

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

10-28-10
03:38 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.

Rulemaking 09-03-014
(Filed March 12, 2009)

**OPENING COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES**

Pursuant to the schedule established in the October 14th Ruling of Administrative Law Judge Gary Weatherford, the Division of Ratepayer Advocates (“DRA”) hereby submits its Opening Comments on the rules proposed in Appendices B and C.

**I. COMMENTS ON APPENDICES B AND C ARE NOT A FORUM
FOR RELITIGATING UNDERLYING ISSUES IN THIS
PROCEEDING**

To a certain extent, the California Water Association’s (“CWA”) comments on Appendices B and C do not raise Legal issues but rather reflect a disagreement with policy decisions made by the Commission in Decision 10-10-018 and should be given no weight. In allowing for Comments on Appendices B and C the Commission did not intend to offer parties a forum to relitigate issues that were thoroughly vetted in the underlying rulemaking.

For example, CWA complains about Rule 2 of Appendix C, but its comments do not identify a legal or factual error in the Rule. Instead, in essence CWA is saying that its members do not like the rules the Commission adopted. Unhappiness with a policy call by the Commission is not grounds for overturning or modifying a Commission decision.

Similarly, CWA contends that Rules 16, 17, 18 and 21 would “impose very complex and restrictive procedures and accounting requirements for sales of assets funded by government loans or of utility systems of such assets,” but its comments do not specify details about the particular provisions of the rules it finds objectionable. Simply stating a rule is complex or restrictive is a policy, not a legal argument. The Commission has broad authority to impose both complex and restrictive rules when it opens a rulemaking. The Commission has repeatedly imposed both complex and restrictive rules governing the utilities it regulates over the past century. The alleged complexity and restrictivity of these rules are not valid grounds for modifying the Rules the Commission adopted in D.10-10-18. Once again CWA’s comments reflect an effort to relitigate issues that were decided and thoroughly vetted in the rulemaking.

II. CWA’S CONCERNS ABOUT FLOWING THROUGH TAX SAVINGS HAVE MERIT BUT MAY BE EASILY REMEDIED

CWA raises concerns about Rule 7 of Appendix C because it requires “deductions of depreciation expenses for income tax purposes and flow-through to customers of any benefits derived from the tax deduction in the most direct way possible.” -- something that CWA contends is not allowed for tax purposes for plant accounted for as contributions in aid of construction (“CIAC”) or that the utility has elected to defer the taxable gain pursuant to IRC section 1033(a)(2). According to CWA, Rule 7 “is problematic, considering that depreciation is not allowed for tax purposes with respect to plant accounted for as CIAC or as to which the utility has elected to defer the taxable gain pursuant to Internal Revenue Code §1033 (a)(2), in which case the tax basis of the new utility plant becomes the tax basis of the plant destroyed by contamination.” CWA also comments that under all circumstances accelerated tax depreciation must be normalized and would increase deferred taxes, but this tax benefit cannot be flowed-through to ratepayers, citing Internal Revenue Code §168(f)(2).¹

¹ (CWA Comments, p. 19, footnote 19.)

CWA has a valid argument here with regard to how the Internal Revenue Code treats these properties, i.e., the utility must normalize the tax timing differences associated with post-1980 depreciable plant additions or it will lose its ability to take accelerated depreciation for tax reporting purposes. Existing Commission policy requires the flow through of all tax benefits other than those which the tax code requires to be normalized. The Decision merely reiterates that policy, however the language of the decision would be improved if additional clarifying language were added to the effect that tax benefits must be flowed through “unless the Internal Revenue Code requires normalization of tax timing benefits.”

III. CONCLUSION

To the extent CWA’s comments on Appendices B and C reflect their policy disagreement with the holding in D.10-10-018 they should be given no weight. CWA did raise a valid concern about the decision’s requirement that certain tax benefits be flowed through to customers. DRA’s proposed language to the decision addresses this concern and ensures that D.10-10-018 is consistent with applicable provisions of the Internal Revenue Code.

Respectfully submitted,

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October 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**OPENING COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES**” in **R.09-03-014** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on October 28, 2010 at San Francisco, California.

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