

157 FERC ¶ 61,056  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

San Diego Gas & Electric Company

Docket No. EL15-103-001

ORDER DENYING REHEARING

(Issued October 26, 2016)

1. San Diego Gas & Electric Company (SDG&E) seeks rehearing of the Commission's March 2, 2016 order, which limited SDG&E's authority to recover 100 percent of all prudently-incurred development and construction costs associated with its South Orange County Reliability Enhancement (SOCRE) project if abandoned or cancelled, in whole or in part, for reasons beyond SDG&E's control (Abandonment Incentive) to costs incurred on or after the date of that order.<sup>1</sup> Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SoCal Edison) also seek rehearing of the March 2 Order. In this order, we deny the rehearing requests.

**I. Background**

2. On September 23, 2015, SDG&E filed a petition for declaratory order seeking authorization to recover 100 percent of all prudently-incurred development and construction costs associated with the SOCRE project if abandoned or cancelled, in whole or in part, for reasons beyond SDG&E's control.<sup>2</sup>

3. In the March 2 Order, the Commission granted SDG&E's request for the Abandonment Incentive for the SOCRE project, but it specified that the Abandonment Incentive is available for 100 percent of prudently-incurred costs expended on or after the date of the March 2 Order. The Commission determined that for the period prior to

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<sup>1</sup> *San Diego Gas & Electric Company*, 154 FERC ¶ 61,158 (2016) (March 2 Order).

<sup>2</sup> SDG&E September 23, 2015 Petition for Declaratory Order (SDG&E Petition).

March 2, 2016, SDG&E is entitled to recover 50 percent of all costs prudently incurred if the SOCRE project is abandoned, consistent with prior precedent.<sup>3</sup>

4. The Commission explained that Order No. 679<sup>4</sup> requires applicants to show “some nexus between the incentives being requested and the investments being made, i.e., to demonstrate that the incentives are rationally related with the investments being proposed.”<sup>5</sup> The Commission noted that SDG&E did not seek approval for the Abandonment Incentive for approximately four years, that SDG&E had incurred approximately \$31 million to develop the SOCRE project over that time, and that SDG&E did so without assurance of cost recovery for these development costs. The Commission concluded that to grant full recovery of these costs pursuant to the Abandonment Incentive would also be contrary to the general policy rationale that incentives are designed to encourage future transmission investments.<sup>6</sup>

## II. Rehearing Requests

5. SDG&E argues in its rehearing request that the denial of the Abandonment Incentive for the period prior to March 2, 2016 exceeds the Commission’s authority under Order No. 679 and the Commission’s regulations in at least three respects. First, SDG&E argues that because the March 2 Order confirms that the SOCRE project satisfies the applicable tests, the Commission has no authority to deny or modify SDG&E’s right (subject to the future section 205 filing) to recover 100 percent of prudently incurred development and construction costs associated with the project from its inception.<sup>7</sup> According to SDG&E, the Commission’s regulations do not authorize any

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<sup>3</sup> March 2 Order, 154 FERC ¶ 61,158 at P 18 (citing, *inter alia*, *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,156, at P 54 (2013); *New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, *order on reh’g*, Opinion No. 295-A, 43 FERC ¶ 61,285 (1988).

<sup>4</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007).

<sup>5</sup> March 2 Order, 154 FERC ¶ 61,158 at P 19 (quoting Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 48).

<sup>6</sup> *Id.* P 20 (citing *Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168, at 61,589 (1992) (noting that “[i]ncentive regulation is not designed to reward past efficient, cost-saving behavior.”)).

<sup>7</sup> SDG&E Rehearing Request at 3.

reduction in the percentage of abandoned plant cost recovery or limitation of the time period in which plant-associated costs were incurred.<sup>8</sup>

6. Second, SDG&E asserts that Order No. 679 and the Commission's regulations do not require a utility to request a declaratory order establishing its eligibility for transmission incentive and the Commission lacks authority to impose such a condition. According to SDG&E, the Commission's denial of the Abandonment Incentive for costs incurred prior to March 2, 2016 exalts a procedural option into a procedural necessity and penalizes SDG&E for incurring expenditures before requesting a declaratory order.<sup>9</sup>

7. Third, SDG&E takes issue with the Commission's finding that "to grant full recovery" of abandoned plant costs incurred from the SOCRE project's inception "would be contrary to the general policy rationale that incentives are designed to encourage future transmission investments."<sup>10</sup> SDG&E contends this vague, case-specific "needs" test goes beyond the requirements of Order No. 679. According to SDG&E, it constitutes a backward-looking variant of the "but for" test which the Commission rejected in Order No. 679, in that it implies that if project development is forecast to occur or has actually commenced, it would demonstrate that the incentives were not needed.<sup>11</sup>

8. In addition to these three arguments, SDG&E also maintains that the March 2 Order errs by departing from the Commission's settled practice when approving the Abandonment Incentive of allowing recovery of 100 percent of prudently incurred costs associated with the development and construction of a transmission facility from its inception. PG&E and SoCal Edison also argue that the Commission's action is inconsistent with Commission precedent.<sup>12</sup>

### **III. Discussion**

9. We deny rehearing. While the March 2 Order stated that "SDG&E has met the rebuttable presumption that the SOCRE project is eligible for the Abandonment Incentive and may recover 100 percent of prudently incurred costs associated with the project if the

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<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 9-11.

<sup>10</sup> *Id.* at 13-14 (quoting March 2 Order, 154 FERC ¶ 61,158 at P 20).

<sup>11</sup> *Id.* at 15.

<sup>12</sup> PG&E and SoCal Edison Rehearing Request at 2-5.

SOCRE project is abandoned for reasons beyond SDG&E's control,"<sup>13</sup> this statement must be read in conjunction with the Commission's precedent regarding the timing of recovery of abandoned plant costs. That precedent supports the finding in the March 2 Order that SDG&E could not recover more than 50 percent of prudently incurred abandonment costs from before the date of the order.

10. It is Commission policy that a public utility may only recover up to 50 percent of prudently incurred abandonment costs for costs that are incurred before the date of the order granting the incentives. While SDG&E refers to this precedent as "outlier cases,"<sup>14</sup> they are in fact the only cases that speak in some way to the issue of retroactive application of an Abandonment Incentive under Order No. 679. We focus here on *PJM Interconnection II*, as it speaks to the issue most directly. In this case, the public utility applicant sought incentives, including an Abandonment Incentive, in a section 205 rate filing, which the Commission accepted. In this case, the Abandonment Incentive was invoked, and the Commission granted 100 percent of prudently incurred project costs from the effective date of the section 205 orders.

11. SDG&E argues that these cases are not applicable here because in each case, the applicant had proposed a prospective effective date for its incentive rates, which the Commission accepted, and "[t]he fact that the Abandonment Incentive became effective on the day after issuance of the incentive authorization orders was a fortuity dictated by the 60-day review requirement" under FPA section 205.<sup>15</sup> *PJM Interconnection II*, however, shows that the Commission's action was not a matter of fortuity but rather of reasoned policy.

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<sup>13</sup> March 2 Order, 154 FERC ¶ 61,158 at P 16. As explained in the March 2 Order, the rebuttable presumption is met if: (1) the transmission project results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable by the Commission; or (2) a project has received construction approval from an appropriate state commission or state siting authority. In addition, an applicant must demonstrate that there is a nexus between the incentive sought and the investment being made. *See id.* P 15.

<sup>14</sup> *Id.* at 17. The cases in question are *DCR Transmission, LLC*, 153 FERC ¶ 61,295 (2015), *PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,197 (2012) (*PJM Interconnection I*), and *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,156 (2013) (*PJM Interconnection II*).

<sup>15</sup> SDG&E Rehearing Request at 18.

12. In *PJM Interconnection II*, the applicant sought 100 of the costs of an abandoned project for the period prior to the effective date of its section 205 order, citing a pre-Order No. 679 Commission decision that had granted such recovery.<sup>16</sup> That order had authorized 100 percent cost recovery as an exception to the Commission's policy under Opinion No. 295 of 50/50 cost sharing between the project developer and ratepayers.<sup>17</sup> The Commission stated in *PJM Interconnection II* that both Order No. 679 and the pre-Order No. 679 order at issue "made clear that such recovery would be atypical," and "the timing of the request" being made "requires us to deny recovery of retroactive abandonment costs, greater than 50 percent, pursuant to Opinion No. 295."<sup>18</sup> In short, *PJM Interconnection II* treats the date of an order issued under Order No. 679 as the dividing line between an Abandonment Incentive under Order No. 679, which applies prospectively from the date of the order, and Commission cost-sharing policy under Opinion No. 295. SDG&E's interpretation would eliminate this line, which would result in Order No. 679 policy entirely displacing Opinion No. 295. Nothing in any of these Commission orders suggests this result.

13. When the Commission limited SDG&E's Abandonment Incentive to 100 percent of prudently-incurred costs expended on or after the date of the March 2 Order, it also determined that for the period prior to the date of the March 2 Order, SDG&E is entitled to recover 50 percent of all costs prudently incurred if the SOCRE project is abandoned, consistent with Opinion No. 295.<sup>19</sup> The cases that the Commission cited point to instances where it had used the date of an order to separate the period for which an applicant was entitled to the full Abandonment Incentive authorized under FPA section 219 and 50 percent recovery under Opinion No. 295 cost sharing policy.<sup>20</sup> The cases are thus not "outliers." They are directly relevant to the issue presented here.

14. The March 2 Order explains why the distinction between costs incurred before and after Abandonment Incentive eligibility is determined is appropriate as a policy matter:

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<sup>16</sup> *PJM Interconnection II*, 142 FERC ¶ 61,156 at P 48 (citing *Southern California Edison Co.*, 112 FERC 61,014 (2005) (*SoCal Edison*)).

<sup>17</sup> See *SoCal Edison*, 112 FERC 61,014 at PP 57-61.

<sup>18</sup> *PJM Interconnection II*, 142 FERC ¶ 61,156 at P 54.

<sup>19</sup> March 2 Order, 154 FERC ¶ 61,158 at P 18.

<sup>20</sup> See, e.g., *PJM Interconnection II*, 142 FERC ¶ 61,156 at PP 52-55.

[t]hrough the risks that may necessitate abandonment have been generally known to SDG&E since the project was included in the [California Independent System Operator's] 2010-2011 Transmission Plan, it did not seek approval for the Abandonment Incentive for approximately four years. Meanwhile, SDG&E incurred approximately \$31 million "to develop a [p]roject that had the greatest likelihood of satisfying the reliability requirements of SDG&E's customers in southern Orange County." Yet, SDG&E concedes that it did so "without assurance of cost recovery for these development costs." To now grant full recovery of these costs pursuant to the Abandonment Incentive would also be contrary to *the general policy rationale that incentives are designed to encourage future transmission investments.*<sup>21</sup>

15. The function of an incentive is to encourage action that has not yet occurred. The various standard dictionary definitions of "incentive" all acknowledge this function. Thus "incentive" is defined as "something that encourages a person to do something or to work harder,"<sup>22</sup> "[s]omething, such as the fear of punishment or the expectation of reward, that induces action or motivates effort,"<sup>23</sup> "something that incites or tends to incite to action or greater effort, as a reward offered for increased productivity,"<sup>24</sup> or "something that encourages a person to do something."<sup>25</sup> Incentives thus are viewed as causes of conduct. They are not necessarily "but-for" causes, as they do not cease to be incentives if other reasons for the action in question also exist or if other reasons are decisive in motivating action in particular cases. The concept of an "added incentive," which spurs or accelerates actions that may eventually have occurred without it, is a familiar one, and it is consistent with the essentially causal function of incentives. The concept is fully consistent with the definitions set for above. To "encourage," to "motivate effort," or to "tend to incite" implies that to refer to something as an incentive does not mean that the action it promotes would not have occurred without it.

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<sup>21</sup> March 2 Order, 154 FERC ¶ 61,158 at P 20 (emphasis supplied) (internal citations omitted).

<sup>22</sup> <http://www.merriam-webster.com/dictionary/incentive>.

<sup>23</sup> <http://www.thefreedictionary.com/incentive>.

<sup>24</sup> <http://www.dictionary.com/browse/incentive>.

<sup>25</sup> <http://dictionary.cambridge.org/us/dictionary/english/incentive>.

16. The motivating function of incentives illuminates an important aspect of the Order No. 679 nexus test. The Commission stated in the March 2 Order that

[i]n explicitly rejecting the “but for” test in Order No. 679, the Commission noted, “[t]his notwithstanding, we do require applicants to show some nexus between the incentives being requested and the investments being made, i.e., to demonstrate that the incentives are rationally related with the investments being proposed.”<sup>26</sup>

17. To say that incentives are rationally related to investments is to say that they are a means to the end in question, i.e., to the investment.<sup>27</sup> Thus when SDG&E incurred approximately \$31 million in development costs over an approximately four-year period and conceded that it did so “without assurance of cost recovery for these development costs,”<sup>28</sup> it conceded that the Abandonment Incentive it seeks here is not rationally related to those previously incurred costs; the incentive does not serve as a means to that end.

18. We thus disagree that the March 2 Order improperly applies a case-specific “needs” test to SDG&E’s requests. SDG&E describes this test as a “graduated evaluation of which incentives and how much of those incentives are needed to ‘encourage’ the particular transmission investments.”<sup>29</sup> What SDG&E refers to as need is simply the rational relationship that must be shown to exist between the incentives requested and the investments being proposed.

19. We reject SDG&E’s contention that there is no substantial evidence to support the conclusion that the Abandonment Incentive was not needed to encourage SDG&E to make the investment in question. “Substantial evidence means ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>30</sup> We think it is

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<sup>26</sup> March 2 Order, 154 FERC ¶ 61,158 at P 19 (quoting Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 48).

<sup>27</sup> See, e.g., *U.S. v. Comstock*, 560 U.S. 126, 134 (2010) (describing the concept of a rational relationship in terms of means-ends rationality).

<sup>28</sup> SDG&E Petition at 16.

<sup>29</sup> SDG&E Rehearing Request at 14.

<sup>30</sup> *New York Independent System Operator, Inc.*, 135 FERC ¶ 61,170, at P 86 (2011) (quoting *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. of New York v. National Labor Relations*

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reasonable to conclude that if SDG&E in fact spent \$31 million in development costs over an approximately four-year period, a significant amount of money over a significant time period, an Abandonment Incentive was not needed to encourage that investment, i.e., the required rational relationship does not exist. We likewise reject SDG&E's alternative argument that it may reasonably have expected to be eligible for the Abandonment Incentive based on the directives in FPA section 219 and the Commission's regulations and that reliance on an expectation of being eligible for an Abandonment Incentive is a factor in encouraging it to incur risky development expenditures. An expectation that one could receive an incentive if one sought it does not constitute an incentive under FPA section 219 and the Commission's regulations. Incentives pursuant to section 219 must be granted through Commission action, and they do not include expectations of eligibility for incentives that the Commission ratifies after the fact. As noted above, Commission precedent makes clear that obtaining full cost recovery for abandoned plant for the period preceding the issuance of an order on cost recovery will be "atypical."<sup>31</sup> There is no basis to conclude that SDG&E's filing qualifies for such atypical treatment.

20. Moving on to the procedural issue that SDG&E raises, we find no merit in SDG&E's argument that the March 2 Order establishes a declaratory order as a procedural prerequisite to recovery of costs under the Abandonment Incentive. The Commission stated in Order No. 679 that a declaratory order

is valuable for an applicant to obtain an order *indicating it qualifies* for incentive-based rates prior to making a formal section 205 filing and prior to commencing siting, permitting and construction activities *because such orders facilitate financing and investment in new facilities*. To provide applicants with as much flexibility as possible, the Commission will permit applicants to seek a declaratory order prior to construction of the facilities to request a finding that the facilities qualify for incentive-based rate treatments.<sup>32</sup>

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*Bd.*, 305 U.S. 197, 229 (1938)).

<sup>31</sup> *PJM Interconnection II*, 142 FERC ¶ 61,156 at PP 54.

<sup>32</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 77 (emphasis supplied). This language points out the fallacy in SDG&E's argument that the Commission erred in the March 2 Order when it stated that "the option of filing a petition for declaratory order was intended to provide the applicant . . . with notification of incentive development before project *development* began." See March 2 Order, 154 FERC ¶ 61,158 at P 19 (emphasis supplied). SDG&E notes that Order No. 679 states at P 77 that "the Commission will permit applicants to seek a declaratory order prior to *construction* of the

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21. To describe the declaratory order process as optional does not make its central purpose, the facilitation of financing and investment, irrelevant. We thus disagree with SDG&E that treating a declaratory order as a means to an end “vitiates the flexibility accorded the utility-applicant as to timing and procedural path.”<sup>33</sup> The flexibility at issue consists of expanding the possibility of financing and investment by increasing investor confidence early in the process. This increase in confidence results from providing notification of eligibility for incentives that, from the investor’s perspective, reduce investment risk. This flexibility cannot be viewed as creating an entitlement to any incentive sought by an applicant at any time or as authorizing incentives for substantial financing and investment that has already occurred.

22. SDG&E maintains that the Commission’s regulations “do not require a utility to request transmission incentives before significant expenditures are incurred.”<sup>34</sup> But SDG&E understates the importance of the Order No. 679 nexus test, as discussed above, as well as the Commission’s “general policy rationale that incentives are designed to encourage future transmission investments.”<sup>35</sup> Thus, while the Commission’s regulations do not explicitly require a utility to request an Abandonment Incentive before significant expenditures are incurred, it is reasonable to infer such a requirement, as incentives cease to be incentives if the action they are intended to promote has already occurred. The Commission has not penalized SDG&E for incurring expenses before seeking an

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facilities to request a finding that the facilities qualify for incentive-based rate treatments” (emphasis supplied). SDG&E states that development and construction are two different things, and SDG&E has not commenced construction of the SCORE project, making the timing of its petition consistent with Order No. 679’s discussion of the declaratory order process. SDG&E Rehearing Request at 9. However, the language quoted in the text accompanying this footnote recognizes that declaratory order can also be a means of facilitating siting and permitting activities, i.e., activities that are part of the development process. Moreover, the Commission granted SDG&E’s requested abandonment incentive going forward from the date of the March 2 Order; that action demonstrates that a petition for declaratory order at even this later phase of development can have value to an applicant, though not the value to which SDG&E claims it is entitled. The Commission’s statement in the March 2 Order regarding seeking a declaratory order before the development process begins is thus consistent with the language of Order No. 679.

<sup>33</sup> SDG&E Rehearing Request at 11.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> March 2 Order, 154 FERC ¶ 61,158 at P 20.

incentive to incur them, as SDG&E claims.<sup>36</sup> To characterize the Commission's action as a penalty fails to recognize the general policy rationale that incentives are designed to encourage future transmission investments.

23. Further, we disagree that our action in the March 2 Order represents a departure from settled Commission practice. SDG&E cites to 40 Commission incentive orders and states that in all but three of these orders the Commission authorized the Abandonment Incentive without limiting prudently incurred to those incurred after the date of the order.<sup>37</sup> However, the thirty-seven orders without a limitation simply make the applicant eligible to recover 100 percent of prudently incurred costs, with a requirement that the justness and reasonableness of recovery be demonstrated in a subsequent filing under FPA section 205. The question of whether such incentive would apply to costs incurred prior to the date of the order was not presented, nor did the Commission address that issue, in any of those cases.

24. This point applies equally to the arguments by SDG&E, PG&E and SoCal Edison that our decision in the March 2 Order is inconsistent with *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009 (2016) (*NEET West*). SDG&E, PG&E, and SoCal Edison argue that *NEET West* supports their position because in that order the Commission authorized recovery of 100 percent of prudently incurred costs in the event the project in question must be abandoned, including costs that were incurred prior to the date of the application for the incentive. However, while the applicant in *NEET West* sought an Abandonment Incentive that covers costs incurred prior to the date of its application, the Commission made no express determinations regarding the effective date when granting the incentive. As a result of this silence, *NEET West* stands apart from both the cases discussed above in which full cost recovery for abandoned plant was not approved for the period preceding the issuance of the order, as well as the many cases where the matter was not broached at all. In particular, the Commission's silence on the issue in *NEET West* cannot be read as overruling the express determinations regarding effective dates that it made in the former group of cases.<sup>38</sup>

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<sup>36</sup> SDG&E Rehearing Request at 10.

<sup>37</sup> *Id.* at 16 and Attachment A.

<sup>38</sup> *Nevada Power Co.*, 113 FERC ¶ 61,007, at 61,013-14 (2005) (refusing to treat a rate calculation from a prior tariff as precedent because "the issue was not raised, and the Commission did not discuss it or rule on it"); *Transwestern Pipeline Co.*, 36 FERC ¶ 61,175, at 61,438 (1986) (finding that the Commission is not bound by everything in an application that it did not specifically reject); *Northwest Pipeline Co.*, Opinion No. 213-A, 27 FERC ¶ 61,339, at 61,657 (1984) (same). See also *Webster v. Fall*, 266

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25. Finally, we reject PG&E and SoCal Edison's argument that the March 2 Order is inconsistent with the Commission's determination in Order No. 679 that Commission regulations under FPA section 219 would apply to costs incurred during the period between August 8, 2005, the effective date of FPA section 219, and August 8, 2006, the effective date of the regulations.<sup>39</sup> This determination applies to unique circumstances of the 12-month period between the date on which section 219 went into effect and the effective date of the regulations mandated in that provision. This period is substantially different in substance as well as substantially less than the more than four years at issue in SDG&E's case, when SDG&E was making investments without Commission authorization for a 100 percent abandoned plant incentive. Congress's directive that the Commission issue regulations within one year of enactment of [the Energy Policy Act of 2005] shows that Congress intended for the Commission to take steps to bring new transmission on line expeditiously, and the Commission determination in question serves that purpose in a situation that will not reoccur.<sup>40</sup> Moreover, as in all other cases, recovery of costs incurred between August 8, 2005 and August 8, 2006 is subject to Commission review under FPA section 205.<sup>41</sup>

The Commission orders:

The requests for rehearing are denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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U.S. 507, 511 (1925) (stating that “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents”).

<sup>39</sup> See PG&E and SoCal Edison Rehearing Request at 6 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 34).

<sup>40</sup> See Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 35.

<sup>41</sup> *Id.* P 34.