

Decision 03-04-028 April 3, 2003

**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 . . . rescind, alter, or amend any order or decision made by it.” 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 Report on Non-Tariffed Offerings**

Since the effective date of D.00-07-018, water utilities may have entered into agreements to provide non-tariffed goods or services and relied on Ordering Paragraph 2 as providing an exemption from the advice letter filing requirement. We will not require advice letter filings for such agreements. As noted above, however, each water utility offering non-tariffed services must submit an annual report to the Water Division. To synchronize the filings and to inform Water Division of all current nontariffed offerings, each water utility shall submit a report to Water Division, with copies to ORA and the service list for the most recent general rate case, describing its nontariffed offerings no later than 45 days after the effective date of this order. We will also require each water utility to specifically describe, document, and provide supporting accounting detail in its next general rate case application for all non-tariffed offerings.

#### **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.

The California Water Association (CWA) filed comments on the draft decision. CWA's first contention is that when interpreting a Commission decision, the ordering paragraphs take precedence over the discussion. As the ordering paragraph at issue here grants the exemption, CWA concludes that any inconsistent language in the text of the decision should be disregarded.

While CWA may well be articulating a correct statement of the law, it is inapplicable. In today's decision, we modify D.00-07-018, rather than interpret it. As quoted above, pursuant to § 1708, we may do so "at any time."

CWA next contends that the existing ordering paragraph is consistent with the ORA/Edison settlement approved in D.99-09-070, and that the Commission intended to adopt a similar program for water utilities. CWA describes the settlement as providing:

Existing affiliate transaction rules (Rule 7.E) required Edison to file an advice letter before offering a new category of non-tariffed products or services, and the settlement required Edison to treat such new offerings as passive (subject to a 30% ratepayer share of gross revenues) unless Edison could show in its advice letter that an offering should be considered "active."

CWA Brief at 8.

In contrast to the ORA/Edison settlement, the affiliated interest rules on non-tariffed offerings do not apply to water utilities. These rules are reproduced

in Attachment A. As CWA points out, these rules require an energy utility to file an advice letter for categories of offerings but not for individual contracts. The term “category” is defined as “a factually similar group of products and services that use the same type of utility assets or capacity.” Such a filing allows the Commission to review the utility’s assertion of excess capacity and no diminished utility service. In contrast to the affiliated interest rule filing requirement, CWA advocates here for all listed active offerings to be completely exempt from filing with the Commission. Another significant difference is that the ORA/Edison settlement creates the presumption that all new offerings are passive, with customers receiving 30% of revenues, rather than the 10% provided for active offerings. No such presumption is applicable to water utilities. In sum, the view that CWA advocates would not allow the Commission any review prior to the utility entering into the contract, and is thus not consistent with the ORA/Edison settlement.<sup>1</sup>

CWA’s final contention is that the rules governing energy and water utilities’ nontariffed offerings should be comparable. As set out above, however, CWA seeks a lower level of Commission review for water utility offerings, not a comparable review.

CWA also challenges the draft decision’s requirement that water utilities submit advice letters for all unapproved non-tariffed offerings. CWA describes this as “retroactive approval” and argues that such approval is unnecessary because non-tariffed offerings will be reviewed as part of the utilities’ general

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<sup>1</sup> We note that D.00-07-018 does not foreclose a water utility from filing “generic” contracts for nontariffed services. Such a filing could set out the terms and conditions for a particular non-tariffed service without a specific customer.

rate cases. We have replaced the advice letter filing requirement with a report as set out above.

Suburban Water Systems filed a document entitled “reply comments,” which echoed CWA’s comments. The document was not limited to “identifying misrepresentations of law, fact or condition of the record contained in the comments of other parties” as is required by Rule 77.5 of the Commission’s Rules of Practice and Procedure. For that reason, we will accord this document little weight in our consideration of these issues.

## **VI. Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Maribeth A. 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 submit a report describing all such offerings to the Water Division, with copies to the Office of Ratepayer Advocates and the service list for the most recent general rate case, no later than 45 days after the effective date of this decision. In the next general rate case application, each water utility should describe, document, and provide supporting accounting detail for all non-tariffed offerings.

## O R D E R

Therefore, **IT IS ORDERED** that:

1. Decision 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 submit a report describing all such offerings to the Water Division, with copies to the Office of Ratepayer Advocates and the service list for the most recent general rate case, no later

than 45 days after the effective date of this decision. In the next general rate case application, each water utility shall describe, document, and provide supporting accounting detail for all non-tariffed offerings.

3. This proceeding is closed.

This order is effective today.

Dated April 3, 2003, at San Francisco, California.

MICHAEL R. PEEVEY  
President

CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners

## ATTACHMENT A

### VII. Utility Products and Services

A. **General Rule:** Except as provided for in these Rules, new products and services shall be offered through affiliates.

B. **Definitions:** The following definitions apply for the purposes of this section (Section VII) of these Rules:

1. "Category" refers to a factually similar group of products and services that use the same type of utility assets or capacity. For example, "leases of land under utility transmission lines" or "use of a utility repair shop for third party equipment repair" would each constitute a separate product or service category.

2. "Existing" products and services are those which a utility is offering on the effective date of these Rules.

3. "Products" include use of property, both real and intellectual, other than those uses authorized under General Order 69-C.

4. "Tariff" or "tariffed" refers to rates, terms and conditions of services as approved by this Commission or the Federal Energy Regulatory Commission (FERC), whether by traditional tariff, approved contract or other such approval process as the Commission or the FERC may deem appropriate.

C. **Utility Products and Services:** Except as provided in these Rules, a utility shall not offer nontariffed products and services. In no event shall a utility offer natural gas or electricity commodity service on a nontariffed basis. A utility may only offer for sale the following products and services:

1. Existing products and services offered by the utility pursuant to tariff;

2. Unbundled versions of existing utility products and services, with the unbundled versions being offered on a tariffed basis;

3. New products and services that are offered on a tariffed basis; and

## ATTACHMENT A

4. Products and services which are offered on a nontariffed basis and which meet the following conditions:
  - a. The nontariffed product or service utilizes a portion of a utility asset or capacity;
  - b. such asset or capacity has been acquired for the purpose of and is necessary and useful in providing tariffed utility services;
  - c. the involved portion of such asset or capacity may be used to offer the product or service on a nontariffed basis without adversely affecting the cost, quality or reliability of tariffed utility products and services;
  - d. the products and services can be marketed with minimal or no incremental capital, minimal or no new forms of liability or business risk being incurred by the utility, and minimal or no direct management control; and
  - e. the utility offering is restricted to less than 1% of the number of customers in its customer base.

**D. Conditions Precedent to Offering New Products and Services:** This Rule does not represent an endorsement by the Commission of any particular nontariffed utility product or service. A utility may offer new nontariffed products and services only if the Commission has adopted and the utility has established:

1. A mechanism or accounting standard for allocating costs to each new product or service to prevent cross-subsidization between services a utility would continue to provide on a tariffed basis and those it would provide on a nontariffed basis;
2. A reasonable mechanism for treatment of benefits and revenues derived from offering such products and services, except that in the event the Commission has already approved a performance-based ratemaking mechanism for the utility and the utility seeks a different sharing mechanism, the utility should petition to modify the performance-based ratemaking decision if it wishes to alter the sharing mechanism, or clearly justify why this procedure is inappropriate, rather than doing so by application or other vehicle.
3. Periodic reporting requirements regarding pertinent information related to nontariffed products and services; and

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4. Periodic auditing of the costs allocated to and the revenues derived from nontariffed products and services.

**E. Requirement to File an Advice Letter:** Prior to offering a new category of nontariffed products or services as set forth in Section VII C above, a utility shall file an advice letter in compliance with the following provisions of this paragraph.

1. The advice letter shall:

a. demonstrate compliance with these rules;

b. address the amount of utility assets dedicated to the non-utility venture, in order to ensure that a given product or service does not threaten the provision of utility service, and show that the new product or service will not result in a degradation of cost, quality, or reliability of tariffed goods and services;

c. demonstrate that the utility has not received recovery in the Transition Cost Proceeding, A.96-08-001, or other applicable Commission proceeding, for the portion of the utility asset dedicated to the non-utility venture; and

d. address the potential impact of the new product or service on competition in the relevant market.

2. In the absence of a protest alleging non-compliance with these Rules or any law, regulation, decision, or Commission policy, or allegations of harm, the utility may commence offering the product or service 30 days after submission of the advice letter.

3. A protest of an advice letter filed in accordance with this paragraph shall include:

a. An explanation of the specific Rules, or any law, regulation, decision, or Commission policy the utility will allegedly violate by offering the proposed product or service, with reasonable factual detail; or

b. An explanation of the specific harm the protestant will allegedly suffer.

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4. If such a protest is filed, the utility may file a motion to dismiss the protest within 5 working days if it believes the protestant has failed to provide the minimum grounds for protest required above. The protestant has 5 working days to respond to the motion.

5. The intention of the Commission is to make its best reasonable efforts to rule on such a motion to dismiss promptly. Absent a ruling granting a motion to dismiss, the utility shall begin offering that category of products and services only after Commission approval through the normal advice letter process.

F. **Existing Offerings:** Unless and until further Commission order to the contrary as a result of the advice letter filing or otherwise, a utility that is offering tariffed or nontariffed products and services, as of the effective date of this decision, may continue to offer such products and services, provided that the utility complies with the cost allocation and reporting requirements in this rule. No later than January 30, 1998, each utility shall submit an advice letter describing the existing products and services (both tariffed and nontariffed) currently being offered by the utility and the number of the Commission decision or advice letter approving this offering, if any, and requesting authorization or continuing authorization for the utility's continued provision of this product or service in compliance with the criteria set forth in Rule VII. This requirement applies to both existing products and services explicitly approved and not explicitly approved by the Commission.

G. **Section 851 Application:** A utility must continue to comply fully with the provisions of Public Utilities Code Section 851 when necessary or useful utility property is sold, leased, assigned, mortgaged, disposed of, or otherwise encumbered as part of a nontariffed product or service offering by the utility. If an application pursuant to Section 851 is submitted, the utility need not file a separate advice letter, but shall include in the application those items which would otherwise appear in the advice letter as required in this Rule.

H. **Periodic Reporting of Nontariffed Products and Services:** Any utility offering nontariffed products and services shall file periodic reports with the Commission's Energy Division twice annually for the first two years following the effective date of these Rules, then annually thereafter unless otherwise directed by the Commission. The utility shall serve periodic reports on the service list of this proceeding. The periodic reports shall contain the following information:

1. A description of each existing or new category of nontariffed products and services and the authority under which it is offered;
2. A description of the types and quantities of products and services contained within each category (so that, for example, "leases for agricultural nurseries at 15 sites" might be listed under the category "leases of land under utility transmission lines," although the utility would not be required to provide the

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details regarding each individual lease);

3. The costs allocated to and revenues derived from each category; and

4. Current information on the proportion of relevant utility assets used to offer each category of product and service.

**I. Offering of Nontariffed Products and Services to Affiliates: Nontariffed** products and services which are allowed by this Rule may be offered to utility **affiliates** only in compliance with all other provisions of these Affiliate Rules. Similarly, this Rule does not prohibit affiliate transactions which are otherwise allowed by all other provisions of these Affiliate Rules.

**(End of Attachment A)**