

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

09-09-10
04:59 PM

Order Instituting Rulemaking on the)
Commission's Own Motion to Develop Rules)
and Procedures to Ensure That Investor-)
Owned Water Utilities Will Not Recover)
Unreasonable Return on Investments)
Financed by Contamination Proceeds,)
Including Damage Awards, and Public Loans)
Received Due to Water Supply Contamination.)
_____)

R.09-03-014
(Filed March 12, 2009)

**COMMENTS OF
CALIFORNIA WATER SERVICE COMPANY (U-60-W)
ON PROPOSED DECISION OF COMMISSIONER BOHN**

Filed: September 9, 2010

CALIFORNIA WATER SERVICE COMPANY

Thomas F. Smegal
Vice President

John Tootle
Corporate Counsel

1720 N. First Street
San Jose, CA 95112
Tel: (408) 367-8200

E-mail: tsmegal@calwater.com
jtootle@calwater.com

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Pursuant to Rule 14.3 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, and an extension of time granted by e-mail ruling of Administrative Law Judge (“ALJ”) Weatherford, on August 11, 2010, California Water Service Company (“Cal Water”) hereby submits its comments on the Proposed Decision of Commissioner Bohn (“Proposed Decision”) issued August 3, 2010, in the above-captioned rulemaking.

A. Summary of Comments

Cal Water agrees with the comments filed by the California Water Association (“CWA”). Cal Water respectfully submits these additional comments on the Proposed Decision to explain the adverse consequences that the Proposed Decision will have on future contamination litigation. Cal Water limits its comments on the Proposed Decision to Commission’s proposed policies and rules regulating contamination litigation.

Cal Water believes that potentially responsible parties that caused contamination of the water supply (commonly referred to as “PRPs”) should be held fully liable. However, Cal

Water does not believe that it is sound public policy for the Commission to adopt rules and policies, which obligate water utilities to undertake litigation and ultimately significantly increase the risk and costs of such litigation. Rather, Commission policies and rules should encourage responsible behavior.

Cal Water agrees that the “[C]ontamination events are among the contingencies which a contemporary water utility needs to be prepared to confront and manage... and generally comes within the obligation to serve.” Cal Water does not agree that such obligation to serve and to handle contamination events, in any way, extends the water utilities’ responsibility to expend and/or invest shareholder funds to recover the higher revenue requirement caused by the contamination solely on the behalf of the ratepayer. The Proposed Decision is imposing a fiduciary responsibility on utilities to protect ratepayers beyond ordinary business risks¹, which is unprecedented. As such, the Proposed Decision adopts policies and rules, which will not achieve the primary objective in contamination litigation to have PRPs clean up and pay for damages caused by their contamination. Simply, the economics of the Commission’s policies and rules should be aligned with the behavior they seek to encourage.

B. Contamination Litigation

Contamination litigation is based on the principal that a plaintiff (the “water utility”) owns a claim against a wrongdoer (the “PRPs”) who has caused damage to the plaintiff. **The amount a plaintiff can recover against a wrongdoer is generally limited to the actual damage caused.** Water utility and ratepayer contamination claims are not necessarily the same. Ratepayer damages are limited; whereas, the water utility has physical, financial and in some cases intangible damages. The damages, which the ratepayer and the water utility are entitled to are not identical. The Proposed Decision fails to take such differentiation into account.

¹ Ordinary business risks may be defined as such risks which a utility may purchase insurance to protect itself.

The "American Rule" of attorneys fees, followed in California, provides that unless there is a special provision in contract or statute, the plaintiff must bear its own attorneys' fees. The result of this rule is that in almost every case - whether settled or tried - against a polluter, **the water utility recovers less than its actual damages**. This is one of the many ways in which the legal system itself is structured to prevent abuse, weed out claims that do not have merit, and encourage settlement instead of trial.

C. Proposed Decision Adverse Impact on Litigation

The Proposed Decision's overall objective should be to encourage water utilities to pursue wrongdoers (PRPs) and to recover damages, **efficiently and timely**. If that is the objective, a water utility should not come out worse from pursuing a wrongdoer than it would from not pursuing; but the Proposed Decision has the opposite effect. The Proposed Decision expresses the opinion that "[B]eing ready and able to respond to contamination, however arduous and frustrating that task, is now part and parcel of doing business as a water utility."² Without being explicit, the statement assumes that long, complex, expensive and risky lawsuits against polluters are just part and parcel of doing business. Timing is a very important part of the process as well as efficiency. The importance of time is overlooked in the Proposed Decision. Two examples of the importance of time are: the interplay between settlement and punitive damages; and the high cost and risk of litigation. In addition, because of the complexity of the cases, the difficulty of proof, and the tenacity of most polluter defendants, some cases recover nothing at all, or far less than the actual damages.

In the meantime, long before any recovery, the water utility has taken risk and incurred huge costs. These costs may not include attorneys' fees, because contingent fee arrangements are often available. But the other costs can be substantial, and they include

² Findings of Fact 3.

human resource costs - which are never recovered. The drain on resources is ignored in the Proposed Decision, despite the fact that contamination litigation demands significant time from some of the water utility's most skilled and valuable people, often for many years. The cost of this drain is almost never recognized as recoverable damage, so the water utility which files a lawsuit against a polluter faces the certainty that it will devote valuable human resources to the success of the case, and that contribution will never be compensated under the Proposed Decision.

Without acknowledging the fact, the Proposed Decision has constructed a rule that makes the recovery of punitive damages the only way a water utility can participate in the benefits of "sharing." Yet punitive damages are rare, and seldom are recovered in a case handled efficiently and prudently. Punitive damages are almost never recovered in settlement; they are recovered in trial against a really bad defendant who failed to make an intelligent decision to settle. Because of the judicial controversy over limitation of punitive damages, they are frequently appealed when awarded, and frequently reduced or overturned by appellate courts. The prospect of punitive damages is rarely sufficient motivation for a plaintiff's lawyer to take a case, and defense lawyers rarely make settlement offers which price in a punitive damage award. Most cases settle. Most cases should settle. Yet the Proposed Decision makes punitive damages a "brass ring" which the water utility is encouraged to pursue as the only prospect of achieving a reward for risk taking.

Prompt recovery from a polluter, and prompt solution to the contamination, are in the ratepayers' best interest, and produce lower cost to the ratepayer. But there is no prospect of any "sharing" for the prudent water utility which brings a case efficiently, prosecutes it diligently, and settles it swiftly - even when it recovers all the actual damage. That company, which has behaved exactly as the rulemaker would wish, is penalized for its responsible behavior.

In several respects the Proposed Decision confuses who is the owner of a claim,

and ignores basic rules of standing. For example, in Table 1 at p.22, the items listed as "risks to ratepayers" include "Ratepayer exposure to the contaminated water" and "Negative impact on customers' property value." This is used to conclude that the ratepayer is bearing these risks in the water utility litigation. But these claims belong to the company, not the ratepayer, and if the ratepayer has been injured by exposure to contaminated water, or the ratepayer's property value has been diminished by a wrongdoer, the ratepayer owns that claim. It is a separate claim, independent of the company claim, and the company does not have standing to bring that claim for the ratepayer. When a water utility is allowed to bring a contamination lawsuit it is because the company itself has been damaged.

Litigation is inherently risky, and the water utility which sues a polluter must rely on the skill and judgment of the trial counsel representing and advising it. These difficult decisions include the very decision whether to bring an action, how much to spend prosecuting it, whether to settle or go to trial. Yet the Proposed Decision would allow for "second guessing" of these difficult decisions after the fact. In most of the business world the Business Judgment Rule recognizes that many business decisions are difficult and hindsight is easy, and great deference is given to the judgment of the honest business person who has to make these decisions. In the utility realm this Commission reserves to itself review of these decisions. But in this Proposed Decision it does so without any objective basis or guidance to the utility manager who must make these decisions along the way, and with no recognition of the risk and responsibility required. Instead, the rule is constructed to make the desired activity - for water utilities to pursue wrongdoers, and to recover damages, efficiently and timely - as risky and unattractive as possible.

D. Cal Water's Proposed Corrections to Proposed Decision

1. On a case-by-case basis, the Commission should determine the allocation of contamination proceeds rather than adopt a single rule for all cases;
2. Redefine "Net Proceeds" to allow an allocation between shareholders and ratepayers in all contamination cases as set forth in CWA's comments;
3. Establish policies and rules that encourage water utilities to use their better business judgment and to act reasonably to mediate ratepayers' higher revenue requirement due to contamination;
4. Use a memorandum account to track and account for contamination proceeds until utility plant is construction and there is a final Commission order allocating remaining proceeds, if any; and .
5. Establish periodic reporting requirements on the status of active litigation, which will not breach attorney-client privilege

In the alternative, if the Commission pursues extending the water utilities' obligation to sue, then all litigation costs should be timely included in the utility's adopted cost of service.

Respectfully Submitted,

California Water Service Company

Thomas F. Smegal
John Tootle

September 9, 2010

/s/ Thomas F. Smegal
Thomas F. Smegal

APPENDIX

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS

Cal Water Agrees With CWA Opening Comment Proposed Findings Of Fact, Conclusions Of Law, And Ordering Paragraphs With The Following Additions

FINDINGS OF FACT

1. ..., the Commission has considered several matters on a case-by-case basis....

ORDER

1. [New] The Commission shall determine on a case-by-case basis the proper determination and allocation of contamination proceeds.
2. [New] The Commission adopts these rules and policies to encourage water utilities to use their better business judgment to mitigate higher revenue requirements due to anthropogenic contamination.
3. [New] Water utilities shall periodically report on the status of active contamination litigation and balances being recorded in any contamination litigation account.

CERTIFICATE OF SERVICE

I, Thomas F. Smegal, hereby certify that on this date I served by electronic mail the foregoing **COMMENTS OF CALIFORNIA WATER SERVICE COMPANY (U-60-W) ON PROPOSED DECISION OF COMMISSIONER BOHN** on the parties in Rulemaking 09-03-014, below:

By electronic mail (Service List as of August 24, 2010):

doug@parkwater.com
tjryan@sgvwater.com
jadarneylane@gswater.com
jhawks_cwa@comcast.net
sha@cpuc.ca.gov
bfinkelstein@turn.org
ldolqueist@manatt.com
mmattes@nossaman.com
bcook@fruitridgevista.com
leigh@parkwater.com
ed.jackson@parkwater.com
lmcghee@calwater.com
larry@epwater.com
bjohnson@valenciawater.com
gmilleman@valencia.com
bkelly@swwc.com
mlwhitehead@sgvwater.com
rkmoore@gswater.com
jgaron@gswater.com
kswitzer@gswater.com
carrie.gleeson@amwater.com
robert.maclean@amwater.com
tom@alcowater.com

mlane@nossaman.com
sleeper@manatt.com
tritchie@manatt.com
jeguzmanjr@gmail.com
tsmegal@calwater.com
sferraro@calwater.com
bloehr@greatoakswater.com
tguster@greatoakswater.com
broeder@greatoakswater.com
palle_jensen@sjwater.com
dstephen@amwater.com
rsf@corporatecenter.us
isaiah@cpuc.ca.gov
gw2@cpuc.ca.gov
sek@cpuc.ca.gov
mfg@cpuc.ca.gov
mcv@cpuc.ca.gov
smw@cpuc.ca.gov
tpy@cpuc.ca.gov
Alex.Barrios@asm.ca.gov
jerri.swoyer@cdph.ca.gov

With Additional Electronic Copies to

Commissioner John Bohn (jb2@cpuc.ca.gov)

and his staff

Stephen St. Marie (Stephen.stmarie@cpuc.ca.gov)

Amy Yip-Kikugawa (ayk@cpuc.ca.gov)

Executed this 9th day of September, 2010 in Piedmont, California.

/S/ THOMAS F. SMEGAL

Thomas F. Smegal

