

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 11, 2002

Agenda ID #1256

TO: PARTIES OF RECORD IN RULEMAKING 97-10-049

This is the draft decision of Administrative Law Judge (ALJ) Bushey. It will not appear on the Commission's agenda for at least 60 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure," except that the due date for comments shall be 40 days after the mailing date of the draft decision with reply comments due 10 days after the comments. These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ CAROL A. BROWN
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:jyc

Attachment

Decision **DRAFT DEICISION OF ALJ BUSHEY** (Mailed 10/11/02)

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 MODIFYING DECISION 00-07-018

I. Summary

In this decision the Commission on its own motion corrects an error in Decision (D.) 00-07-018 which created an unintended exemption for certain projects from the advice letter-filing requirement of the decision.

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. Id.

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 reasoned that to do otherwise could result in the utility becoming “encumbered with substantial long-term obligations without Commission review and approval” and that such obligations “could have serious impacts on ratepayers which . . . would not be considered until after-the-fact review in the net general rate case.” Id. at 15.

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.

Notwithstanding the above-cited statements, Ordering Paragraph 2 exempted all active projects listed in Attachment A from the advice letter-filing requirement. The Commission did not provide any discussion or any statement of rationale to support this exemption, nor does the record of the proceeding show any evidence supporting such an exemption.

III. Discussion

Pursuant to Pub. Util. Code § 1708, the Commission “may at any time, upon notice to the parties, and with opportunity to be heard” With regard to proceedings without evidentiary hearings, Pub.Util. Code § 1708.5 provides that “the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by § 1708.” Here, the Commission used notice and comment procedures rather than evidentiary hearings to adopt D.00-07-018. Accordingly, we will use notice and comment procedures as well to consider altering this decision.

Specifically, we propose to amend 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 new ~~active~~ non-tariffed endeavor.

Rationale: The word “active” suggests that “passive” endeavors do not require prior Commission approval. This clarifies that all non-tariffed offerings by a water utility are subject to prior Commission approval.

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.~~

Rationale: As discussed above, the text of the decision demonstrates an intention to have all water utility non-tariffed offerings submitted for Commission approval. No exemptions of any kind are provided for in the text of the decision. This change to the Ordering Paragraph brings the paragraph into conformity with the text.

IV. Requirement to Submit Advice Letter Filings for Active Non-tariffed Offerings

Since the effective date of D.00-07-018, water utilities may have implemented non-tariffed offerings that the water utilities believed, based on Ordering Paragraph 2, were not subject to prior Commission review and approval. Such offerings, however, were and are subject to the substantive requirements of D.00-07-018. To enable the Commission and our staff to review any unapproved non-tariffed offerings, all water utilities shall file advice letters conforming to Ordering Paragraphs 3 and 4 of D.00-07-018 no later than 45 days after the effective date of this order.

V. Opportunity for Comment

In addition to the need for notice and comment procedures pursuant to Pub. Util. Code § 1708.5, this is a matter that pertains solely to water corporations but it may not be uncontested. Therefore, the draft decision must be mailed to the parties, with a provision for comments pursuant to Pub. Util. Code § 311(g)(1).

To accomplish the notice and comment requirements of Pub. Util. Code §§ 1708.5 and 311(g)(1), the draft decision in this matter was mailed to the parties with a cover letter from the Chief Administrative Law Judge setting an extended

schedule for comments and reply comments. Comments were filed on _____ and reply comments on _____.

VI. Assignment of Proceeding

Henry Duque is the Assigned Commissioner and Maribeth Bushey is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Commission issued D.00-07-018 after receiving comments from the parties; the Commission did not hold evidentiary hearings.
2. The record in this proceeding supports requiring all water utility non-tariffed offerings to be subject to prior Commission review and approval.
3. D.00-07-018 contains no discussion or justification for an exemption of listed active non-tariffed offerings from the advice letter-filing requirement.
4. In D.00-07-018, Ordering Paragraph 2 exempts listed active non-tariffed offerings from the advice letter-filing requirement.
5. In D.00-07-018, Conclusion of Law 5 is unclear as to whether passive offerings are subject to the advice letter-filing requirement.

Conclusions of Law

1. Pursuant to Pub. Util. Code § 1708, the Commission “may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it.” Where the Commission adopted a regulation using notice-and-comment procedures, Pub. Util. Code § 1708.5 authorizes the Commission to change that regulation using the same procedures and without holding an evidentiary hearing.

2. Evidentiary hearings are not required to make the changes set forth in the foregoing opinion.

3. The parties were afforded notice of and an opportunity to comment on the proposed alteration of D.00-07-018.

4. All non-tariffed offerings by water utilities 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. D.00-07-018 should be altered to require that all non-tariffed offerings provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement be subject to prior Commission review and approval.

6. D.00-07-018 should be altered in the following respects with deletions noted by strikethroughs:

Conclusion of Law 5: The public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into 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.~~

7. Water utilities that have made non-tariffed offerings of goods or services provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement, and have not filed advice letters seeking approval of such offerings, should file advice letters in conformance with Ordering Paragraphs 3 and 4 of D.00-07-018 no later than 45 days after the effective date of this order.

O R D E R

Therefore, **IT IS ORDERED** that:

1. Decision (D.) 00-07-018 should be altered in the following respects with deletions noted by strikethroughs:

Conclusion of Law 5: The public interest requires that water utilities have a means of obtaining Commission review and approval prior to entering into 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.~~

2. Water utilities that have made non-tariffed offerings of goods or services provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement, and have not filed advice letters seeking approval of such offerings, shall file advice letters in conformance with Ordering Paragraphs 3 and 4 of D.00-07-018 no later than 45 days after the effective date of this order.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.