

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation to Consider Policies to Achieve the Commission's Conservation Objectives for Class A Water Utilities.

Investigation 07-01-022  
(Filed January 11, 2007)

In the Matter of the Application of Golden State Water Company (U 133 E) for Authority to Implement Changes in Ratesetting Mechanisms and Reallocation of Rates.

Application 06-09-006  
(Filed September 6, 2006)

Application of California Water Service Company (U 60 W), a California Corporation, requesting an order from the California Public Utilities Commission Authorizing Applicant to Establish a Water Revenue Balancing Account, a Conservation Memorandum Account, and Implement Increasing Block Rates.

Application 06-10-026  
(Filed October 23, 2006)

Application of Park Water Company (U 314 W) for Authority to Implement a Water Revenue Adjustment Mechanism, Increasing Block Rate Design and a Conservation Memorandum Account.

Application 06-11-009  
(Filed November 20, 2006)

Application of Suburban Water Systems (U 339 W) for Authorization to Implement a Low Income Assistance Program, an Increasing Block Rate Design, and a Water Revenue Adjustment Mechanism.

Application 06-11-010  
(Filed November 22, 2006)

Application of San Jose Water Company (U 168 W) for an Order Approving its Proposal to Implement the Objectives of the Water Action Plan.

Application 07-03-019  
(Filed March 19, 2007)

**ORDER GRANTING LIMITED REHEARING OF  
DECISION (D.) 08-02-036 ON THE ISSUE RELATED TO  
THE EXTENSION OF MEMORANDUM ACCOUNT  
TREATMENT TO ALL CLASS A WATER UTILITIES,  
AND DENYING REHEARING OF DECISION IN ALL  
OTHER RESPECTS**

**I. INTRODUCTION**

On January 16, 2007, the Commission opened Order Instituting Investigation to Consider Policies to Achieve the Commission’s Conservation Objectives for Class A Water Utilities (“OII”), Investigation (I.) 07-01-022. The OII was issued to address policies to achieve its conservation objectives for Class A water utilities. In the OII, we ordered the consolidation of four pending conservation rate design applications. Specifically, we issued the OII to request comments on increasing block rates, water revenue adjustment mechanisms (“WRAM”), rebates and customer education, conservation memorandum accounts (“memorandum accounts”), and rationing programs, and to hear proposals other than those set forth in the utilities individual applications. (OII, pp. 2-3.) We consolidated the OII with several applications: (A.) 06-09-006 (Golden State Water Company (“Golden State”)), A.06-10-026 (California Water Service Company (“Cal Water”)), A.06-11-009 (Park Water Company (“Park”)), and A.06-11-010 (Suburban Water Systems (“Suburban”)). By a May 29, 2007 administrative law judge (“ALJ”) ruling the conservation rate design application of San Jose Water Company, A.07-03-019, was added to this consolidation. (See ALJ Ruling Consolidating Application of San Jose Water Company, Modifying Schedule and Adjusting Phase 1 Hearings, dated May 29, 2007.)

The consolidated proceedings contain several phases: Phase 1A and Phase 1B. Phase 1A involved contested issues raised by the parties to the settlement

agreements and Suburban's proposed memorandum account from July 30 to August 2, 2007.<sup>1</sup>

Decision (D.) 08-02-036 (or "Decision") constituted our order on Phase 1A issues. This decision addressed rate related conservation measures, including the parties' increasing block rate and water revenue adjustment mechanism ("WRAM") proposals. The issue of return on equity ("ROE") adjustment for WRAMs issue was deferred to Phase 1B, as well as rate measures for Golden State and San Jose.

D.08-02-036 adopted eight settlements on conservation rates, revenue adjustment mechanisms, modified cost balancing accounts, a low-income assistance program, customer education and outreach, and data collection and reporting. D.08-02-036 also approved a conservation memorandum account for extraordinary legal and regulatory expenses. (See D.08-02-036, p. 2.) Specifically, D.08-02-036 authorized Suburban and other Class A water utilities to establish memorandum accounts to track the legal and related costs of participating in this proceeding. The Decision permitted tracking of costs in these memorandum accounts from the date of the issuance of the OII.

The Division of Ratepayer Advocates ("DRA") and the Consumer Federation of California ("CFC") timely filed applications for rehearing of D.08-02-036. In its rehearing application, DRA alleges the following legal error: (1) authorizing the tracking of costs incurred between the OII and the issuance of the Decision constitutes retroactive ratemaking; (2) the Commission's authorization of tracking costs incurred prior to the issuance of D.08-02-036 departs from Commission policy and is arbitrary and capricious; (3) the Commission's grant of memorandum

---

<sup>1</sup> Suburban's conservation memorandum account proposal was not resolved by settlement and was addressed in this phase. Suburban requested a memorandum account to track costs for developing and establishing a conservation rate design, including legal and consulting services associated with its consolidated application, and all customer notifications that are not otherwise covered separately by the low income memorandum account. DRA supported opening a memorandum account to track prospective costs but opposed tracking expenses already incurred on the grounds that such recovery would be contrary to the principle against retroactive ratemaking. (See Rehearing App., pp. 7-11.)

account treatment to all Class A water companies is arbitrary and capricious and there is no record evidence to support such authorization; and (4) the Commission's direction regarding future generic proceedings is arbitrary and capricious and modifies policy regarding generic water proceedings. (See DRA's Rehearing App., pp. 1-18.)

In its rehearing application, CFC alleges the following legal error: (1) the Commission's decision is contrary to state policy; (2) the Commission has made no progress in developing a rate design that will encourage water conservation, as promised in the Water Action Plan; (3) the Commission allowed rates to be placed in effect without entering the findings required by Public Utilities Code sections 454 and 1705; (4) the Commission failed to enter a conclusion of law on burden of proof and failed to apply the correct rule of law on burden of proof in this case; (5) the Commission erred in refusing to require water companies to demonstrate that settlement rates were based on cost and that costs were equitably allocated among customer classes; (6) the Commission is required by section 701.10 to set rates based on the cost of water service; (7) the Decision erroneously describes the Scoping Memo and erroneously excludes evidence of costs underlying rate design; (8) the Commission did not make the requisite findings to enable a court to determine whether the apparently discriminatory rates approved by D.08-02-036 are lawful; and (9) the hearing process was unfair. (See CFC's Rehearing App., pp. 4-27.)

We have reviewed each and every allegation raised in the applications for rehearing, and have determined that a limited rehearing is warranted on our determination to extend memorandum account treatment to all Class A water utilities, and not just Suburban, for the reasons fully discussed below.<sup>2</sup> Suburban's memorandum account however, remains in place. Moreover, pending outcome of the

---

<sup>2</sup> As discussed in detail in Section II.A.1, in Cal-Am's AL 676-W, Cal-Am made a similar request although the request was made after the record closed in this proceeding. In a letter dated November 13, 2007, the Water Division summarily rejected AL 676-W.

limited rehearing we will leave in place any memorandum account established by D.08-02-036, subject to adjustments and/or refunds depending on the resolution of the limited rehearing we grant today. For clarification purposes, we also modify Conclusion of Law No. 7 and a quote found on page 46 of the Decision. Except as discussed in this decision, rehearing of D.08-02-036, as modified, is denied in all other respects.

## **II. DISCUSSION:**

### **A. DRA's Application for Rehearing**

DRA challenges two aspects of the Commission's authorization of memorandum accounts to all Class A water companies to track expenses associated with participating in this proceeding. Specifically, DRA contends that (1) the Commission's authorization of memorandum account treatment for all Class A water companies violates substantive and procedural due process, lacks evidentiary support, and is arbitrary and capricious; and (2) the Commission's authorization of memorandum account treatment to track expenses incurred prior to the issuance of the Decision violates principles of retroactive ratemaking, and is arbitrary and capricious. (See Rehearing App., p. 2.)<sup>3</sup>

#### **1. Authorization to all water companies.**

DRA contends that the Commission's grant of memorandum account treatment to all Class A water companies is arbitrary and capricious given that D.08-02-036 goes beyond the prayer for relief of any of the participants in this case.<sup>4</sup> DRA

---

<sup>3</sup> DRA requests specific modifications to the Decision, namely: (1) deny Suburban's request to track expenses in a memorandum account incurred prior to the issuance of D.08-02-036 (and deleting any reference to such authorization for other Class A companies); (2) delete the grant of memorandum account authority for OII-related expenses to all Class A water companies; (3) clarify that requests by any other Class A water company to open a memorandum account for OII-related expenses incurred after issuance of D.08-02-036 must meet the Commission's four-part test for memorandum accounts (Standard Practice U-27-W ("SP-U-27")); and (4) delete the reference to future memorandum accounts requests relating to other generic proceedings. (See Rehearing App., p. 4.)

<sup>4</sup> DRA contends that the Decision extends memorandum account treatment for more

*(footnote continued on next page)*

further contends that the grant of memorandum account treatment to all water companies violates parties', due process rights given that no notice was given that these issues were under consideration in this phase of the proceeding, and that such decision lacks evidentiary support. (See DRA's Rehearing App., pp. 11-13.)

Specifically, DRA argues that Suburban is the sole company to have requested memorandum account treatment, and thus, there is insufficient justification to extend such treatment to all Class A water utilities. (See Rehearing App., p. 13.) DRA contends that the Commission improperly relied on Cal-Am's Advice Letter ("AL") 676-W given that this advice letter is not a part of the evidentiary record. DRA further claims that even if it had been consolidated into this proceeding, AL 676-W is insufficient justification to extend memorandum account treatment to all Class A water utilities. (See DRA's Rehearing App., p. 13.)<sup>5</sup> DRA maintains that the Commission's reliance on *Investigation on Commission's Own Motion Into Measures To Mitigate Effects of Drought on Regulated Water Utilities ("Drought OII")* [D.92-09-084] (1992) 45 Cal.P.U.C.2d 630 as authority to extend memorandum account treatment to all Class A companies was improper, given that the *Drought OII* differs

---

*(footnote continued from previous page)*

expenses than what Suburban asked for, arguing that Suburban only asked for legal and consulting services associated with this application. (See Rehearing App., p. 12.) DRA alleges the Commission went beyond Suburban's request. (See Rehearing App., pp. 11-12.) We disagree. In further testimony, Suburban expanded its request "seeking recovery of expenses associated with developing and establishing a conservation rate design, including legal and consulting services, public education and outreach expenses, and data collection and reporting expenses." (See Ex. 3, Further Testimony of Robert Kelly, pp. 2-6, see also Ex. 4, Rebuttal Testimony of Robert Kelly, pp. 1-3.) Thus, we see no distinction between what was requested and our determination to extend memorandum account treatment for costs incurred in participation in the OII.

<sup>5</sup> AL 676-W sought regulatory expense relief related to participation in the OII along with the consolidated applications. AL 676-W was submitted after settlement agreements had been submitted, evidentiary hearings held, and briefs were submitted. (See DRA's Rehearing Appl., p. 13.) In a letter dated November 13, 2007, the Commission's Water Division rejected the advice letter.

from the instant Decision. (See DRA's Rehearing App., p. 14.) DRA's allegations have merit.

For example, Suburban is the sole company to have sought memorandum account treatment.<sup>6</sup> While Cal-Am made its request on October 16, 2007 (AL 676-W), this request was summarily rejected by the Water Division, and Cal-Am's request was made after the close of record in this proceeding, and thus is not a part of the evidentiary record. DRA and Suburban were the sole parties to submit testimony on whether Suburban should receive memorandum account treatment for previously incurred implementation expenses.<sup>7</sup>

As such, DRA's allegations have merit given that the record appears to support memorandum account treatment only for Suburban. The parties have not had notice and opportunity to be heard on whether the Commission should have granted memorandum account treatment to all Class A water companies. This issue was neither discussed during the course of the proceeding, nor did it appear in the Commission's Proposed Decision. The Commission became aware of this fact in

---

<sup>6</sup> In accordance with Ordering Paragraph 2 of Suburban's last GRC, *In the Matter of the Application of Suburban Water Systems (U 339-W) for Authority to Increase Rates Charged for Water Service* [D.06-08-017] (2006) \_\_ Cal.P.U.C.3d \_\_, Suburban submitted an application proposing conservation rates on November 22, 2006, requesting among other things, a memorandum account to track the legal and consulting services costs needed to implement the water conservation rate design and low income program. (See A.06-11-010.) Suburban's application was subsequently consolidated with this proceeding. Suburban's request was submitted prior to the issuance of the OII, and thus did not seek authority to track all expenses related to participating in this proceeding. In further testimony, dated June 29, 2007, Suburban characterized and/or expanded its request for a memorandum account. Specifically, Suburban reiterated that it is "seeking recovery of expenses associated with developing and establishing a conservation rate design, including legal and consulting services, public education and outreach expenses and data collection and reporting expenses." (See Ex. 3, Further Testimony of Robert Kelly, pp. 2-6; see also Ex. 4, Rebuttal Testimony of Robert Kelly, pp. 1-3, see also DRA and Suburban Settlement 11.1.)

<sup>7</sup> See Reply Brief of the Division of Ratepayer Advocates on Phase 1A Issues; see also Suburban's Opening Brief and Reply Brief on Phase 1A issues, pp. 7-10 and pp. 20-28, respectively.

DRA agreed as a part of a negotiated settlement to support the recovery of *prospective* expenses.

comments to the proposed Decision. In fact, specific reference to this first appeared in the Commission's Final Decision.

As to Suburban, the grant of memorandum account treatment to Suburban is proper, and thus we leave in place the memorandum account approved by D.08-02-036. However, with respect to the other Class A water utilities, we grant limited rehearing to consider, and give parties notice and opportunity to be heard as to whether the memorandum account should be applied to all Class A water utilities. The limited rehearing will be in the form of comments and reply comments, and is strictly limited to the issue of whether the Commission should extend memorandum account treatment to other Class A utilities, and the reasons for extending or precluding such treatment. Pending the outcome of the limited rehearing, the memorandum accounts adopted in D.08-02-036 shall remain in effect, subject to adjustment and/or refunds.

## **2. Retroactive ratemaking allegations.**

DRA contends that the Commission has committed legal error by allowing memorandum account treatment for costs incurred since the OII was issued, but before the adoption of D.08-02-036, because this constitutes unlawful retroactive ratemaking. (See Rehearing App., pp. 7-11.) DRA notes that D.08-02-036 denied recovery of costs incurred before the OII was issued on grounds of retroactive ratemaking.<sup>8</sup>

---

<sup>8</sup> Specifically, DRA contends that the Commission erred in concluding that memorandum account treatment for costs incurred between the issuance of D.06-08-017 [Suburban's last GRC] and the issuance of this OII constitutes retroactive ratemaking, yet the authorization of memorandum account treatment for costs incurred since the OII issued but before the adoption of D.08-02-036, is not. DRA cites Conclusion of Law No. 7, which states: "It is reasonable to deny Suburban's request to track in a memorandum account expenses incurred between the issuance of D.06-08-017 and the issuance of this OII as such recovery is contrary to the principle of retroactive ratemaking. Because these costs were anticipated at the time of Suburban's GRC proceeding, there is no reason to consider recovery of them now." (See D.08-02-036, Conclusion of Law No. 7, p. 54.)

Generally, in order for a utility to recover expenses separate from its adopted revenue requirement, the costs must be recorded in a previously-established memo or balancing account. Ratemaking is generally done on a prospective basis. Suburban made its request for memorandum account treatment in its application dated November 22, 2006. As discussed in detail in Section 1, Cal-Am's Advice Letter AL 676-W requested similar treatment, but was rejected by the Water Division in a letter dated November 13, 2007.

We note that the statutory prohibition on retroactive ratemaking (Pub. Util. Code, § 728) does not apply to recovery of limited and specific costs previously incurred, where the Commission is not engaging in general ratemaking. By "ratemaking" the Court in *Southern California Edison Co. v. Public Utilities Commission* ("*Southern California Edison*") (1978) 20 Cal.3d 813, 816 means "general ratemaking."<sup>9</sup> The conservation OII is not a general ratemaking proceeding, and a memorandum account to track, and potentially recover, the costs of participating in this OII, is for the purpose of recovering a specific, very limited class of costs and thus, is not "general ratemaking." Further, like *Southern California Edison*, the Decision identified various policy reasons which support our determination. One very important policy consideration is fairness. In D.08-02-036, we noted that: (1) participation in the OII proceeding was a Commission ordered proceeding and was not anticipated; (2) although several Class A water utilities filed applications prior to the issuance of this investigation, the time frame for the proceeding and issues under consideration have broadened as a result of the OII; (3) participation of consumer groups has resulted in increased time spent in settlement negotiations and litigation; (4) the costs arose due to our requiring the utilities' participation in a special proceeding to develop conservation rate designs and address

---

<sup>9</sup> The Court described general ratemaking as a comprehensive review of a utilities rate base, expenses, and earnings, as distinguished from other Commission review of a more limited nature.

non-rate design issues; and (5) Cal-Am properly sought by advice letter to establish a memorandum account to track expenses which was improperly rejected by the Commission's staff. (See D.08-02-036, pp. 43-44.) As such, it would be unjust not to let Suburban track expenses related to its participation in the OII, and thus there is no violation of the rule against retroactive ratemaking and our determination is neither arbitrary nor capricious.

DRA also contends that the Decision's authorization of memorandum account treatment of previously incurred costs is arbitrary and capricious in that the Commission offers no explanation or legal basis as to why it redressed alleged inequities in this case, as opposed to other cases where it has denied retroactive memorandum accounts. (See Rehearing App., p. 11.) DRA cites *Order Authorizing All Utilities To Establish Catastrophic Events Memorandum Accounts, And Defined, To Record Costs Resulting From Declared Disasters [Resolution E-3238]* ("*Loma Prieta*") (1991) as one example wherein the Commission determined that only costs incurred after the accounts were authorized were recoverable because to do so otherwise would have constituted retroactive ratemaking.<sup>10</sup> (See Rehearing App., p. 10.) Essentially, DRA argues that the unjustness and unfairness was much greater in the *Loma Prieta* decision than here, and given that we didn't allow it then, so too should it be disallowed in the present situation.

We disagree with DRA's arguments. In considering fairness, we look at each situation on a case-by-case basis. We believe that in the instant case, fairness warranted the treatment that was granted for the reasons discussed above. Further, and contrary to DRA's contention, the Decision fully explains the various reasons why it would be unjust to disallow the tracking of expenses incurred as a result of the Commission imposed OII. (See discussion above; see also, D.08-02-036, pp. 43-44.)

---

<sup>10</sup> This Resolution arose as a result of the Loma Prieta earthquake when utilities requested authority to establish accounts to record all costs associated with the earthquake.

Lastly, DRA takes issue with Conclusion of Law No. 7, arguing that the Commission states recovery of these pre-OII costs is contrary to the principle of retroactive ratemaking but then inexplicably goes on to improperly authorize costs incurred since the OII was issued. (See Rehearing App., p. 9.) DRA points out an ambiguity. The Decision does not permit recovery of pre-OII costs but only permits cost recovery since the issuance of the OII. The reason for this distinction is that pre-OII costs were not a result of issuance of the OII, and the basis for the Commission's grant of relief here is that the issuance of the OII, and the resulting costs, were not anticipated. To make this point clear, we will modify Conclusion of Law No. 7.

### **3. Other arguments.**

DRA contends that the Commission's directive regarding future generic proceedings is arbitrary and capricious. (See DRA's Rehearing App., p. 17.) Specifically, DRA cites the following language used in the Decision:

“[F]uture requests for memorandum accounts to track costs associated with participating in generic proceedings shall be made by advice letter and the appropriate industry division, in this instance the Water Division, shall prepare a resolution for our consideration of the request.”

(See D.08-02-036, p. 46.)

DRA contends that such language along with reference to “the appropriate industry and division” and “in this case the Water Division” could be interpreted as adopting a process for all commission regulated industries, which is beyond the scope of this water conservation proceeding, lacks evidentiary support, and thus should be deleted from the Decision. (See Rehearing App, p. 17.) DRA's contention points out a possible ambiguity. We did not intend to reach a determination as to the process for all industries but the language does not reflect this intention. Therefore, we will modify D.08-02-036 accordingly, in the manner set forth below.

Lastly, DRA argues that that the Commission's statement that “future memorandum account requests for the expenses of participating in generic proceedings shall be made by advice letter” appears to adopt a Commission policy on

an issue not identified as being within the scope of Phase 1A, and reaches a conclusion not supported by findings of fact or conclusions of law and should be deleted from the Decision. (See Rehearing App., p. 18.) DRA also argues that specifying that generic proceedings be filed by advice letter suggests that utilities no longer must meet the 4 prong test set forth in SP U-27-W and suggests a shift in policy that would favor such requests. (See Rehearing App., p. 18.)

DRA is wrong and misinterprets the Decision. DRA incorrectly interprets this language to suggest that utilities no longer must meet the four prong requirements for memorandum accounts as set forth in SP-U-27-W. DRA, however, offers no support for this interpretation. Furthermore, DRA does not cite any specific language in the Decision which would support its contention that the Commission intended to waive these requirements for memorandum accounts. Accordingly, DRA provides no basis on which the Commission should grant rehearing.

## **B. CFC's Application for Rehearing**

### **1. State policy.**

CFC contends that D.08-02-036 is contrary to State policy established in Section 701.10 and Water Code section 500, et. seq. (See Rehearing App., p. 5.) Specifically, CFC maintains that the adopted rates are not based on the cost of providing water service as required by section 701.10, and do not provide an incentive for consumers to conserve water. (See Rehearing App, pp. 5-6.) CFC contends that the Commission erred in determining that cost allocation studies and cost information were not within the scope of this proceeding, and that CFC had untimely raised its section 701.10 cost issues. (See Rehearing App., p. 18.) CFC cites a portion of section 701.10 which states:

“... that the policy of the State of California is that rates and charges established by the Commission for water service provided by water corporations shall do all of the following ... (c) provide appropriate incentives to water utilities and customers for conservation of water resources ... (f) be based on the cost of providing water service

including, to the extent consistent with the above policies, appropriate coverage of fixed costs with fixed revenue.”<sup>11</sup>

CFC’s claims lack merit.

First, CFC fails to provide any substantiation that the Decision violated the incentive and costs provisions in section 710.10.<sup>12</sup> In fact, CFC offers no analysis whatsoever and instead references the statute and reiterates its position that rates be based on the cost of providing water service. In this regard, CFC has failed to comply with section 1732 requiring an application for rehearing to “set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.” (See Pub. Util. Code, § 1732.) Mere allegations without more is not enough.

Second, CFC’s reliance on section 710.10 is misplaced. Specifically, the Decision reasoned that CFC’s proposed delay in the adoption of conservation rates until cost allocation studies were performed was unnecessary given that the Suburban, Park and Cal Water conservation rate designs proposed in the settlement agreements were revenue neutral. In fact, the Commission stated that the conservation rates for each utility generate the adopted revenue requirement and maintain the existing allocation of revenue for each customer class adopted in the utilities most recent GRC. (See D.08-02-036, p. 7.) Thus, the provisions of section 710.10 do not apply given that there is no change in revenue requirement, and we adopted conservation

---

<sup>11</sup> CFC further contends that the Constitution requires “the Commission to ensure that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” (See CFC’s Rehearing App., p. 5.)

<sup>12</sup> Similarly, although CFC makes a reference to section 500 of the Water Code, CFC fails to make any allegation or make any argument as to how the Decision violates this section. CFC’s rehearing is replete with references to our basis for adopting conservation rates. Instead, CFC simply maintains that energy utilities set rates based on costs of providing service and so should water utilities. (CFC’s Rehearing App., p. 7, citing *Pacific Gas & Electric* [D.92-12-057] (1992) 47 Cal.P.U.C.2d 143.)

rate designs consistent with adopted revenue requirement and allocations. Nor does CFC provide any convincing rationale which would support such an argument.<sup>13</sup>

Third, the Decision does not violate any provision specified in section 710.10 given that the Commission determined that cost allocation and cost information were not within the scope of this phase of the proceeding. Specifically, the Commission determined that CFC arguments were untimely, and not within the scope of this phase of the proceeding.<sup>14</sup> An OII issued and a prehearing conference was held in this proceeding. The OII put parties on notice that it would afford parties an opportunity and forum to provide and consider evidence on issues of interest raised by the applicants. (See OII, p. 2.) CFC was given notice and opportunity to be heard in the development of the Scoping Memo. Parties were aware they could file a response to the preliminary Scoping Memo to state any objections that party had regarding the issues to be considered. (See OII, p. 10.) Parties were equally made aware that if no comments were filed concerning the preliminary Scoping Memo, the Scoping Memo would be deemed the Scoping Memo for this proceeding. As such, the Commission determined the time for CFC to have proposed alternatives to the preliminary Scoping Memo and to DRA's phased proposal was in advance of

---

<sup>13</sup> CFC makes numerous unsupported allegations. For example, CFC cites *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 260-261, to stand for the proposition that a Commission decision was annulled because of its discriminatory impact and the lack of findings explaining the reasons for the disparity between classes of users. CFC contends that the Commission should grant rehearing to avoid a similar outcome. (See Rehearing App, p. 24.) CFC offers no analysis or discussion in support of this allegation or why the case cited applies in the instant case. (See CFC's Rehearing App., p. 24.) This claim is vague and unsupported and completely devoid of the necessary specificity required in an application for hearing as required by the Public Utilities Code section 1732 and Rule 16.1 of the Commission Rules of Practice and Procedure. Accordingly, it has no merit. Moreover, the Commission made sufficient findings and conclusions consistent with Section 1705.

<sup>14</sup> Specifically, costs are generally reviewed in GRC's and the OII relied on revenue requirements adopted in the GRCs in adopting conservation rates. (See D.08-02-036, p. 7.) The Commission further determined that the Commission would proceed with consideration of the conservation rate design settlement agreements before us and CFC's objections to them. (D.08-02-036, p. 7.)

issuance of the scoping memo, either in response to the OII or at the PHC. (See D.08-02-036, pp. 6-7.) CFC did not specifically raise these issues, however, until it filed testimony.<sup>15</sup> As such, the Decision correctly pointed out CFC's concerns that the rates be based on the cost of providing water service, yet dismissed the request as untimely, and as outside this phase of the proceeding.

Fourth, and contrary to CFC's assertion, the Decision fully addresses the concerns raised by CFC. Specifically, the Decision states "we address CFC's procedural and policy concerns and adopt the goal of a targeted reduction in consumption for Class A water utilities with price and non-price conservation programs and a tentative targeted reduction for the trial programs." (See D.08-02-036, pp. 5-6.) The Decision further states, "in testimony, at hearings and in its briefs, CFC has urged us to postpone implementation of conservation rates until the utilities provide cost allocation studies, to be reviewed in general rate cases, and cost information, which would illustrate how conservation rates are aligned with costs..." (See D.08-02-036, p. 6.) The fact that the Commission does not agree with CFC's proposal does not, however, constitute legal error.

Fifth, we approved conservation rate design settlements that encourage conservation of water resources. As the Decision states, "we support equitable treatment of customer classes and rate designs to prompt conservation." (See D.08-02-036, p. 10.) We permitted the negotiation of settlement agreements for trial programs which will be in effect until the companies next general rate cases.<sup>16</sup> DRA also noted at evidentiary hearings that the settlements rate structures were based on actual consumption, and provide an economic incentive to cut consumption to a point

---

<sup>15</sup> See Ex. 19, Testimony of Alexis Wodtke, pp. 12-16.

<sup>16</sup> The impact of all the rate design issues decided in the settlement will be reviewed in the next GRC. Specifically, they will be reviewed should the adopted rate designs fail to achieve targeted reductions in consumption, or should the Class A water utility decide to propose an alternate rate design, or should a settlement agreement on an alternate rate design be presented to the Commission. (See D.08-02-036, pp. 11-13.)

that had not been defined. (See D.08-02-036, p. 10, citing Testimony of Tatiana Olea, Reporter's Transcript ("RT"), Vol. 2, p. 268:15-20.) We also reviewed the overall water conservation goals of a number of California municipal utilities, and set a 1%-2% reduction in consumption per year for each year or partial year the program is in place, examining the specific targeted reductions in Phase 2 of this proceeding. (See D.08-02-036, p. 10.) We further noted that the proposed rate structure discourages use beyond indoor use, and thus a greater economic incentive to reduce their outdoor use and hence, a greater financial incentive to conserve water. (See D.08-02-036, p. 19.) We adopted a conservation goal for Class A water utilities that sets a target for a reduction in consumption, while noting that we will consider a longer range goal that will apply to conservation rates adopted after these trial programs. Accordingly, there is no error.

## **2. Section 2714.5 and the Water Action Plan.**

CFC contends that the Commission is required by section 2714.5 to "prepare and submit to the Legislature, a report that describes the progress achieved toward implementing the policy objectives of the Commission's Water Action Plan." (See CFC's Rehearing App., p. 7.) CFC argues that based on decisions made in D.08-02-036, the Commission will have very little progress to report. (See Rehearing App., p. 8.) Specifically, CFC argues that instead of implementing a rate design that will encourage water conservation, the Commission stated a preference for an overall conservation goal which has yet to be quantified, and thus rehearing should be granted to consider how rates should be designed to encourage such conservation. (See CFC's Rehearing App., p. 8.) These claims are equally without merit.

CFC's claims are vague and fail to establish that the determinations made in D.08-02-036 are not lawful. Section 1732 requires that the application for a rehearing "shall set forth specifically the ground or grounds on which the rehearing applicant considers the decision or order to be unlawful." (See Pub. Util. Code, §1732.) Rule 16.1 further requires that applications for rehearing must make specific references to the record or law. (Rule 16.1 of the Commission's Rules of Practice and

Procedure, Code of Regs., tit. 20, §16.1.) CFC's claims that "based on decisions made in D.08-02-036 the Commission will have very little progress to report" fail to meet such specificity. Because CFC's allegations fail to provide the requisite specificity and do not show legal error consistent with Rule 16.1 or Public Utilities Code section 1732, they are rejected.

Further, CFC makes numerous other claims regarding the Commission's alleged violation of statutes relevant to the Water Action Plan. For example, CFC cites the Water Action Plan's objective to "strengthen water conservation programs to a level comparable to those of energy utilities" in an attempt to illustrate how the decisions made in D.08-02-036 allegedly fall short of fulfilling this objective, and argues that the Commission's decision in this case does not mirror the high priority for conservation in the energy sector. (See CFC's Rehearing App., p. 9.) CFC further contends that the Decision declined to adopt specific rate objectives (baseline allowance and demand base rates), and this in effect constitutes a rejection of the rate design objective of the Water Action Plan. (See CFC's Rehearing App., p. 10.) With respect to baseline allowance, CFC argues the Commission abandoned the lifeline principle and denied some customers reasonably priced water for the first 10 ccf of water needed for basic household needs. With respect to demand base rates, CFC argues the Commission failed to address the need for peak demand or seasonal rates. CFC also maintains that the Commission's baseline water allowance was described in a 1976 decision, and although the parties testified that the level of water deemed essential was 10 ccf, the Commission found no reason to exempt districts with low average consumption from increasing block rates. (See CFC's Rehearing App., p. 10.)

CFC's claims lack merit and amount to nothing more than CFC's overall disagreement with the Commission in not having reached the same policy conclusions that CFC proposed. The fact that CFC disagrees with the Commission's determination on the issue does not, however, constitute legal error. Moreover, these allegations are unfounded, and fail to prove in any way, that D.08-02-036 violates

section 2714.5 or any other statute relevant to the Water Action Plan. CFC's allegations fail to provide the requisite specificity and do not show legal error consistent with Rule 16.1 or section 1732.

D.08-02-036, moreover, is consistent with the Water Action Plan. Specifically, the Water Action Plan identifies the policy objectives that will guide the Commission in regulating the investor-owned water utilities, and highlights the actions that the Commission anticipates or will consider taken in order to implement these objectives.<sup>17</sup> The Water Action Plan embodies goals and policy objectives for the Commission to work towards; but these are not absolute mandates. The Decision is consistent with these goals and objectives.

For example, D.08-02-036 acknowledges that the Water Action Plan recommended means to achieve the stated objective of strengthening water conservation programs to a level comparable to those of energy utilities. (See D.08-02-036, p. 9.) The Decision found it appropriate to preliminarily quantify the overall goal for water conservation, absent drought or other extraordinary conditions, in order to provide guidance in adopting conservation rates and other conservation programs. In doing this, the Decision acknowledges CFC's objectives, although preferring an overall policy objective to the narrower objectives CFC advances. (See D.08-02-036, p. 10). The Commission set an overall goal for water conservation ranging, at a minimum, from 3% to 6% reduction in per customer or service connection consumption every three years once a full conservation program, with both price and non-price components, is in place. If a utility with conservation rates does not meet this goal, or does not meet the goal for a customer class, the utility will adjust its conservation rate design to prospectively meet the goal in its next GRC. We did not express a desired reduction in consumption prior to consideration of the proposals before us, and there will be no penalty for failure to meet the target we finally adopt.

---

<sup>17</sup> See Water Action Plan, Summary p. 1.

Thus, we adopted an initial target for a reduction in consumption for the trial programs and noted that it will consider a longer range goal that will apply to conservation rates adopted after these trial programs. (See D.08-02-036, p. 12.) Our Decision favored a broad approach, adopting an overall reduction in consumption, because it permits individual utilities latitude to meet this goal through price and non-price policies. (See D.08-02-036, p. 12.) Although we rejected CFC's specific policy recommendations in favor of this overall goal, we did so without determining whether those recommendations might advance the Commission's policy goal. (See D.08-02-036, p. 13.) Setting an objective different from that which CFC proposed in itself does not, however, constitute legal error.

Lastly, CFC contends that the Commission's decision to defer decisions on rate design issues to the utilities individual cases rather than addressing them constitutes legal error. (See CFC's Rehearing App., p. 11.) This claim lacks merit. The Commission has broad statutory powers granted, including those set forth in section 701, which provides that the Commission can "do all things whether specifically designated [by statute] or in addition thereto, which are necessary and convenient to the exercise of its power and jurisdiction." (See *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4<sup>th</sup> 781, 792; see also, Pub. Util. Code, §701.) As the party seeking rehearing, CFC has the burden to demonstrate the specific grounds upon which it considers the decision to be unlawful, and vague assertions as to the record or law, without citation, may be afforded little weight. (See Pub. Util. Code, §1732; see also Rule 16.1 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §16.1.) CFC does not meet its burden. Specifically, CFC fails to demonstrate how our decision to defer the issue amounts to a failure on the Commission's part to give utilities the same high priority as given to the energy sector or how this constitutes legal error. There is nothing unlawful in choosing to defer rate issues to the utilities next GRC.

Moreover, the Decision explains that the conservation rate designs are trial programs. (See D.08-02-036, pp. 10-13.) The parties designed the conservation

rates as a first step for the individual Class A water utilities in order to avoid rate shock and a negative impact on low income customers. Further, these trial programs will be reviewed in the companies' next GRCs, and monitoring of these rates will permit the Class A utilities to propose alternate rate designs should the adopted rates fail to achieve targeted reductions in consumption. CFC's concerns on where breakpoints between tiers were set, the differential between tiers, and the amount of conservation expected by low usage districts were all countered by the settling parties' explanations of the rationale for each of these choices.<sup>18</sup> Accordingly, there is no error.

### 3. Section 1705.

CFC contends that the Commission failed to enter sufficient findings on the lawfulness of rates proposed in the settlements with Suburban Water Company, Park Water Company and Cal Water. (See Rehearing App., p. 12.) CFC cites Public Utilities Code sections 454(a), 453, 451, and 1705 in support of its argument. CFC argues that the Commission should grant rehearing and enter findings on 24 issues. (See CFC's Rehearing App., pp. 14-17.) These claims lack merit.

Section 1705 provides that the Commission decisions shall contain findings of facts and conclusions of law on all issues material to the order or decision. (Pub. Util. Code, §1705.) D.08-02-036 complies with this requirement.

The purpose for having findings in Commission decisions is to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [C]ommission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for

---

<sup>18</sup> Further, no other consumer group supported CFC's positions. In fact, TURN joined with DRA and Cal Water in an amended settlement which reduced service charges for residential customers in some districts but left the other parameters of the settlement agreements opposed by CFC in place. Moreover, Phase 2 scoping memo referenced by CFC makes it clear that the utilities should consider CFC's proposals in the next round of conservation rate designs along with other rate design issues. (See Assigned Commissioner's Ruling and Phase 2 Scoping Memo, p. 2, dated February 8, 2008.)

rehearing or review, assist others planning activities involving similar questions, and serve to help the [C]ommission avoid careless or arbitrary action.” (*Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813; see also *California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal.3d 251, 258-259.)

The Commission is not required to make each and every finding requested by the parties. CFC’s claims merely restate CFC’s criticism of the settlements and the settling parties’ positions relating to water rate design that were considered and adopted in the Decision. The Decision and its findings of fact and conclusions of law, however, comply with the requirements of section 1705 and fully express “the reasoning behind and the basis for the Commission’s decision.”

For example, Finding of Fact No. 1 details the settlement agreements proposed for adoption. Finding of Fact No. 3 points out that the conservation rate design settlement agreements are trial programs which will remain in effect only until the utilities next GRC. Finding of Fact No. 4 states the comments, testimony, and hearing record provide a comprehensive record for consideration of the settlements. Finding of Fact No. 5 acknowledges CFC’s request for delaying implementation of conservation rates until cost studies were done but supporting the utilities proposed rate designs in their applications if the Commission proceeds to adopt conservation rates. Finding of Fact No. 7 summarizes the Phase 1 scoping memo while noting that preparation of cost studies is not within the scope of this proceeding. Finding of Fact No. 11 notes the consistency of Cal Water’s existing and proposed non-residential rate designs with conservation rate design policy as consistent with CUWCC’s requirement. Finding of Fact No. 12 discusses Cal Water’s proposed residential rate design proposal. Findings Nos. 13 through 16 state findings relevant to Park Water and Suburban’s conservation rate designs. Finding Nos. 21 through 24 discuss the discounting method for low-income rate programs consistent with conservation goals, while deferring impact of conservation rate designs on LIRAs and higher discounts on service charges for larger households to Phase 2. Finding No. 28 discusses the

adjustment of approved rate designs for attrition or escalation factor adjustments. Conclusion of Law No. 2 approves the proposed settlements as reasonable in light of the whole record, consistent with the law, and in the public interest. Moreover, in the body of the Decision, the Commission makes multiple determinations that the proposed settlements are reasonable. (See D.08-02-036, pp. 2-7, 9, 11, 13, 14-17, 19-22, 28.) These findings and conclusions support the Commission's approval of the proposed settlements as reasonable. There is no error.

CFC further criticizes the Decision for failing to enter a conclusion of law on the burden of proof and demonstrating that the correct rule of law on the burden of proof was applied to the facts of the case as required by Section 1705. (See CFC's Rehearing App., p. 17.) CFC further argues that there is some reason to believe that the burden of proof was misallocated. (See CFC's Rehearing App., p. 18.) As discussed above, the Commission is not required to make each and every finding requested by the parties.

Moreover, CFC's allegations are also unsupported and incomprehensible. Claims such as: "There is some reason to believe it was not" and "It also appears from language used in the proposed decision (e.g., "we are not persuaded by CFC's other criticisms of the amended settlement") that the burden of proof was misallocated" are unclear, unsupported, and in no way constitute an allegation of legal error as required by section 1732 and Rule 16.1. At best, it appears that CFC raises a burden of proof argument because it disagreed with how we weighed the evidence in making its determinations in D.08-02-036. CFC's claims are essentially without merit, and merely constitute a complaint about the Commission not having reached the same policy conclusions that CFC urged it to adopt. The Decision, however, reasoned that there was a comprehensive record from testimony and comments for consideration of the settlements. The Commission further determined that the proposed settlements were reasonable in light of the whole record, consistent with the law, and in the public interest. (See D.08-02-036, p. 53 [Conclusion of Law No. 2].)

CFC, however, fails to provide any support or convincing rationale which would support its allegation.

Nonetheless, the burden was met in this case. Pursuant to Rule 12.1, parties were responsible for showing that “a settlement [was] reasonable in light of the whole record, consistent with law, and in the public interest.” (See Commission Rule of Practice and Procedure, tit. 20, §12.1.) For example, in the Motion of DRA and Suburban Water Systems to Approve Settlement Agreements, DRA and the utilities explained how the Conservation Rate Design settlement and the Low Income Settlement met these requirements, by stating:

“[T]he Settlements are reasonable in that they take into account the requirements of D.06-08-017, principles of conservation rate design as enumerated above, and underlying data unique to these districts including consumption and billing data. Secondly, the parties are aware of no statutory provision or prior Commission decision that would be contravened or compromised by the Settlements. The issues resolved in the Settlements are within the scope of this proceeding. The Settlements produce just and reasonable rates. The Settlements are in the public interest. The principal public interest affected by this proceeding is delivery of safe, reliable water service at reasonable rates. The Settlements advance this interest because they fairly balance [the company’s] opportunity to earn a reasonable rate of return against the needs of consumers for reasonable rates and safe, reliable water service. The Settlements are also consistent with the Commission’s Water Action Plan objective for setting rates that balance investment, promote conservation, and ensure affordability. In addition, the Commission approval of the Settlements will provide speedy resolution of contested issues, will save unnecessary litigation expense, and will conserve Commission resources...”<sup>19</sup>

As such, the parties met their burden, and there is no error.

---

<sup>19</sup> See Motion of Division of Ratepayer Advocates and Suburban Water Systems to Approve Settlement Agreements, pp. 15-16.

#### 4. Scoping Memo.

CFC argues that the Decision erroneously describes the Scoping Memo and excludes evidence of costs underlying rate design. (See Rehearing App., p. 20.) Specifically, CFC contends that D.08-02-036 erroneously concludes that cost allocation studies and cost information were not within the scope of this phase of the proceeding and that CFC's request is untimely. (See CFC's Rehearing App, p. 23.) CFC further maintains that the Scoping Memo precluded CFC from raising the issue of discrimination and need for cost studies. (See CFC's Rehearing App., p. 23.) CFC's argument has no merit.

The OII in this proceeding, issued January 2007, and consolidated pending conservation rate design applications and requested comments on both rate and non-rate design issues. The OII issued a preliminary Scoping Memo, and noticed parties that the Commission would consider implementing any increasing block rates that it might adopt for residential customers and WRAMs by advice letter or subsequent decision after issuing a decision on the broad policy issues. As previously discussed in Section II.B.1 above, CFC could have made its request after the issuance of either the OII or the preliminary Scoping Memo, or after DRA's proposal to phase this proceeding. CFC did not, and instead waited until testimony, evidentiary hearings and briefs to consider postponement of implementation of conservation rates until after cost allocation studies had been performed. As such, the assigned Commissioner granted DRA's unopposed request to phase this proceeding in the final scoping memo. More importantly, once the Scoping Memo issues, and absent any amendment, it governs the issues in the proceeding or, in this case, this phase of the proceeding. Parties were aware of this fact.<sup>20</sup> As such, the Scoping Memo did not

---

<sup>20</sup> "Any party filing a response to this preliminary scoping memo shall state in its comments any objections the party has regarding (1) the issues to be considered; (2) the need for hearings; and (3) the schedule for this proceeding as described in this order.... If no comments are filed concerning the preliminary scoping memo, the preliminary scoping memo will be deemed the scoping memo for the proceeding...." (See OII, p. 10.)

preclude CFC from raising these issues; CFC failed to timely raise the issues. Thus, CFC's argument has no merit.

### 5. Due process.

Lastly, CFC contends that CFC was not afforded a fair hearing. (See CFC's Rehearing App, p. 25.) CFC identifies a few rulings made by the ALJ during this proceeding which CFC alleges constitute procedural irregularities and which produced a hearing that CFC contends was not fair and open. (See Rehearing App., pp. 25-27.) For example, CFC argues that the comment period was shortened to accommodate water company delays and that settlements were not excluded even though filed late, settling parties were not required to offer evidence to support their settlements, and the ALJ refused to accept CFC's exhibits. (See CFC's Rehearing App., pp. 25-27.)<sup>21</sup> These claims are without merit.

In fact, the OII in this proceeding set a tentative schedule for this proceeding, and notified the parties that such is subject to change by the Commissioner or assigned ALJ in this proceeding. Specifically, the OII states, "through the scoping memo and subsequent rulings, the assigned Commissioner and the assigned ALJ may adjust the timetable as necessary during the course of the proceeding and establish the schedule for remaining events." (See OII, pp. 11-12.) In a ruling, dated May 28, 2007, the ALJ granted Cal Water's request for continuance to allow the negotiation of the settlement. This is within the Commission's authority. (See e.g., Pub. Util. Code, §701.)

Further, CFC's claim that the ALJ refused CFC's exhibits because "she did not want to have to read them" is equally without merit, nor does CFC offer any support for its claim. In fact, a motion to strike Ms. Wodtke's testimony and many of her proposed exhibits were made on the grounds that Ms. Wodtke was not a qualified expert, and that many of the proposed exhibits constituted impermissible hearsay, as

---

<sup>21</sup> This issue was addressed by CFC in its Comments to the Proposed Decision.

well as the exhibits comprised of incomplete documents or documents already in evidence. The ALJ later recognized Ms. Wodtke as an expert for limited purposes and agreed to accept documents into evidence or designate them as items for reference based on those limits. Ms. Wodtke and Cal Water Association stipulated to a procedure by which such testimony and proposed exhibits were allowed into evidence while other exhibits were received for information purposes only.<sup>22</sup> CFC expressly stipulated to that disposition of the evidentiary material, made no timely objection to it, and thus has no basis to object to the ALJ's disposition of its proposed evidentiary material. There was nothing unfair about this procedure. CFC had notice and an opportunity to be heard, and as such, was afforded due process.

### III. CONCLUSION

We have reviewed all of the allegations in the rehearing applications and we grant limited rehearing solely on the issue of extending memorandum account treatment to all Class A utilities. For clarification purposes, we also modify Conclusion of Law No. 7, and quote discussed above, which appears on page 46 of the Decision. Rehearing of D.08-02-036, as modified, is denied in all other respects.

**THEREFORE IT IS ORDERED** that:

1. A limited rehearing of D.08-02-036 is granted solely on the issue of extending memorandum account treatment to all Class A water utilities. An assigned ALJ ruling will issue setting forth the schedule for this limited rehearing, including, but not limited to, the time for filing opening and reply comments by parties in the OII. The limited rehearing shall be limited to the issue of whether memorandum account treatment should be extended to all Class A water utilities to this OII proceeding, and shall include all documentation to support or oppose this memorandum account treatment. The utilities should provide information regarding

---

<sup>22</sup> See RT, Vol. 3, p. 310-313; see also RT Vol. 3, pp. 333-336, 343-344, 454-456; RT Vo. 4, pp. 516-520.

legal and related expenses incurred in participating in this proceeding from the date of issuance of this OII.

2. Conclusion of Law No. 7, as modified, should read:

“It is reasonable to deny Suburban’s request to track in a memorandum account expenses incurred between the issuance of D.06-08-017 and the issuance of this OII. Because these costs were anticipated at the time of Suburban’s GRC proceeding, there is no reason to consider recovery of them now.”

3. For purposes of clarification, the quote on page 46 of the Decision shall be modified to read as follows:

“Future requests for memorandum accounts to track costs associated with participating in generic proceedings shall be made to the Water Division by advice letter in accordance with G.O. 96-B and the Water Industry rules. Water Division should prepare a resolution for Commission consideration unless the Commission has previously directed staff to deny or to approve the particular relief requested.

4. The Executive Director shall serve this Order on all Class A water utilities.
5. Except as set forth above, rehearing of D.08-02-036 is hereby denied in all other respects.

This order is effective today.

Dated June 18, 2009 at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY A. SIMON  
Commissioners