BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Rulemaking regarding whether, or subject to what Conditions, the suspension of Direct Access may be lifted consistent with Assembly Bill IX and Decision 01-09-060.	R.07-05-025 (Filed May 24, 2007)

OPPOSITION OF THE CITY AND COUNTY OF SAN FRANCISCO TO THE APPLICATION FOR REHEARING OF DECISION 11-12-018 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY AND PACIFIC GAS AND ELECTRIC COMPANY

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I. INTRODUCTION

In Decision 11-12-018 Adopting Direct Access Reforms ("Decision"), the California Public Utilities Commission ("Commission") adopted rules applicable to Direct Access ("DA") service to address changes that have occurred in the industry and regulatory environment since the Commission last addressed these issues in 2006. One of the matters addressed in the Decision concerns the applicable "re-entry" fees for "en masse involuntarily returned" DA customers. (Decision at 3.)

In their Application for Rehearing, Southern California Edison Company ("SCE") and Pacific Gas and Electric Company ("PG&E") ("Application") assert that the Commission erroneously concluded that Electric Service Providers ("ESPs") need not pay or post a bond under Public Utilities Code § 394.25(e), for the incremental procurement costs resulting from involuntarily returned DA customers.

The standard for granting rehearing is clear. The applicant must show that the Commission committed "legal error." In their Application, SCE and PG&E fail to make such a showing. For this reason, the Commission should deny the Application.

II. THE LEGAL STANDARD FOR AN APPLICATION FOR REHEARING

Under Commission Rule of Practice and Procedure 16.1(c), an application for rehearing must "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous" and must demonstrate that the Commission committed "legal error, so that the Commission may correct it expeditiously." The claimed error here concerns the Commission"s construction of a statute. Relevant case law concerning court review of a State agency"s construction of a statute demonstrates that the Applicant"s burden here is a difficult one.

The Commission is the State agency charged with the implementing § 394.25(e). It is well-settled under California law that "the contemporaneous administrative construction of [an]

enactment by those charged with its enforcement . . . is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921; see also *Burlington Northern and Santa Fe Ry. Co v. Pub. Util. Comm.* (2003) 112 Cal.App.4th 881, 889.) If an agency has "reasonably interpreted" a statute a court must uphold it. (*Engs Motor Truck Co. v. State Bd. of Equalization* (1987) 189 Cal.App.3d 1458, 1466.) A court will "not to assess the wisdom" of the agency"s interpretation. (*Id.*)

III. IN THEIR APPLICATION, SCE & PG&E FAIL TO SHOW THAT THE COMMISSION COMMITTED "LEGAL ERROR" BECAUSE THE COMMISSION HAS "REASONABLY INTERPRETED" SECTION 393.25(e)

In their Application, SCE and PG&E argue that under the "plain and unambiguous" language of § 394.25(e) ESPs must indemnify DA customers for all costs arising from the "ESP"s forced (or involuntary) reentry of DA customers to utility procurement services." (Application at 3.) According to SCE and PG&E, in the Decision the Commission ignored the "vast majority of reentry fees" by "carv[ing] out of its definition of „re-entry fees" all incremental procurement costs for large DA customers and small DA customers affiliated with those large customers." (Application at 4.)

Section 394.25(e) provides in part:

> If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, any reentry fee imposed on that customer that the commission deems is necessary to avoid imposing costs on other customers of the electrical corporation shall be the obligation of the electric service provider or a community choice aggregator, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer"s contract has expired.

In their proposed construction of § 394.25(e), SCE and PG&E ignore an important aspect of the statute"s clear language. The statute grants the Commission broad discretion to determine what "reentry fee" the Commission "deems is necessary." The Legislature easily could have defined the term "reentry fee" and included within that definition all of the fees the Legislature

deemed would be necessary. Instead, the Legislature left that issue to be determined by the Commission. Moreover, the Legislature"s concern was to protect "other customers of the electrical corporation" – not the DA and community choice aggregator customers that are involuntarily returned.

Nothing in § 394.25(e), therefore, requires the Commission to define the term "reentry fee" to include the returning utility"s incremental procurement costs. The Commission acknowledged that incremental procurement costs could occur, but in the case of large DA customers, opted to require that these costs be recovered by the returning utility through the utility"s Temporary Bundled Service ("TBS") rate. (Decision at 66-67.) It was in the Commission"s discretion to define the term "reentry fee" in this manner because, as the Commission correctly notes, it would be consistent with the purpose of § 394.25(e), which is to "prevent[] shifting costs to bundled customers." (Decision at 67.) The Commission has adequately protected those customers by requiring large DA customers to pay the TBS rate upon returning to bundled customer service and by requiring ESPs to cover the "administrative costs of switching the customers back to bundled service." (Decision at 66-68.)

IV. CONCLUSION

Based on the foregoing, the Commission should deny SCE"s and PG&E"s application for rehearing.

Dated: January 23, 2012

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