C.2d at p. __, p. 23 (mimeo.).)

PG&E also claims that the Rate Freeze Termination Decision errs because it fails to acknowledge that certain costs are recovered with a combination of rate revenue and balancing accounts. The application for rehearing seems to claim that

[9] We use the term expenses advisedly, since capital costs are properly capitalized with their depreciation, etc., then expensed over the life of the asset.

because these accounts are associated with a category of costs that is also collected through forward-looking revenue requirements that balances in those accounts can be carried over to the post-rate-freeze period. This claim is inaccurate. The Rate Freeze Termination Decision does not distinguish between costs based on the type of cost they are. It distinguishes between balances tracked in regulatory accounts and forward-looking revenue requirements.

The application for rehearing also asserts that the Rate Freeze Termination Decision is in error because it might prevent PG&E from collecting certain amounts that are mandated by sections 454.9 and 1807. These claims, too, misunderstand the Rate Freeze Termination Decision. Costs referred to in sections 454.9 and 1807 are recoverable "in rates," so long as the Commission approves. (Pub. Util. Code, §454.9, subd. (b), 1807.) Therefore, they can be included in a forward-looking revenue requirement. Moreover, these claims are too speculative. The application asserts that the Rate Freeze Termination Decision should be altered to accommodate events that may or may not occur, and may or may not produce the results PG&E claims. The basic structure of the transition cost recovery mechanism should not be changed to produce a result inconsistent with AB 1890 simply to guard against the unlikely possibility that a regulatory problem might occur. Instead, PG&E should work to avoid such a result. Intervenor compensation should be anticipated and dealt with by forecasting and adjusting the amount of headroom available. Whether or not we would be hampered in the application of section 454.9 is an issue we will address if a catastrophic event occurs. (Cf., Pub. Util. Code, § 1708.)

The application also implies that the Rate Freeze Termination Decision will be in error if some costs being tracked in regulatory accounts end up being unrecoverable. It refers to costs booked into memorandum accounts and not authorized for recovery, negative balances in the TRA and costs associated with PX billing lag. However, this is not error. Certain rate effects are bound to occur

when the rate freeze ends, as a result of the structure required by AB 1890. PG&E has had ample time to devise regulatory and accounting responses to those rate effects. We announced "costs incurred during the rate freeze period must be recovered during that period by changing the 'headroom' available. . . ." in November 1997. (Re: Pacific Gas and Electric Company (Unbundling) [D.97-11-073] (1997) __ Cal.P.U.C.2d __.) We are not now required to ignore or circumvent AB 1890 or to modify this or other past decisions so that PG&E can recover these costs from sources other than the frozen rates from which they are properly to be recovered.[10]

Moreover, the basic premise of the application for rehearing is incorrect. PG&E attempts to convince us that the rule is too strict with a parade of accounting and ratemaking problems. As explained above, many of those claims exaggerate the Rate Freeze Termination Decision's requirements or speculate that results we hope to avoid might occur. And the solution the application suggests—a blanket approval of post-rate-freeze cost recovery—is too broad to solve these

[10] The application asserts that these prior holdings carry no weight because they were "sweeping," and because utilities were not required to apply for rehearing at the time these decisions were made. This claim has no merit. In Re: Pacific Gas and Electric Company (Unbundling) [D.97-11-073] (1997), supra, Re: Proposed Policies Governing Restructuring, etc. (Streamlining) [D.97-10-057], supra, and Re: Proposed Policies Governing Restructuring, etc. (Transition Cost Eligibility) [D.97-11-074], supra, the Commission set out the principles that would govern subsequent transition cost recovery. It is improper to claim that because principles are stated generally they are too "sweeping" or "broad" to warrant specific application. It is also incorrect to assert that such principles do not become valid holdings of the Commission when they are established in proceedings that did not have an adverse financial effect on the utility. Public Utilities Code section 1732, subdivision (b) provides, in relevant part: "No cause of action arising out of any order or decision of the commission shall accrue in any court to any person or corporation unless the person or corporation has filed an application to the commission for a rehearing within 30 days after the date of issuance" of the decision. Pursuant to section 1732, that application must be specific and "No person or corporation shall in any court urge or rely on any ground not so set forth in the application." Neither section 1731 or 1732 contains any exception for holdings made in decisions that do not have an adverse financial effect on the utility. Thus the Rate Freeze Termination Decision properly relied on these final determinations. (Cf., City of Los Angeles v. Public Utilities Com. (1975) 15 Cal.3d 680.)

particular problems. Instead of convincing us to disregard the rule, PG&E's lengthy list of exceptions indicates why we must uphold it. If we create the exception the application suggests, that exception would swallow the rule. We prefer to adhere to the previously announced requirement that rate freeze period costs, that are being tracked in regulatory accounts be collected from transition period rates by adjusting headroom.

Finally, we disagree with the applicant's claims that policy reasons support the idea of deferring collection of some costs to the post-rate-freeze period and that the Rate Freeze Termination Decision's result is too "harsh." These claims do not indicate legal error. The purpose of an application for rehearing is to indicate whether or not a decision is legally insupportable. We weighed policy considerations when we made the Rate Freeze Termination Decision, and they should not be re-evaluated here, specifically when the Rate Freeze Termination Decision is based on statutes and prior Commission decisions.

C. There Does Not Appear to be Sufficient Record to Support the Interest Rates Chosen for Refunds of Overcollected CTC.

The Rate Freeze Termination Decision determines that the CTC that is collected after the rate freeze ends should be refunded with "interest equal to the utility's authorized rate of return." (Re: Pacific Gas and Electric Company, et al. (Rate Freeze Termination), supra, __Cal.P.U.C.2d at p. __, p. 40 (mimeo.).) The interest rate is set at this level to "assure the utility is indifferent with regard to the timing of refunds." (Id. __Cal.P.U.C.2d at p. __)), p. 16 (mimeo.).) The Rate Freeze Termination Decision does not contain any other discussion of the rationale behind setting this interest rate for refunds.

The application for rehearing asserts that it is error to adopt this interest rate for a number of reasons. One is persuasive. The applicant points out that there is no basis in the record for determining that such an interest rate would produce

indifference, provide an incentive, or produce any other effect. Our review of the record did not produce any evidence on why the rate of return would be a proper interest rate for refunds of overcollected CTC. The only discussion of interest rates appears to be PG&E's and Edison's comments on the proposed decision. This discussion only refers to the commercial paper rate as a proper interest rate. TURN and ORA assert the interest rate is proper because it is analogous to the rate adopted in Re: San Diego Gas and Electric Company (Financing Order) [D.97-09-057] (1997) __Cal.P.U.C.2d__. Although we may base a determination on a finding made in another decision, we generally do so by taking official notice of the other decision. The Commission may take notice of such facts as may be judicially noticed by the State of California. (Rule 73 of the Commission's Rules of Practice and Procedure, Cal. Code Regs., tit. 20 § 73.) However, that process requires that parties be given the opportunity to comment on whether or not the holding or rationale of another decision should be applied to them. Since the Rate Freeze Termination Decision does not refer to Re: San Diego Gas and Electric Company (Financing Order) [D.97-09-057], supra, PG&E was not able to respond in its comments on the Proposed Decision.

Thus, we will modify the Rate Freeze Termination Decision to apply the commercial paper rate, for which there is evidence in the record.

IV. CONCLUSION

The application for rehearing claims that we must permit PG&E to recover two types of costs that are not permitted by AB 1890's transition cost recovery mechanism and relevant Commission Decisions: (1) the above-market portion of Diablo Canyon ICIP that occurs after PG&E's transition period ends, and (2) cost incurred during the rate freeze—and required to be paid for from frozen rate revenue—that PG&E continues to carry in regulatory accounts after the rate freeze has ended. As explained above, relevant statutory provisions do not require these

results, nor do our past decisions. Therefore, we will deny PG&E's application for rehearing. The application correctly points out that the record does not support our determination on interest rates, and we will modify the decision accordingly.

THEREFORE, it is ordered:

1. The first sentence of the last partial paragraph on page 15 of D.99-10-057 is modified to read: "No utility may carry over costs from the TRA or TCBA or any other account for costs incurred during the rate freeze period into the post rate freeze period."

2. A limited rehearing is granted to make certain modifications to correct errors in the Decision.

3. The last sentence of Conclusion of Law 8 on page 37 of D.99-10-057 is modified to read: "Refunds should accrue interest at the commercial paper rate."

4. The last sentence of the sixth bullet point of Ordering Paragraph 2, which is the fourth bullet point on page 40 of D.99-10-057 is modified to read: "Refunds shall accrue interest at the commercial paper rate."

5. In all other respects, the application for rehearing of D.99-10-057 as modified herein filed by Pacific Gas and Electric Company is denied.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
LORETTA M. LYNCH
Commissioners