

Decision ALTERNATE DRAFT DECISION OF PRES. MICHAEL PEEVEY
(Mailed 10/26/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission Order Instituting Rulemaking on the Commission's own motion to set rules and to provide guidelines for the Privatization and Excess Capacity as it relates to investor owned water companies.

Rulemaking 97-10-049
(Filed October 22, 1997)

OPINION ACCEPTING PETITION TO MODIFY DECISION 03-04-028

I. Summary

In this decision the Commission accepts in part and denies in part the petition of the California Water Association (CWA) to modify and/or clarify Decision (D.) 03-04-028.

II. Background

The Commission opened this proceeding to consider rules and guidelines for regulated water utilities to better utilize excess capacity. In D.00-07-018, we adopted a methodology for water utilities to allocate revenue from non-tariffed projects between ratepayers and shareholders. The methodology created a distinction between "active" and "passive" non-tariffed offerings by the utility. D.00-07-018 also adopted a list (in Attachment A to that decision) designating many potential non-tariffed offerings as either active or passive, and stating that any non-tariffed offerings by the utility not present on the list would be designated as active if the shareholders incurred incremental investment costs of

\$125,000 or more. For active projects, the water utility shareholders would receive 90% of the revenue, and for passive projects, 70%. Ratepayers would receive the remaining 10% and 30%, respectively.

The Commission required that the shareholders absorb all incremental costs of the non-tariffed offering, and left it to “future rate cases to consider the issue of whether or to what extent rates should reflect investments made and costs incurred for labor and capital jointly used for tariffed and non-tariffed products and services.” D.00-07-018 at p. 16. The Commission also required an annual report for each utility engaging in non-tariffed endeavors describing each passive and active investment and the aggregate revenues derived there from. *Id.* at p. 16.

To enable review of proposed non-tariffed offerings by water utilities, the Commission required “all subject utilities to file an Advice Letter before providing new non-tariffed products and services.” The Commission specifically made a Conclusion of Law that: “[T]he public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into a new active non-tariffed endeavor.” *Id.* at p. 18. The Commission further stated in Ordering Paragraph No. 2, that only active, non-tariffed goods and services, not already designated as active (as defined by Attachment A of D.00-07-018), be subject to advice letter approval. *Id.* at p. 19.

III. Discussion

In D.03-04-028, we modified D.00-07-018 to correct what we believed was “an unintended exemption for certain projects from the advice letter-filing requirement of the decision.” That was not the case. In our attempt to correct our perceived error, we erroneously ordered in D.03-04-028 that all new non-tariffed products, services and possibly contracts be submitted for Commission

advice letter approval, contrary to the findings and orders contained in D.00-07-018.

Specifically, In D.03-04-028, we amended D.00-07-018 in the following respects with deletions noted by strikethroughs:

1. Conclusion of Law 5: The public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into a new ~~active~~ non-tariffed endeavor.
2. Ordering Paragraph 2: Any water utility which proposes to engage in a sale of non-tariffed goods or services provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement, ~~which would be proposed to be classified as active as described herein,~~ shall file an advice letter seeking Commission approval, ~~except for those activities designated as active in attachment A.~~

By striking out the word "active" and by removing the exemption "for those activities designated as active in attachment A" of D.00-07-018, we nullified both the intent and requirements of D.00-07-018. And by doing so, we unduly placed strict advice letter filing requirements on water utilities offering non-tariffed products and services. D.00-07-018 only required water utilities to seek advice letter approval for active, non-tariffed investments. All passive investments, and active investments as described in Attachment A of D.00-07-018, were specifically excluded from the advice letter filing requirement.

On April 6, 2004, CWA filed its petition seeking modification of D.03-04-028, or in that alternative, clarification. CWA stated that the approval process adopted in D.00-07-018, and modified in D.03-04-028, places water utilities at a competitive disadvantage to electric utilities offering similar services because electric utilities obtain approval for categories of service offerings with

no further Commission approval required for individual contracts. In contrast, CWA contended that modified Conclusion of Law No. 5 of D.03-04-028 could be misinterpreted to require that water utilities obtain Commission approval for each service contract. CWA argued that water utilities, like electric utilities, should only be required to file requests for approval of categories of non-tariffed services, not each contract. In Appendix 1 of its petition, CWA proposes language for conclusions of laws and ordering paragraphs consistent with its rationale for modification.

Pursuant to Rule 47 of the Commission's Rule of Practice and Procedure, "in response to a petition for modification, the Commission may modify the decision as requested, modify the affected portion of the decision in some other way consistent with the requested modification, set the matter for further hearings or briefings, summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action."

After careful consideration of CWA's petition for modification and/or clarification of D.03-04-028, we grant in part and deny in part CWA's petition. D.00-07-018 never intended that water utilities be subject to the same requirements as electric utilities. Instead, it recognized that the "energy utility process is predicated upon specific affiliate transaction framework adopted for that industry," a framework not applicable to the water industry. Therefore, we do not accept CWA's proposed conclusions of law or ordering paragraphs. We will, however, restore D.00-07-018's conclusions of law and ordering paragraphs that were modified by D.03-04-028.

D.00-07-018 recognized the importance of "periodic reporting and auditing of the costs allocated to and the revenues derived from non-tariffed products and

services,” and it further stated that “we will require an annual report listing each active and passive investment, and revenues from aggregate non-tariffed offerings.” Since this requirement was left out of the ordering paragraphs contained in D.00-07-018, we will order water utilities now to submit this information along with their annual reports that are filed each calendar year with the Water Division. Having in place such a reporting mechanism will enable the Commission to review revenues derived from non-tariffed endeavors and assess their relative impact on water system plant and personnel.

IV. Comments to the Alternate Draft

The alternate draft decision of President Peevey was mailed to the parties in accordance with Rule 77.6 of the Rules of Practice and Procedure. Parties to the proceeding may file comments no later than November 9, 2004.

Comments were filed by _____.

V. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. In D.03-04-028, Ordering Paragraph 1 requires that all non-tariffed products and services, both active and passive investments, are subject to the advice letter filing requirement.
2. In D.03-04-028, Ordering Paragraph 2 requires that water utilities submit a report describing all non-tariffed offerings within 45 days of the effective date of the decision, and again during the next general rate case filing.
3. D.03-04-028 erroneously modified D.00-07-018 to require that all non-tariffed products, services and possibly contracts be subject to the advice letter filing requirement.

4. The record in this proceeding requires water utilities to seek advice letter approval for only active investments not listed in Attachment A of D.00-07-018.

5. The record in this proceeding requires water utilities to submit an annual report listing each active and passive investment, and revenues from aggregate non-tariffed offerings.

Conclusions of Law

1. Pursuant to Rule 47 of the Commission's Rule of Practice and Procedure, the Commission may accept, accept in part, or deny a petition for modification.

2. The parties were afforded notice of and an opportunity to comment on the proposed modification of D.03-04-028.

3. We accept in part, and deny in part the petition of CWA to modify and/or clarify Decision (D.) 03-04-028.

4. All water utility non-tariffed products and services, except those described in Attachment A of D.00-07-018, that are provided in whole or in part, by assets or employees reflected in the utility's revenue requirement, should be subject to prior Commission review and approval.

5. Ordering Paragraph No. 1 of D.03-04-028 should be altered to restore the original conclusions of law and ordering paragraphs contained in D.00-07-018, and be replaced by the following paragraph:

Conclusion of Law 5: The public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into a new active non-tariffed endeavor.

Ordering Paragraph 2: Any water utility which proposes to engage in a sale of non-tariffed goods or services provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement, which would be proposed to be classified as active as described herein, shall file an advice letter seeking

Commission approval, except for those activities designated as active in attachment A.

6. All water utilities should submit an annual report listing each active and passive investment, and aggregate revenues derived from non-tariffed offerings.

7. Ordering Paragraph No. 2 of D.03-04-028 should be replaced with the following paragraph:

Water utilities that have made non-tariffed offerings of products and services, provided in whole or in part, by assets or employees reflected in the utility's revenue requirement, shall submit, as part of their annual report, a list describing each active and passive investment, and aggregate revenues derived from its non-tariffed offerings.

8. Today's decision should be made effective immediately.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The Petition of the California Water Association for Modification and/or clarification is accepted in part, and denied in part pursuant to Rule 47 of the Commission's Rules of Practice and Procedure.

2. Decision 03-04-028 shall be modified by replacing Ordering Paragraph No. 1 with the following:

Conclusion of Law 5: The public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into a new active non-tariffed endeavor.

Ordering Paragraph 2: Any water utility which proposes to engage in a sale of non-tariffed goods or services provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement, which would be proposed to be classified as active as described herein, shall file an advice letter seeking

Commission approval, except for those activities designated as active in attachment A.

3. Decision 03-04-028 shall be modified by replacing Ordering Paragraph No. 2 with the following:

Water utilities that have made non-tariffed offerings of products and services, provided in whole or in part, by assets or employees reflected in the utility's revenue requirement, shall submit, as part of their annual report, a list describing each active and passive investment, and aggregate revenues derived from its non-tariffed offerings.

4. Water Division shall modify its Annual Report forms for calendar year 2004 and beyond to include a line item to report aggregate revenues derived from non-tariffed endeavors and shall include a schedule to list all non-tariffed active and passive investments.

5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.