

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking on the)
Commission's Own Motion to Develop)
Standard Rules and Procedures for)
Regulated Water and Sewer Utilities) R.09-04-012
Governing Affiliate Transactions and the) (Filed April 16, 2009)
Use of Regulated Assets for Non-Tariffed)
Utility Services (formerly called Excess)
Capacity.))
_____)

**RESPONSE OF CALIFORNIA WATER ASSOCIATION
TO THE REQUEST OF THE CONSUMER FEDERATION OF CALIFORNIA
FOR AN AWARD OF COMPENSATION**

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January 18, 2011

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TO THE REQUEST OF THE CONSUMER FEDERATION OF CALIFORNIA
FOR AN AWARD OF COMPENSATION**

Pursuant to Rule 17.4(g) of the Commission’s Rules of Practice and Procedure, California Water Association (“CWA”) hereby files its response to the “Request of the Consumer Federation of California for an Award of Compensation For Its Substantial Contribution to D.10-10-019,” originally filed on December 9, 2010. On December 16, 2010 the Consumer Federation of California (hereinafter, “CFC”) filed a “reformed copy of the request for compensation . . . [as] required by the docket office . . . to add issues to the attached time sheet in accordance with Rule 17.4(b)(3,4) . . .”¹ After consulting with the Assistant Chief Administrative Law Judge who advises the Docket Office, CWA was informed that it could file its response to CFC’s Request for Compensation within 30 days of December 16, 2010. Thus, this response is timely filed.

For the reasons discussed in this response, CWA opposes CFC’s request for intervener compensation pursuant to Public Utilities Code §§ 1801, *et seq.* Specifically joining in this response to CFC’s request for compensation are the following Class A and

¹ See, December 16, 2010 electronic mail message from counsel for CFC to the parties in this proceeding transmitting a copy of the reformed Request for Compensation.

Class B water utility members of CWA: California American Water Company, California Water Service Company, Golden State Water Company, Park Water Company, Apple Valley Ranchos Water Company, San Gabriel Valley Water Company, San Jose Water Company, Suburban Water Systems, Valencia Water Company, Alisal Water Corporation (dba Alco Water Service), Del Oro Water Company, and East Pasadena Water Company.

I. INTRODUCTION

Among several procedural and substantive requirements for qualifying for an award of compensation, the primary one is that the intervener in the proceeding must have made “a substantial contribution to the adoption, in whole or in part, of the Commission’s order or decision.” P.U. Code §1803(a). The term “substantial contribution” is defined as:

“. . . in the judgment of the commission, the [intervener’s] presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the [intervener].” *Id.*, §1802(i).

In this proceeding, CFC made no such substantial contribution to the Commission’s final order. To the contrary, CFC’s participation was of no help to the ultimate outcome of this proceeding, and the ill-informed, disagreeable, doctrinaire, anti-utility approach it took served as a deterrent to successfully adopting balanced, reasonable rules for affiliate transactions and non-tariffed products and services. In addition to being a deterrent to an expeditious (and equitable) decision, CFC’s participation required additional resources and expenditures to be made by the other parties in the proceeding, thereby raising the utilities’ and customers’ costs.

From its opening words in its initial comments on the Order Instituting Rulemaking in this case – “It is very easy for a holding company to slip some of its costs, either directly or indirectly, into the utilities’ financial statements, particularly when the utility is permitted to do business with its affiliates”² – CFC revealed its preconceived belief that utilities and their holding companies were evil, could not be trusted, and were only concerned with making a profit at the expense of ratepayers. For a proceeding that relied heavily on workshops, where parties could discuss their positions and attempt collaboratively to reach common ground on important and difficult issues, CFC’s prejudices and unwillingness to compromise were of no help at all.

CFC also revealed how out of touch it was by urging that the first step in this proceeding “should be to examine the practices of the holding companies which led, in part, to the Great Depression in 1929 to better understand the purposes the affiliate transaction rules serve.”³ CFC then proceeded to quote extensively from a U.S. Department of Energy publication on the Public Utilities Holding Company Act of 1935, discuss the Securities and Exchange Commission’s review of holding companies in the 1920s and 1930s, and then attempt to relate those 80 year-old events to the 21st century, ignoring along the way that the Public Utilities Holding Company Act had been repealed in 2006 and that water utilities were never subject to it in the first place.

² “Comments of the Consumer Federation of California on the Development of Standard Rules for Water Companies’ Affiliate Transactions and Non-Tariffed Services,” dated July 16, 2009, at 3. The opening words of CFC’s reply to opening prehearing conference statements were: “The first question to ask when reviewing the water utilities’ Prehearing Conference . . . Statements is ‘Who wrote it?’ Was it the holding company with an interest in taking as big a profit from the water utility as possible? Or was it the water utility with an interest in serving its customers reliably and safely?” “Reply PHC Statement of the Consumer Federation of California on the Development of Standard Rules for Water Companies’ Affiliate Transactions and Non-Tariffed Services,” dated August 20, 2009, at 1.

³ “Comments of the Consumer Federation of California on the Development of Standard Rules for Water Companies’ Affiliate Transactions and Non-Tariffed Services,” dated July 16, 2009, at 9.

Putting aside CFC's misguided approach to this proceeding, the bottom line is that the Commission did not adopt any factual contentions, legal contentions, or specific policy or procedural recommendations presented by CFC. Thus, CFC made no substantial contribution to the Commission's decision adopting the water utility affiliate transaction rules and the non-tariffed products and services ("NTP&S") rules. The most CFC did was to generally support the affiliate transaction and NTP&S rules that were appended to the OIR, and the later rules proposed by Commission staff in December 2009. CFC proposed no factual or legal contentions of its own nor any new policy or procedural recommendations that the Commission ultimately adopted. Simply supporting policies and procedures that the Commission or others have advanced does not qualify as a substantial contribution.

CWA also objects to CFC's request for compensation because it does not understand the request, both in terms of the tasks performed and their relation to the issues addressed.

These CWA objections to CFC's request for compensation are discussed in greater detail below.

II. DISCUSSION

A. CFC's Claims of Substantial Contributions Are Unfounded.

In its request for compensation, CFC asserts that "comments by CFC were recognized and the Commission adopted positions advocated by CFC . . ." CFC then provides a seven-page table that compares statements made by CFC in the course of this proceeding with passages from the Commission decision in an attempt to show that its comments and positions were "adopted" by the Commission. However, a close look at

the comparisons provided by CFC shows that the positions adopted by the Commission in the final decision were positions already existing in the draft affiliate rules appended to the OIR or the draft rules proposed by Commission staff in December 2009, as those rules were later (and substantially) revised by the parties during the workshop process. These were not “CFC positions” that the Commission adopted. The following discussion of some of CFC’s claims demonstrates this point:

The issue of “**Need for Regulation: Avoid Subsidies**” on page 5 of CFC’s request shows CFC’s comment that “[t]here are significant consequences if utilities are permitted to engage in unregulated transactions with affiliates.” The corresponding Commission language for which CFC claims credit – “[e]nsuring reasonable rates requires that the relationship between the utility and its affiliates be transparent, and that the regulated revenue requirement is not the source of funding for competitive or unregulated ventures”; and “[e]nsuring utility financial integrity are traditional objectives which provide the balancing act of utility regulation” – does not constitute concepts that CFC introduced in this proceeding. These concepts constituted – as the Commission said – traditional objectives and concepts that were at the heart of the OIR in the first place. CFC cannot claim credit for them.

The issue of “**Need for Rules**” on page 6 of CFC’s request shows CFC’s comment that “Cal Water . . . argues . . . existing state and federal antitrust laws . . . and their enforcement mechanisms are plainly adequate to protect consumers and competitors without Commission action. CFC disagrees” and “CFC agrees with Commissioner Bohn that both rules and revisions are necessary. Customers need the Commission’s protection from the excessive rates which arise out of utilities’ transactions with affiliated

companies.” The corresponding Commission language for which CFC claims credit – noting that CWA contends the draft affiliate rules in the Workshop Report are unnecessary, inappropriate, unwarranted and unduly burdensome, and the Commission’s observation that these “objectives are consistent with the Commission’s goals stated in the OIR . . .” – does not constitute concepts that CFC introduced in this proceeding. First, CFC quotes Cal Water out of context. Cal Water did not argue that the antitrust laws obviated the need for all affiliate rules. Rather, Cal Water contended that the antitrust laws obviated the need for the affiliate rules that addressed issues of unfair competition.⁴ CFC also quotes the Commission out of context. CWA did not contend that no affiliate rules were needed. CWA simply objected to the rules proposed by Commission staff in December 2009, rules that were modeled after the large energy utility affiliate rules. CWA expressed its preference on a number of occasions for the affiliate rules that were appended to the OIR.⁵ In addition, CFC’s comments that it “agrees with Commissioner Bohn” and the Commission’s language that these “objectives are consistent with the Commission’s goals stated in the OIR” shows that the need for affiliate rules had already been stated and advocated by Commissioner Bohn in the OIR, well before CFC’s first statements in this proceeding. The need for affiliate rules is not a position for which CFC can claim credit.

⁴ See, letter dated January 26, 2010 from counsel for Cal Water commenting on the staff-drafted affiliate transaction rules, at 1 (“[u]nlike the context in which energy rules were developed, there is no potential with water and sewer utilities for them to compete directly with others in the provision of tariffed services. Thus, there is no need for rules . . . to enable and protect such competition. To the extent that water utilities engage in non-tariffed products and services, they are subject to state and federal antitrust laws just like other companies.”) See, also, “California Water Service Company’s Comments on Workshop Report and On Issues Within Scoping Ruling,” dated May 7, 2010, at 4-5.

⁵ See, letter dated January 26, 2010 from counsel for CWA commenting on the staff-drafted affiliate transactions rules, at 1 (“CWA also has attached a copy of the draft ATRs and the draft non-tariffed products and services (“NTP&S”) rules [that were appended to the OIR] . . . CWA and its member utilities strongly believe these . . . draft rules offer a much more realistic and reasonable starting point [than the staff-drafted rules] for addressing [affiliate transaction and NTP&S issues] . . .”

The issue of “**Need for Consistency in Rules**” on page 7 of CFC’s request shows CFC’s comment that cases “support the Commission’s belief that ‘consistent rules governing affiliate transactions and nontariffed utility products and services for all water and sewer utilities would provide appropriate Commission oversight . . .’” The corresponding Commission language for which CFC claims credit – addressing the need for “rules which are consistent across the industry and consistently applied to each utility [and that] will ensure transparency and help ensure reasonable rates” – does not constitute positions introduced by CFC in this proceeding. The need for consistency of rules was stated in the OIR and was also supported by CWA.⁶ It is not a position that can be attributed to CFC or for which CFC can claim credit.

The issue of “**New Affiliates**” on page 7 of CFC’s request shows CFC’s comment objecting to Rule VII.D and the provision that an advice letter may include a request that the affiliate rules not be applied to the new affiliate that is the subject of the advice letter. CFC comments that “[s]ome explanation of the standard to be applied by the Commission when an exemption is requested should be included in the rule so that the utility knows what it must prove and the public will know how the rule is being applied.” The corresponding Commission language for which CFC claims credit curiously retains Rule VII.D as it is and does not adopt CFC’s recommendation to include an explanation of the standard to be applied by the Commission. Here, the Commission clearly did not

⁶ See, “Prehearing Conference Statement of California Water Association with Responses to Questions and Scenarios In Order Instituting Rulemaking,” dated July 16, 2009, at 1-2 (“CWA agrees with the Commission that ‘consistent rules governing affiliate transactions and non-tariffed utility products and services for all water and sewer utilities would provide appropriate Commission oversight and protect ratepayers.’ [Citation omitted.] Thus, CWA is pleased to participate in this proceeding and to assist in the development and adoption of consistent rules governing both affiliate transactions and the provision of non-tariffed utility products and services.”)

adopt the position advocated by CFC, so clearly no contribution (substantial or otherwise) was made by CFC on this issue.

The issue of “**Energy Rules Compatible**” on page 8 of CFC’s request shows CFC’s recommendation that four rules applicable to the large energy utilities, relating to sharing of officers, joint marketing and purchasing, sharing of name and logo with affiliate, and prohibited offerings, should be included in the water utility affiliate rules. The corresponding Commission language for which CFC claims credit addresses only the general similarities between water and energy utilities, not the specific energy rules that CFC recommended for adoption in the water utility rules. In fact, the water utility affiliate rules adopted by the Commission do not include the energy affiliate rules prohibiting the sharing of officers, the sharing of a utility name and logo with an affiliate, or many of the prohibited offerings which are applicable to the large energy utility. Here again, the Commission clearly did not adopt the position advocated by CFC, so clearly no contribution (substantial or otherwise) was made by CFC on this issue.

The issue of “**Deletion of Existing Rules**” on page 9 of CFC’s request shows CFC’s comment that the “water utilities are attempting, by proposing deletion of existing rules, to nullify previous rulings of the Commission.” The corresponding Commission language for which CFC claims credit addresses this issue (of whether existing rules adopted in water utility holding company or transfer of control cases should be retained), but notes that the Commission “will modify the language from Staff Proposed Rules to include a rebuttable presumption that the rules adopted today apply.” The continued application of existing rules was not a position attributable to CFC. The continued application of existing rules was proposed, as the Commission noted, in the staff-

proposed rules. It was not “a policy or procedural recommendation presented” by CFC. The fact that CFC supported that rule does not constitute a substantial contribution to the final decision.

Virtually all of CFC’s claims of substantial contribution are similarly flawed, inaccurate or just plain wrong. On the issue of **Utility’s Proprietary Information** (page 9), CFC’s comments address the sharing of utility and customer information with affiliates and competitors, while the corresponding Commission language for which CFC claims credit addresses a completely different issue: the sharing by a utility of market analysis reports, including market, forecast, planning or strategic reports with the utility’s parent company. On the issue of **Cost Allocation** (page 9) CFC’s comments support cost allocation, but the corresponding Commission language for which CFC claims credit is a discussion of the Division of Ratepayer Advocates’ (“DRA”), not CFC’s, support of cost allocation. On the issue of **Ring-Fencing** (page 10) CFC’s comments support Rule VII.C as it was originally proposed by Commission staff. In the end, however, the final decision deleted the requirement for a legal non-consolidation opinion that Rule VII.C originally contained. On the issue of **Intra-Company Debt** (page 10), CFC’s comments address a completely different rule (inter-company loans) than the allegedly corresponding Commission language addresses (prohibition on the utility’s issuance, guarantee, or securing of parent or affiliate debt). Regarding the issues of **Availability of Witnesses, Audit of Transactions, and Annual Reports** (pages 11-12), none of these rules were rules that can be attributed to CFC. These rules were all a part of the staff-proposed rules that CFC merely supported. And finally, on the issue of **NTP&S Assets** (page 12), CFC’s comments recommend that “[a]ny unused capacity purchased to meet

customer demand or to satisfy regulations affecting its use, should either remain available to customers or removed from rate base.” The corresponding Commission language for which CFC claims credit addresses a completely different point: that the utility should not “hire and put into rates additional labor costs which are not necessary for the provision of regulated utility service.”⁷

In summary, none of CFC’s claims of substantial contribution to the Commission’s final decision in this proceeding can be substantiated. Thus, CFC’s request for an award of compensation should be denied.

B. CFC’s Detail on the Tasks Performed Appears Inaccurate.

CFC’s request for compensation includes an attachment that purports to itemize the services and expenses its counsel provided in this case. However, some of the detail contained in the attachment does not seem entirely right. The horizontal rows of the attachment show the date, the hours and the tasks performed, as well as an indication that such tasks related to specific issues that are set forth in the vertical columns. There are 56 separate issues set forth in the vertical columns, and check marks are placed in those columns where a specific task (in the horizontal rows) addressed a specific issue.

For many tasks performed on various dates a large number of issues are listed as having been addressed. Just one example is the entry for June 19, 2009 (row 8) where CFC’s counsel claims to have spent 7.4 hours to “[c]ontinue research, examine 10Ks of CalServGroup, Am Water, SW Water, and news stories about Valencia.” In connection with those tasks, CFC indicates that 36 issues were addressed, including the issues of applicability of rules to Class C and D utilities (Column F), competition (Column P),

⁷ D.10-10-019, *mimeo*, at 87. In the discussion of this subject, in Section 6.3.2 of the Decision, CFC is not even mentioned.

subsidies (R), transfer pricing (S), management focus (U), information sharing (W), sharing of offices and equipment (Z), sharing of officers and employees (AA), transfer of employees and secrets (AB), affiliate books and records (AI), annual report/compliance plan (AJ), goal of rules (AM), need for rules (AN), risk (AO), proof of benefits of NTP&S (AT), passive/active NTP&S (BA), NTP&S advice letter (BB), and laws and policies affected by NTP&S (BG). To CWA, this seems like an awful lot of issues to be attributed to the review of several companies' 10K reports, especially for issues such as the applicability of rules to Class C and D companies, the goal of and need for affiliate rules, and NTP&S advice letters, which are unlikely to be addressed in 10K reports.

Some of the time spent on various tasks also seems curious. For example, beginning on July 17, 2009 and continuing through August 20, 2009 (rows 17 through 25), CFC's counsel claims to have spent a total of 64 hours reviewing the opening comments (prehearing conference statements) of other parties and drafting reply comments to the other parties' opening comments. CFC reply comments were all of 24 pages long. By contrast, the entries for September 14 and 27, and October 3 and 4, 2010 (rows 46 through 49) indicate that CFC's counsel spent only a total of 22 hours reviewing Commissioner Bohn's proposed decision and drafting and finalizing CFC's comments on the PD, an arguably more important task than responding to other parties' prehearing conference statements. Similarly, on October 5, 7, 8, 9 and 11, 2010, (rows 50 through 54) CFC's counsel spent only a total of 24.1 hours reviewing other parties' opening comments on the PD and drafting CFC's reply comments on the PD. To CWA, the time spent on these different tasks seems incongruous and not quite right.

III. CONCLUSION

CWA believes that the foregoing discussion demonstrates that CFC did not make a substantial contribution to the Commission's final order adopting water and sewer utility affiliate transaction and non-tariffed products and services rules and that its detail on the tasks performed raises some questions about accuracy. Moreover, CFC's participation and comportment during the proceeding was a deterrent, not a help in reaching a final decision in this proceeding. Therefore, CWA urges the Commission to deny CFC's request for and award of compensation.

DATED: January 18, 2011

Respectfully submitted,

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I, Jeannie Wong, hereby certify that on this date I served the foregoing RESPONSE OF CALIFORNIA WATER ASSOCIATION TO THE REQUEST OF THE CONSUMER FEDERATION OF CALIFORNIA FOR AN AWARD OF COMPENSATION by electronic mail or hand delivery on the service list for Rulemaking 09-04-012:

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CALIFORNIA PUBLIC UTILITIES COMMISSION

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