

Decision 07-09-021 September 6, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion for the purpose of considering policies and guidelines regarding the allocation of gains from sales of energy, telecommunications, and water utility assets.

Rulemaking 04-09-003
(Filed September 2, 2004)
(Phase Two)

**OPINION REGARDING GAINS ON SALE OF UTILITY ASSETS
(PHASE TWO)—ISSUES NOT RESOLVED IN DECISION 06-05-041**

TABLE OF CONTENTS

Title	Page
OPINION REGARDING GAINS ON SALE OF UTILITY ASSETS (PHASE TWO) – ISSUES NOT RESOLVED IN DECISION 06-05-041	2
1. Summary	2
2. Background.....	4
3. Discussion	5
3.1. “Major Facility” Under Pub. Util. Code § 455.5	5
3.1.1. Introduction.....	5
3.1.2. Electric Utility Reporting Threshold.....	6
3.1.2.1. Comments – Electric Utility Reporting Threshold	6
3.1.2.2. Discussion – Electric Utility Reporting Threshold	8
3.1.3. Natural Gas Utility Reporting Threshold	9
3.1.3.1. Comments – Natural Gas Utility Reporting Threshold...	9
3.1.3.2. Discussion – Natural Gas Utility Reporting Threshold.	11
3.1.4. Water Utility Reporting Threshold	12
3.1.4.1. Comments – Water Utility Reporting Threshold	12
3.1.4.2. Discussion – Water Utility Reporting Threshold.....	14
3.2. Formula for Determining a Reasonable Rate of Return on CIAC Funds (Water Utilities)	16
3.2.1. Statutory Framework	16
3.2.2. Comments – Developer CIAC	17
3.2.3. Discussion – Developer CIAC	19
3.3. Sale of Water Utility Assets Due to Condemnation	21
3.3.1. Comments – Condemnation/Threat of Condemnation/Service Duplication	22
3.3.2. Discussion – Condemnation/Threat of Condemnation/Inverse Condemnation	24
4. Comments on Proposed Decision.....	28
5. Assignment of Proceeding	29
Findings of Fact.....	30
Conclusions of Law	31
ORDER	33

**OPINION REGARDING GAINS ON SALE OF UTILITY ASSETS
(PHASE TWO)—ISSUES NOT RESOLVED IN DECISION 06-05-041**

1. Summary

In Decision (D.) 06-05-041, we adopted a process for allocating gains on sale received by certain electric, gas, telecommunications and water utilities when they sell utility land, assets such as buildings, or other tangible or intangible assets formerly used to serve utility customers. We left open a few issues for further comment, as we had an inadequate record on which to render a decision at that time.

The open issues and our decisions on them are as follows:

- **What constitutes a "major facility" under Pub. Util. Code § 455.5?**

Section 455.5¹ requires that utilities report to the Commission when a “major facility” is taken out of service for nine or more consecutive months, to ensure that rates do not include the value of these facilities. In D.06-05-041, we suggested the parties meet and confer, and also file an additional round of comments, addressing a means of defining “major facility” that varies depending on the size of the utility.

We adopt separate Section 455.5 definitions for electric, gas and water facilities. We adopt the parties’ consensus definitions for electric utilities, and adopt a threshold for gas and water utilities that ensures that high value facilities are reported. We believe the definitions we adopt protect ratepayers from

¹ All statutory references are to the Public Utilities Code unless otherwise noted.

having to make significant overpayments, while not imposing excessive regulatory or financial burdens on the utilities we regulate.

- **Formula for determining a reasonable rate of return on Contribution in Aid of Construction (CIAC) funds (water utilities)**

In D.06-05-041, the Commission found that under Section 790, “water companies should re-invest gains from the sale of assets recorded under Contributions in Aid of Construction (CIAC) in new water infrastructure, and that the water companies may earn a reasonable rate of return on that reinvested gain.” However, the Commission deferred a determination of what constitutes a “reasonable rate of return.” We asked parties to comment whether this rate of return “ought to be the same as (or different from) the rate of return the utility earns on other property.”

We find that there is no evidence to support a different rate of return for plant purchased with the proceeds of CIAC sales. Instead, we require any water company seeking to sell CIAC to apply to the Commission for approval of such sale, and in so doing to prove the property is no longer necessary and useful and that the utility is not selling the property simply to obtain a rate of return on plant purchased with the proceeds.

- **Sale of water utility assets due to condemnation or under threat of condemnation**

In comments leading up to D.06-05-041, certain water utilities contended that Section 790 allows water company shareholders to reinvest proceeds from three different types of condemnation scenarios in infrastructure, rather than returning such proceeds to ratepayers. These scenarios are: 1) condemnation, 2) sale in anticipation of condemnation and 3) inverse condemnation. We asked for further comment on these scenarios in D.06-05-041.

We find that all three of these scenarios implicate Section 790 because they each qualify as a species of sale. Thus, the proceeds resulting from each condemnation scenario must be allocated as indicated by Section 790; namely, invested into improved water system infrastructure, plant, facilities, and properties useful in the water utility's performance of its duties to the public or, after a period of eight years, allocated solely to ratepayers.

2. Background

After the Commission issued D.06-05-041, Administrative Law Judge (ALJ) Thomas sent two rulings to parties asking them for comment on the three open issues.² At the parties' request, they were given until September 2006 to furnish complete responses to the rulings. The parties filed the comments listed in Appendix A to this decision.

At the same time as ALJ Thomas was gathering comments on the open issues, Applications for Rehearing of D.06-05-041 were pending. The Commission resolved those issues in December 2006 in D.06-12-043. One of the rehearing issues related to whether D.06-05-041 properly interpreted Section 790, one of the statutes also at issue here. We therefore refrained from deciding the issues here until the Commission had decided the Applications for Rehearing. Ultimately, D.06-12-043 upheld the Commission's application of Section 790, and therefore does not affect our approach to the issues presented here.

² *Administrative Law Judge's Ruling Regarding Allocation of Gains on Sale of Utility Assets*, filed June 29, 2006, and *Administrative Law Judge's Ruling Requiring Parties to Meet and Confer*, filed Aug. 14, 2006. The first ruling asked for comment; the second required the parties to meet and confer in an attempt to reach agreement on the § 455.5 issue. The parties' comments are listed in Appendix A to this decision.

3. Discussion

3.1. “Major Facility” Under Pub. Util. Code § 455.5

3.1.1. Introduction

Section 455.5 requires that utilities report periodically to this Commission whenever any portion of an “electric, gas, heat, or water generation or production facility” is out of service, and immediately when a portion of such facility has been out of service for nine consecutive months. Section 455.5(f) notes that an “electric, gas, heat, or water generation or production facility includes only such a facility that the commission determines to be a major facility” The purpose of the statute is to ensure that utilities not earn a rate of return on utility assets (or portions thereof) that are out of service for at least nine months. Allowing a rate of return on such property would overcompensate the utilities at ratepayers’ expense.

We proposed in the original Order Instituting Rulemaking (OIR) initiating this proceeding that a “major facility” include any asset with an initial acquisition price of \$500,000 or more. The parties' comments suggested we avoid a "one size fits all" approach since the definition of what is “major” depends on the size of the utility. We agreed with this premise in D.06-05-041³ and asked interested parties to meet and confer in an attempt to reach a consensus definition for electric, gas and water facilities. The parties held several meet and confer sessions. While the parties did not reach complete agreement, they came close, as shown below.

³ D.06-05-041, *mimeo.*, pp. 51-52.

Where possible, we adopt the consensus definitions because we find them reasonable. We also agree with the premise, borne out by the parties' comments, that differences in the electric, gas and water industries merit different definitions for each industry.

3.1.2. Electric Utility Reporting Threshold

3.1.2.1. Comments—Electric Utility Reporting Threshold

The electric utilities and other interested parties generally reached a consensus on the types of electric facility subject to the Section 455.5 reporting requirements.⁴ They recommend for electric utilities that

a “major generation or production facility” include any generation plant or facility with nameplate capacity of 50 megawatts (MW) or more, *or* that represents at least one percent (1%) of an electric utility’s retained generation system capacity. System capacity includes the utility’s ownership share in jointly-owned and out-of-state facilities.

A reportable outage of a “portion” of a major generation facility should be interpreted as an outage of any independent operating unit at a major generation facility. Thus, electric utilities must report

⁴ See Aglet Consumer Alliance (Aglet) Reply Comments (9/8/2006) at 2; Southern California Edison Company (SCE) Reply Comments (9/8/2006) at 2; San Diego Gas & Electric Company (SDG&E)/Southern California Gas Company (SoCalGas) Reply Comments (9/8/2006) at 2 (“either Edison’s or Aglet’s wording is acceptable to SDG&E and SoCalGas”); Pacific Gas and Electric Company (PG&E) Reply Comments (9/8/2006) at 2; Division of Ratepayer Advocates (DRA) Reply Comments (9/8/2006) at 2 (with one qualification: that the definition be modified to include electric generation facilities of \$30 million net plant value or greater).

any outage of a single generating unit for which the capacity of the entire plant exceeds the 50 MW or 1% minimums.⁵

Aglet states that this definition will cover most large generation facilities of the three largest electric utilities, PG&E, SCE, and SDG&E, including all of their nuclear and coal facilities and out-of-state plants (Palo Verde Nuclear Generating Station and Four Corners Generating Station). SCE concurs regarding its facilities, stating that at present the definition would apply to the same group of SCE facilities using either the one percent prong (approximately 60 MW) or the 50 MW prong, and capture as "major facilities" SCE's Mountainview plant, each of SCE's shares in coal and nuclear facilities, and SCE's hydroelectric facilities.

DRA agrees generally with the consensus definition, but would add a qualifier to the 50 MW/1% of retained generation system capacity threshold. Noting that the consensus definition would leave out significant hydroelectric facilities of PG&E,⁶ DRA proposes adding a threshold of \$30 million in net plant value to the conditions triggering Section 455.5 reporting requirements.

PacifiCorp proposes a wrinkle on the consensus definition because it is a multi-jurisdictional electric utility with limited facilities in California. It suggests that the 1% of system generation capacity be calculated based on all PacifiCorp-owned or jointly owned generation within PacifiCorp's six state service

⁵ For example, PG&E's Bucks Creek hydroelectric plant has two units of approximately 33 MW each. Under the consensus proposal, PG&E would report an outage at either unit, even though the unit capacity is below the limits, because the capacity of the entire plant exceeds the limit. Aglet Reply Comments at 2.

⁶ DRA identifies PG&E's DeSabra and Newcastle hydro facilities, with net plant value of \$37.3 million and \$55.9 million, respectively. DRA Reply Comments (9/8/2006) at 2.

territories⁷ (approximately 9,000 MW of generation) rather than its much smaller California base. This modification will require less reporting by PacifiCorp, as 1% of 9,000 MW will require reporting of far fewer outages than if PacifiCorp reports outages of 1% of the approximately 170 MW of generation PacifiCorp uses to serve California.

3.1.2.2. Discussion—Electric Utility Reporting Threshold

We adopt the consensus threshold for electric utilities, as follows:

For electric utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 includes any generation plant or facility with nameplate capacity of 50 megawatts (MW) or more, or that represents at least one percent (1%) of an electric utility’s retained generation system capacity, whichever is smaller. System capacity includes the utility’s ownership share in jointly-owned and out-of-state facilities.

A reportable outage of a “portion” of a major generation facility should be interpreted as an outage of any independent operating unit at a major generation facility. Thus, electric utilities must report any outage of a single generating unit for which the capacity of the entire plant exceeds the 50 MW or 1% minimums.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

This definition appropriately defines “major facility” pursuant to Section 455.5(f) as a relative term. Should a utility’s owned capacity grow, whether through mergers, major acquisitions, or other major investments, then the one percent threshold would also grow, and smaller, now-less-significant

⁷ PacifiCorp Reply Comments at 2-3.

facilities would drop out of the reporting requirement. Conversely, should a utility's owned capacity decline, whether through municipalization or other major divestiture, smaller units would become relatively more important to the overall system, and therefore appropriately would become reportable under Section 455.5.

We do not adopt DRA's additional \$30 million net plant value threshold, although we acknowledge reasonable minds could differ on the appropriate dollar threshold. The 1% threshold that is part of the test we adopt is adequate in our view to capture out of service facilities with a material impact on rates.

We adopt PacifiCorp's recommendation for its own reporting, and allow it to calculate the 1% or 50 MW threshold based on its total generation rather than the much smaller number representing the generation it uses to serve California. This proposal appropriately balances the need for reporting to avoid overcharging ratepayers against overly burdensome or unnecessary reporting.

3.1.3. Natural Gas Utility Reporting Threshold

3.1.3.1. Comments—Natural Gas Utility Reporting Threshold

The parties could not reach consensus on a definition of "major facility" for natural gas production facilities. The key dispute is over whether gas storage fields are reportable under the statute. This dispute matters, because if storage fields are not included under the statute, no gas facilities will be reportable at all. This is because utility-owned wells and gathering facilities tend to be small and dispersed over broad areas, and are therefore not "major facilities" by any party's definition. Storage fields, by contrast, are large, high-value facilities whose improper inclusion in rate base could have significant impact on ratepayers.

SoCalGas and SDG&E contend a storage facility does not “produce” gas, and therefore is not covered by the statute at all. They add that in other parts of the Public Utilities Code when the Legislature intends to include storage fields, it says so explicitly.

Aglet believes the term “gas production facilities” includes gas wells, gathering facilities and storage facilities, but that no wells or gathering facilities are “major facilities.” Thus, according to Aglet, the only reportable facilities under Section 455.5 are storage fields. If storage fields are not included in the statute, the statute would cover no gas facilities, which defies logic, contends Aglet.

Aglet recommends using 25% of a utility’s capacity to trigger the reporting requirement. According to Aglet, the following facilities either meet the threshold or are of unknown size, and thus reportable: a) PG&E’s McDonald Island and Los Medanos gas storage fields; and b) SoCalGas’ Aliso Canyon, Honor Rancho, La Goleta and Playa Del Rey gas storage fields.⁸ Aglet also proposes that “out of service” for gas storage fields mean that “the mechanical equipment used to inject or withdraw gas at the field is not available to inject or withdraw gas at a rate of at least 25% of the capacity of the equipment.”⁹

PG&E supports the following definition: “any production facility that represents at least one percent (1%) of a gas utility’s rate base.”

⁸ For security reasons, SoCalGas does not report the sizes or capacities of its storage fields. Absent such information, Aglet assumes all such fields are major fields.

⁹ Aglet Reply Comments at 3.

3.1.3.2. Discussion—Natural Gas Utility Reporting Threshold

In determining what gas facilities require reporting under Section 455.5, we look to the purpose of the statute. Section 455.5 is a ratemaking statute, and seeks to avoid giving utilities a rate of return on property that is out of service. Thus, we agree with Aglet that it makes no sense to exclude gas storage operations, because if we do, no gas utility property will be reportable. This cannot have been the Legislature's intent.

The fact that SoCalGas/SDG&E report outages on their electronic bulletin board on a real-time basis,¹⁰ while important for other purposes such as reliability of supply, does not address the ratemaking concern the Legislature addressed in Section 455.5. As we explained in D.06-05-041, the statute is intended to avoid charging a rate of return on property that is out of service:

Assuming a rate of return in the 10% range, such an asset, if left in rate base without being used for utility service, could lead to significant ratepayer overpayments. The statute's purpose to avoid such overpayment is clear on its face. If nothing else, the statute is designed to ensure that ratepayers do not pay a rate of return on assets in rate base that the utility is not using for utility service. Setting the "major facility" definition too high could cause significant ratepayer harm.¹¹

We thus find that major facility includes, for gas facilities, their storage fields. We also find reasonable Aglet's definition of "out of service": "out of

¹⁰ SDG&E/SoCalGas Reply Comments (9/8/06) at 4.

¹¹ D.06-05-041, *mimeo.*, p. 51. See also California Water Association (CWA) Reply Comments (9/8/06) at 5 ("All parties appear to have agreed that the Legislative policy underlying § 455.5 was an interest in protecting against significant ratepayer overpayments.").

service” for gas storage fields mean that “the mechanical equipment used to inject or withdraw gas at the field is not available to inject or withdraw gas at a rate of at least 25% of the capacity of the equipment.”

We do not agree with Aglet that all storage facilities of unknown size are reportable. Rather, gas utilities shall report out of service conditions on all gas storage facilities that meet the 25% threshold. If they are concerned about the security implications of reporting the size of facilities, they may file a motion or declaration concurrently with their Section 455.5 submission seeking confidential treatment.

We thus adopt the following definition of a reporting threshold for gas utilities:

For gas utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 is a facility representing at least 25% of the utility’s storage capacity. A “major generation or production facility” for this purpose includes a gas storage field. A gas storage field is “out of service” if the mechanical equipment used to inject or withdraw gas at the field is not available to inject or withdraw gas at a rate of at least 25% of the capacity of the equipment.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

3.1.4. Water Utility Reporting Threshold

3.1.4.1. Comments—Water Utility Reporting Threshold

Park Water, CWA, and Aglet reached a consensus on the appropriate reporting threshold for water utilities, as follows:

A “major generation or production facility” is a facility or combination of facilities, such as wells, interconnections, surface water diversion structures, and/or treatment facilities, that:

(a) produces water of a quality suitable for delivery into the distribution system of the utility or into storage for eventual delivery to customers; (b) is accounted for as "Source of Supply Plant" in Accounts 311 through 317 of the Uniform System of Accounts for Utilities, or as "Pumping Plant" in Accounts 321 through 325, or as "Water Treatment Plant" in Accounts 331 and 332; and (3) has a Net Plant Value of at least \$3,000,000 in the case of a Class A water company, \$2,000,000 in the case of a Class B water company, or \$1,000,000 in the case of a Class C or Class D water company.

A "portion" of a major production facility is a facility that, if it is out of service, prevents production of water from the major facility as a whole.

"Net Plant Value" means recorded plant in service minus accumulated depreciation.

Park Water asserts that in the Class A utility context, basing the reporting threshold on the initial cost of the facility would be over-inclusive, and therefore that it makes sense to base the Section 455.5 reporting threshold on the facility's depreciated value. Park Water also states that the threshold should not be so low as to burden water companies with excessive reporting requirements. It notes that cost increases of less than 1% of a company's revenue requirement are not significant enough to warrant a rate increase between general rate cases (GRC). It follows, states Park, that a "major facility" should not be defined so liberally as to include facilities without a GRC level of materiality to the company's revenue requirement.

CWA notes that the consensus definition places the focus in the appropriate place: on the revenue requirement of the utility. Out of service plant with a high net (depreciated) value will result in the most significant ratepayer overpayments, it states, and therefore should be reported under Section 455.5.

DRA recommends a different definition that focuses on the original cost of the facilities:

Class A water utility “major facilities” for purposes of § 455.5 are any real or personal property having an initial acquisition price of \$500,000 or more as recorded in Uniform System of Accounts (USOA) account numbers 311-325; Class B, C, and D water utility “major facilities” are calculated based on the average of the total original acquisition prices of all the real and personal property recorded in USOA account numbers 311-325.

DRA later states, inconsistently, that “the only criterion for § 455.5 reporting purposes should be whether the real or personal property is booked in one or more of the USOA account nos. 311-325. A dollar threshold should not be allowed....”¹²

3.1.4.2. Discussion—Water Utility Reporting Threshold

The definition of major facilities should focus on the revenue requirement impact of including out of service facilities in rate base. The consensus definition appropriately has this focus, and ensures adequate reporting without imposing unnecessary regulatory burdens.

We reject DRA’s proposal, which focuses on the initial cost of utility plant. A definition that is tied to the revenue requirement (the net value of utility facilities) makes more sense, because it is that value that the Commission uses to calculate rates.

We are concerned that the \$1,000,000 agreed-upon threshold for Class C and D water companies is too high to be meaningful in the context of these

¹² DRA Reply Comments (9/13/06) at 3.

companies' small operations. It is likely that outages of facilities worth \$1,000,000 will cause serious interruptions in water service to these companies' customers, and that we will thus know of the outages as a result of customer complaints or other notification. We therefore question whether Section 455.5 reporting is meaningful or necessary for these small companies. No party addresses the Class C and D issues specifically. We are inclined to waive Section 455.5 altogether for these companies, and instead to rely on receiving notice of such large outages in the ordinary course. Thus, we will not adopt the Section 455.5 reporting requirement for Class C and D water companies.

We also believe the consensus definition should be modified to make clear that all outages, whatever the cause, should be reported. Thus, utilities must report out of service conditions caused by events outside the control of the utility such as drought or earthquake, for example, as well as conditions caused by the utility such as a decision to take facilities out of service because they are no longer necessary or useful.¹³

Thus, we adopt the following Section 455.5 definition for water utilities:

For water utilities, a "major generation or production facility" for purposes of the requirements of Pub. Util. Code § 455.5 is a facility or combination of facilities, such as wells, interconnections, surface water diversion structures, and/or treatment facilities, that:

- (a) produces water of a quality suitable for delivery into the distribution system of the utility or into storage for eventual delivery to customers;
- (b) is accounted for as "Source of Supply Plant" in Accounts 311 through 317 of the Uniform System of Accounts for Water Utilities, or as "Pumping Plant" in Accounts 321 through 325, or as "Water Treatment Plant" in Accounts 331 and 332; and
- (3) has

¹³ This same provision should apply to electric and gas utilities.

a Net Plant Value of at least \$3,000,000 in the case of a Class A water company, or \$2,000,000 in the case of a Class B water company.

A “portion” of a major production facility is a facility that, if it is out of service, prevents production of water from the major facility as a whole.

“Net Plant Value” means recorded plant in service minus accumulated depreciation.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

3.2. Formula for Determining a Reasonable Rate of Return on CIAC Funds (Water Utilities)

3.2.1. Statutory Framework

For gain on sale purposes, water utilities are unique because there is a specific statute governing gain on sale allocation, the Water Utility Infrastructure Improvement Act of 1995, Pub. Util. Code § 789 *et seq.* (Infrastructure Act). The statute provides, in pertinent part, that a water corporation shall invest the “net proceeds” of the sale of no longer necessary or useful “real property” in water system infrastructure that is necessary or useful for utility service. The statute gives a utility a period of eight years from the end of the calendar year in which the water corporation receives the net proceeds to invest them in facilities necessary or useful to the performance of duties to the public. Any proceeds the utility does not so invest in the eight-year period shall be allocated solely to ratepayers.

We held in D.06-05-041 that the Infrastructure Act “limit[s] Commission discretion in how it allocates gains on sale of real property, provided that water companies shall use the proceeds from sales of formerly used and useful utility real property to invest in new water infrastructure. Such proceeds may not be

used to reduce rates or otherwise be returned to ratepayers unless the water companies fail to reinvest the proceeds within the eight-year period contained in § 790(c).”¹⁴ We also stated that, “water utilities must invest net proceeds from the sale of formerly used and useful real property in new water infrastructure. They need not refund such proceeds to ratepayers, but they may not pay the funds out to shareholders in the form of dividends or other earnings either.”¹⁵

We held that Section 790 also allows water utilities to reinvest gains on sale from developer CIAC property. However, we deferred decision on what the rate of return should be on infrastructure traceable to CIAC proceeds. This decision addresses the rate of return issue.

3.2.2. Comments—Developer CIAC

DRA/The Utility Reform Network (TURN) contest our holding that Section 790 allows water utilities to earn a rate of return on infrastructure purchased with proceeds from CIAC property. Because the utility does not purchase such property, but rather receives it from land developers, DRA/TURN claim, it is inequitable to allow water utilities a rate of return on infrastructure installed with proceeds from the sale of such CIAC property (CIAC property). They unsuccessfully made this same claim in an Application for Rehearing of D.06-05-041. All rehearings of D.06-05-041 have been resolved and our determination that D.06-05-041 correctly decided the Section 790 issue stands. See D.06-12-043.

¹⁴ D.06-05-041, *mimeo.*, p. 62 (footnotes omitted).

¹⁵ *Id.*, p. 64.

In response to our denial of rehearing in D.06-12-043, several parties claim the rate of return on CIAC property should be zero, or an amount that does not allow the utility to earn a return on property it had no financial role in acquiring. Aglet contends that because shareholders do not invest in CIAC property, and the utility has put no capital at risk, the only fair rate of return is zero. Anything else, claims Aglet, would give water utilities a perverse incentive to sell CIAC.

DRA/TURN note that since the water utility may not earn a rate of return on CIAC before selling it, it should not earn a return after selling it. Since CIAC is a gift, its character should not change after sale. DRA/TURN cite several Commission decisions holding utilities are not entitled to a rate of return on CIAC property.¹⁶

The water utilities take the position that there is no basis to allow a lower rate of return on CIAC property than any other water utility property in rate base. CWA, for example, quotes Section 790(b), which states that “All water utility infrastructure . . . shall be included among the water corporation's other utility property upon which the Commission authorizes the water corporation the opportunity to earn a reasonable return.” This provision, in CWA’s view, dictates *one* class of Section 790 property (“all water utility infrastructure”), *one* rate base (“the water corporation’s other utility property”) and *one* rate of return (“a reasonable return”).

¹⁶ DRA/TURN Comments (7/20/06) at 3, citing OIR *re Government Financed Funding to Investor-Owned Water and Sewer Utilities*, R.04-09-002, 2004 Cal. PUC LEXIS 411, at * 4 n.1 (filed Sept. 2, 2004), in turn citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591(1944); *Bluefield Water Works Co. v. Public Service Commission*, 262 U.S. 679 (1923); *Duquesne Light Co. v. Barash*, 488 U.S. 299 (1989).

Park Water asserts that to give water utilities a lower rate of return on property purchased with CIAC proceeds violates Section 790 because it effectively gives some of the gain on sale to ratepayers. “Even a slight reduction in rate of return, operating over the probably 40-year average life of the facilities funded with the reinvestment of the gain, would result in the allocation of a substantial portion of the gain to ratepayers.”¹⁷

3.2.3. Discussion—Developer CIAC

We have already considered and rejected in D.06-05-041 (and on rehearing in D.06-12-043) assertions that water utilities may not earn a rate of return on CIAC. This result is dictated by the Infrastructure Act, and we do not have discretion to deviate from the statute. Commission decisions issued before the Legislature promulgated Section 790 are not relevant to an interpretation of whether a rate of return is payable.

However, to mitigate the impact of allowing a water utility to profit from the sale of property it received for free, we proposed in D.06-05-041 that a “reasonable” rate of return on CIAC property might be lower than the rate a utility earns on other property. We agree with Aglet that allowing a full rate of return on such property might create an incentive for water utilities to sell CIAC property in order to reinvest the proceeds in infrastructure and earn a rate of return where none was earned before sale.

However, there is no proposal in the record, apart from the ratepayer advocates’ claim for a zero rate of return, supporting a rate that differs for CIAC property. Awarding a zero rate of return would be a transparent attempt to

¹⁷ Park Water Comments (7/20/06) at 4.

circumvent the statute. The better approach to ensure that water utilities do not sell CIAC property to boost their rate base is to require an approval mechanism. We will therefore impose an approval requirement for water companies selling CIAC property they contend is subject to Section 790 (that is, as to which they claim the right to reinvest the proceeds and for which they do or will receive a rate of return on infrastructure purchased with those proceeds). By the same token, we do not preclude any party from asserting, in an individual water company's general rate case or elsewhere, that its rate of return should be lowered to reflect that some property in its rate base was originally CIAC and thus acquired for free.

Any water company that sells real property that a developer contributed to the water company in aid of construction (CIAC property) which it claims or will claim is subject to Section 790 shall seek leave from the Commission to do so. In so doing, the water company shall prove that the property is no longer necessary or useful and that the sale is not intended merely to gain an opportunity for the water company to earn a rate of return on infrastructure purchased with the sale proceeds. The water company shall seek such approval by application or Advice Letter prior to any such sale, and may not make the sale without Commission authorization.

Whether the approval requires an application or an Advice Letter will be governed by the rules of our Section 851 pilot program, approved in Resolution ALJ-186 (August 30, 2005), or successor document. That pilot program currently allows utilities to elect to file an Advice Letter instead of a Section 851 application for certain small transactions.

Here, we are requiring an application or Advice Letter because of the potential for water companies to sell necessary and useful CIAC property out of

a motive to earn a rate of return after reinvesting the proceeds. Since CIAC property prior to its sale does not earn a rate of return, the opportunity could be substantial to convert it to a profit-making asset from one on which the company earns no return. Our modest approval requirement will ensure that water companies prove to the Commission's satisfaction prior to sale that the property is truly no longer necessary or useful, the prerequisite to Section 790 treatment.

3.3. Sale of Water Utility Assets Due to Condemnation

There are three condemnation scenarios at issue in this proceeding. The first involves eminent domain condemnations that go to judgment, with just compensation ordered by the court. The second involves sales in anticipation of condemnation, where a water company sells its property in order to stave off a condemnation action or settle a pending claim. The third scenario arises because California law (1) treats a government agency's duplication of the service or facilities provided by a privately-owned water utility as a taking of the property of the private utility to the extent that it renders the private utility's property useless, inoperative, or reduces its value; and (2) provides for payment of just compensation.¹⁸

In each scenario, the water companies claim the proceeds should be treated as a gain on sale pursuant to Section 790. It follows, they claim, that any proceeds from such sales should be reinvested in water utility property rather than allocated to ratepayers. By contrast, DRA/TURN contend proceeds attributable to condemnations, threats of condemnation, or service duplications

¹⁸ CAL. PUB. UTIL. CODE § 1501 *et seq.* (2006).

are not Section 790 sales at all and that, as a result, the proceeds must be returned to ratepayers.

3.3.1. Comments—Condemnation/Threat of Condemnation/Service Duplication

DRA/TURN contend that sales of utility assets due to condemnation or threat of condemnation should not fall under Section 790. They cite D.04-07-034,¹⁹ stating that proceeds from inverse condemnation settlements received by San Gabriel Valley Water Company (San Gabriel Water) were not subject to Section 790 because they did not involve the actual sale of real property.

By contrast, CWA contends that a transfer of property pursuant to a condemnation is a sale. It refutes the rationale denying “sale” status to condemnations (which asserts that Section 790 requires a “voluntary” act and selling under threat is not voluntary²⁰) by asserting that the rationale is a strained interpretation of the word “encouraged” in Section 789.1. It cites past (pre-Section 790) Commission decisions allocating gains on sale of property faced with condemnation.²¹

¹⁹ 2004 Cal. PUC LEXIS 334, at *71-*73. DRA/TURN also cited D.06-06-036, in which the Commission reaffirmed its D.04-07-034 holding.

²⁰ This “voluntariness” rationale was initially included in ALJ Thomas’ proposed decision in Phase One of this proceeding, and also appears in ALJ Barnett’s proposed decision in A.05-08-021, which involved further consideration of the San Gabriel Water issues not fully resolved in D.04-07-034.

²¹ CWA cites D.90-02-020, 35 CPUC 2d 275, 1990 Cal. PUC LEXIS 95, at *34; D.90-12-118, 29 CPUC 2d 33, 1990 Cal PUC LEXIS 1406, at *25; D.95-08-020, 51 CPUC 2d 50, 1995 Cal. PUC LEXIS 626, at *10-11; and D.98-10-044, 82 CPUC 2d 422, 1998 Cal. PUC LEXIS 818, at *3, *7, *11-*12. *See also* Park Water Comments (July 20, 2006) at 6 (“Nowhere in

Footnote continued on next page

Initially, California American Water Company (Cal-Am) took a different approach to the issue than the other water companies.²² It claimed, contrary to CWA and Park Water, that Section 790 does not cover condemnations at all because it only applies to “voluntary” sales of real property – the same argument the ratepayer advocates make here. Rather, Cal-Am contended, shareholders were entitled to all proceeds of such sales under the Commission’s *Suburban Water Systems*²³ and *Redding I*²⁴ decisions. Cal-Am later partially withdrew its comments, stating that “no-longer-needed real estate parcels sold under condemnation or the threat or imminence of condemnation would qualify for Section 790 reinvestment if all the other elements required by that code section are satisfied.”²⁵

In a case for San Gabriel Water, the same issues were briefed and addressed.²⁶ There, San Gabriel Water claimed that even where the public agency does not physically acquire the utility’s property, the utility may account for such payments as proceeds of a sale.²⁷ San Gabriel Water contended that

Section 790 does it specify that a sale must be voluntary in order for the utility to be allowed to reinvest the gain.”).

²² Cal-Am Comments (July 20, 2006) at 2-3.

²³ D.94-01-028, 53 CPUC 2d 45, 1994 Cal. PUC LEXIS 45.

²⁴ D.85-11-018, 19 CPUC 2d 161, 1985 Cal. PUC LEXIS 958.

²⁵ Partial Withdrawal of Comments of California-American Water Co. at 2 (July 20, 2006).

²⁶ A.05-08-021 (Aug. 5, 2005).

²⁷ *San Gabriel Valley Water Co. v. Montebello*, 84 Cal. App.3d 757 (1978); *Re San Gabriel Valley Water Co.*, D.92112 (hereinafter *Montebello*).

inverse condemnation proceeds are treated under the California Code of Civil Procedure and under state and federal tax laws as inverse condemnation damages and, pursuant to Pub. Util. Code § 1501, as an involuntary sale of property. San Gabriel Water therefore asserted that it should account for such proceeds as attributable to a sale of real property. We issued a decision on A.05-08-021 in D.07-04-046, but deferred the Section 790 issue to this proceeding for resolution.

3.3.2. Discussion—Condemnation/Threat of Condemnation/Inverse Condemnation

The key question is whether a condemnation is a “sale” covered by Section 790. Legislative intent, the plain language of the statute, and past Commission decisions all dictate that a condemnation is a species of sale and should be treated as such for the purposes of Section 790.

The first step in construing a statute is ascertaining the intent of the Legislature in order to “effectuate the purpose of the law.”²⁸ The Utility Infrastructure Improvement Act of 1995 is clear as to its purpose: to facilitate investment by water corporations into new and improved infrastructure.²⁹ Section 790 was written as the operative statute to the Act. Treating condemnations as equivalent to sales carries out the Legislature’s purpose and the sound public policy on which it rests. There is nothing inherently different about gains resulting from condemnations that makes them unfit for investment into the improvement of infrastructure. For the purposes of Section 790 and the

²⁸ *Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n*, 43 Cal. 3d 1379, 1386 (1987).

²⁹ CAL. PUB. UTIL. CODE § 789 *et seq.* (2006).

legislative intent behind it, there is no reason to treat gains on sale resulting from condemnations any differently than gains on sale resulting from voluntary transactions.

Section 790 is concerned with results, not motivations. The focus of the statute is the exchange of no longer useful land for a gain that can be used by the water utility to improve its infrastructure.³⁰ The most important part of effecting the ultimate goal of the statute, then, is the availability of increased funds for the construction of infrastructure. Creating a distinction between sales and condemnations³¹ based on the notion that a condemnation is a taking ignores the half of the exchange that is most important to achieving this objective. When the government takes land in an eminent domain proceeding or duplicates infrastructure to a degree sufficient to constitute an inverse condemnation, it must provide the injured party with “a fair payment . . . for property it has taken under eminent domain – usu[ally] the property’s fair market value, so that the owner is no worse off after the taking.”³² In other words, the government has to pay a price equivalent to that which “a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect.”³³ The transaction as a whole is difficult to distinguish from other types of sales – one party transfers property to another

³⁰ See CAL. PUB. UTIL. CODE § 790 (2006).

³¹ Here “condemnation” refers only to eminent domain proceedings and inverse condemnations. As sales in anticipation of condemnation do not constitute takings, they are not being addressed in this paragraph.

³² BLACK’S LAW DICTIONARY 277 (7th ed. 1999).

³³ BLACK’S LAW DICTIONARY 1549 (7th ed. 1999).

in exchange for some form of appropriate compensation. The end result of a condemnation and any other sale is essentially identical: The water utility has additional funds at its disposal with which to construct new and improved facilities and infrastructure. For the Commission to now hold that these gains do not fall within the scope of Section 790 is to confound the purpose of the statute on the basis of semantics without considering the transaction as a whole.

When a statute is interpreted, its words must be given their plain meaning.³⁴ Section 790 states in relevant part, “Whenever a water corporation sells any real property that was at any time, but is no longer, necessary or useful in the performance of the water corporation's duties to the public, the water corporation shall invest the net proceeds, if any . . . from the sale in water system infrastructure, plant, facilities, and properties that are necessary or useful in the performance of its duties to the public.”³⁵ Black’s Law Dictionary defines a “sale” as the “transfer of property or title for a price.”³⁶ A “price” is the “amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold.”³⁷ Condemnations by eminent domain, inverse condemnations, and sales in anticipation of condemnation all fall within the definition of “sale,” as they each involve the transfer of property in exchange for some consideration, usually monetary.

³⁴ *City of Long Beach v. Workers' Comp. Appeals Bd.*, 126 Cal. App. 4th 298, 311 (Cal. Ct. App. 2005).

³⁵ CAL. PUB. UTIL. CODE § 790 (2006).

³⁶ BLACK’S LAW DICTIONARY 1337 (7th ed. 1999).

³⁷ BLACK’S LAW DICTIONARY 1207 (7th ed. 1999).

Under the above definitions, neither the source of the consideration nor the circumstances under which it is given are relevant to the nature of the exchange. Furthermore, the language of the statute itself makes no distinction between voluntary and involuntary sales. When a statute's meaning is clear on its face, it is unnecessary to look to external sources.³⁸ Had the Legislature intended for Section 790 to apply only to voluntary sales, it would have included language so indicating. In the absence of such language, there is no reason to narrow the scope of the statute or to interpret it as requiring the Commission to make difficult distinctions between the motivating factors of real property transactions.

Past Commission decisions have effectively eliminated any substantive distinction between condemnations and sales. References to a "condemnation" and a "sale" have been used almost interchangeably,³⁹ condemnations have been described as "condemnation sales,"⁴⁰ and gains resulting from condemnations have been called "gains on sale."⁴¹ The condemnation proceeds in these cases were treated in the same way as any other gains on sale would have been

³⁸ *Kavanaugh v. W. Sonoma County Union High Sch. Dist.*, 29 Cal. 4th 911, 919 (2003).

³⁹ *In re S. California Water Co. (U 133 W) for an order authorizing it to increase rates for water serv. in its Desert Dist.*, 1990 Cal. PUC LEXIS 95, 35 CPUC2d 275, at *34 (1990).

⁴⁰ *Investigation on the Comm'n's own motion into the proposed transfer of water pumping rights by Park Water Co. to the City of Bell Gardens*, 1998 Cal. PUC LEXIS 818, 82 CPUC2d 422, at *3-*4, *11 (1998).

⁴¹ *In re S. California Water Co. (U 133 W) for auth. pursuant to Pub. Util. Code Section 454 & 1001 et seq. to enter into an agreement with the Contra Costa Water Dist. for the constr. of facilities into the Bay Point Dist. and for the resolution of other pending issues; and to revise its tariffs regarding new serv. connections*, 1995 Cal. PUC LEXIS 626, 61 CPUC2d 50, at *10-*11 (1995).

treated.⁴² Distinguishing between the condemnations at issue in this case and any other sales has essentially become a case of squares and rectangles – all condemnations are sales, but not all sales are condemnations. Given the broad language of Section 790, a departure from the precedent established by this case history would be unfounded.

4. Comments on Proposed Decision

The proposed decision of President Peevey in this matter was mailed to the parties in accordance with Section 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on August 22, 2007 by the City of Fontana, Aglet Consumer Alliance, California Water Association, California-American Water Company, and DRA. Reply comments were filed on August 27, 2007 by Southern California Gas, PacifiCorp, Pacific Gas & Electric, the California Water Association, Aglet Consumer Alliance, and California-American Water Company. We have adopted some changes suggested in comments and rejected others. Any comment not addressed below has been considered and rejected.

In its reply comments, PacifiCorp argues that the inclusion of the phrase "whichever is smaller" in the definition of what constitutes a "major facility" in the PD is contradictory with the PD's finding that "major facility" should be a relative term that shrinks or grows as the utility's owned capacity shrinks or grows. We disagree with PacifiCorp. The definition of "major facility" in the PD includes generation facilities with a nameplate capacity of 50 MW, or 1% of total

⁴² Opening Comments of California Water Association in Response to ALJ's Ruling at 15-16 (Sept. 2, 2004).

retained generation capacity, “*whichever is smaller.*” This mean that as a utility’s retained generation capacity grows beyond 5,000 MW, 50 MW will remain the trigger for “major facility” treatment. For utilities with a total retained generation capacity of less than 5,000 MW, however, 1% of the total retained capacity will serve as the reporting trigger. PacifiCorp urges the Commission to delete the phrase “whichever is smaller” from the definition in order to provide the maximum amount of reporting flexibility for larger utilities. The definition in the PD was proposed by a consensus of electric utilities, none of which echoed PacifiCorp’s concern in their own comments. While it is true that the PD states that as the utility’s owned capacity grows larger, smaller, now-less-significant facilities should drop out of the reporting requirement, we conclude that definition as drafted is consistent with this purpose. For utilities with a retained generating capacity of less than 5,000 MW, the reporting requirement trigger will fluctuate with increases and decreases in retained generation. In its opening comments Aglet argues that the definition of major natural gas facilities is confusing and that the decision should be clarified so that out-of-service gas fields are subject to a 10%-15% threshold for reporting. We reject Aglet’s new proposal for reporting gas storage facility outages under § 455.5 that would reduce Aglet’s recommendation (requiring reporting if 25% of the capacity of the equipment at a gas storage field is out of service) to a 10%-15% threshold. We do, however, add language to clarify the 25% threshold.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. Differences in the electric, gas and water industries also merit different Section 455.5 definitions for each industry.
2. The electric utilities and most other interested parties reached a consensus on the types of electric facility subject to the Section 455.5 reporting requirements.
3. The water utilities and most other interested parties reached a consensus on the types of water facility subject to the Section 455.5 reporting requirements.
4. The parties could not reach consensus on a definition of “major facility” for natural gas facilities.
5. The consensus definition of the types of electric facility subject to the Section 455.5 reporting requirements will cover most large generation facilities of the three largest electric utilities, PG&E, SCE, and SDG&E.
6. The Section 455.5 definition we adopt for electric utilities appropriately defines “major facility” as a relative term.
7. Gas utility-owned wells and gathering facilities tend to be small and dispersed over broad areas, and are therefore not “major facilities” by any party’s definition. Gas storage fields, by contrast, are large, high-value facilities whose inclusion in rate base could have significant impact on ratepayers.
8. If gas storage fields are not included under the statute, no gas facilities will be reportable pursuant to Section 455.5.
9. Out of service plant with a high net (depreciated) value will result in the most significant ratepayer overpayments, and therefore should be reported under Section 455.5.
10. Water utilities do not purchase CIAC property.

11. Allowing a full rate of return on property purchased with proceeds from the sale of CIAC property might create an incentive for water utilities to sell such property in order to reinvest the proceeds in infrastructure and earn a rate of return where none was earned before sale.

12. Damages arising from an inverse condemnation proceeding qualify as proceeds from a sale of property.

Conclusions of Law

1. The purpose of Pub. Util. Code § 455.5 is to ensure that utilities not earn a rate of return on utility assets (or portions thereof) that are out of service. Allowing a rate of return on such property would overcompensate the utilities at ratepayers' expense.

2. Pub. Util. Code § 455.5 requires reporting of out of service conditions for gas storage fields.

3. We should adopt the following Section 455.5 definition for electric utilities:

For electric utilities, a "major generation or production facility" for purposes of the requirements of Pub. Util. Code § 455.5 includes any generation plant or facility with nameplate capacity of 50 megawatts (MW) or more, or that represents at least one percent (1%) of an electric utility's retained generation system capacity, whichever is smaller. System capacity includes the utility's ownership share in jointly-owned and out-of-state facilities.

A reportable outage of a "portion" of a major generation facility should be interpreted as an outage of any independent operating unit at a major generation facility. Thus, electric utilities must report any outage of a single generating unit for which the capacity of the entire plant exceeds the 50 MW or 1% minimums.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

4. We should adopt the following Section 455.5 definition for gas utilities:

For gas utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 is a facility representing at least 25% of the utility’s storage capacity. A “major generation or production facility” for this purpose includes a gas storage field. A gas storage field is “out of service” if the mechanical equipment used to inject or withdraw gas at the field is not available to inject or withdraw gas at a rate of at least 25% of the capacity of the equipment.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

5. We should adopt the following Section 455.5 definition for water utilities:

For water utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 is a facility or combination of facilities, such as wells, interconnections, surface water diversion structures, and/or treatment facilities, that:
(a) produces water of a quality suitable for delivery into the distribution system of the utility or into storage for eventual delivery to customers; (b) is accounted for as "Source of Supply Plant" in Accounts 311 through 317 of the Uniform System of Accounts for Water Utilities, or as “Pumping Plant” in Accounts 321 through 325, or as “Water Treatment Plant” in Accounts 331 and 332; and (3) has a Net Plant Value of at least \$3,000,000 in the case of a Class A water company, or \$2,000,000 in the case of a Class B water company.

A “portion” of a major production facility is a facility that, if it is out of service, prevents production of water from the major facility as a whole.

“Net Plant Value” means recorded plant in service minus accumulated depreciation.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

6. Awarding a zero rate of return on plant purchased with CIAC proceeds is not consistent with Section 790.

7. Water utilities should receive Commission authorization before selling CIAC property.

8. Section 790 is intended to provide funds for water companies to invest in improved infrastructure, plant, facilities, and properties that are necessary or useful in the performance of its duties to the public.

9. Condemnation/threat of condemnation/inverse condemnation/service duplication proceeds are covered by Section 790.

O R D E R

IT IS ORDERED that:

1. We adopt the following Section 455.5 definition for electric utilities:

For electric utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 includes any generation plant or facility with nameplate capacity of 50 megawatts (MW) or more, or that represents at least one percent (1%) of an electric utility’s retained generation system capacity whichever is smaller. System capacity includes the utility’s ownership share in jointly-owned and out-of-state facilities.

A reportable outage of a “portion” of a major generation facility should be interpreted as an outage of any independent operating unit at a major generation facility. Thus, electric utilities must report any outage of a single generating unit for which the capacity of the entire plant exceeds the 50 MW or 1% minimums.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

2. We adopt the following Section 455.5 definition for gas utilities:

For gas utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 is a facility representing at least 25% of the utility’s storage capacity. A “major generation or production facility” for this purpose includes a gas

storage field. A gas storage field is “out of service” if the mechanical equipment used to inject or withdraw gas at the field is not available to inject or withdraw gas at a rate of at least 25% of the capacity of the equipment.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

3. We adopt the following Section 455.5 definition for water utilities:

For water utilities, a “major generation or production facility” for purposes of the requirements of Pub. Util. Code § 455.5 is a facility or combination of facilities, such as wells, interconnections, surface water diversion structures, and/or treatment facilities, that:
(a) produces water of a quality suitable for delivery into the distribution system of the utility or into storage for eventual delivery to customers; (b) is accounted for as “Source of Supply Plant” in Accounts 311 through 317 of the Uniform System of Accounts for Water Utilities, or as “Pumping Plant” in Accounts 321 through 325, or as “Water Treatment Plant” in Accounts 331 and 332; and (3) has a Net Plant Value of at least \$3,000,000 in the case of a Class A water company, or \$2,000,000 in the case of a Class B water company.

A “portion” of a major production facility is a facility that, if it is out of service, prevents production of water from the major facility as a whole.

“Net Plant Value” means recorded plant in service minus accumulated depreciation.

A facility is out of service and subject to the reporting requirement irrespective of the cause of the out of service condition.

4. Pursuant to Section 455.5, gas utilities shall report out of service conditions on all facilities, including gas storage facilities, that meet the 25% threshold. If they are concerned about the security implications of reporting the size of facilities, they may file a motion or declaration concurrently with their Section 455.5 submission seeking confidential treatment.

5. Any water company that sells real property that a developer contributed to the water company in aid of construction (CIAC property) which it claims or will claim is subject to Section 790 shall seek leave from the Commission to do so. In so doing, the water company shall prove that the property is no longer necessary or useful and that the sale is not intended merely to gain an opportunity for the water company to earn a rate of return on infrastructure purchased with the sale proceeds. The water company shall seek such approval by application or Advice Letter prior to any such sale, and may not make the sale without Commission authorization.

6. We do not preclude any party from asserting, in an individual water company's general rate case or elsewhere, that its rate of return should be lowered to reflect that some property in its rate base was originally CIAC and thus acquired for free.

7. Whether the approval in Ordering Paragraph No. 5 requires an application or an Advice Letter will be governed by the rules of our Section 851 pilot program, approved in Resolution ALJ-186 (August 30, 2005), or successor document. That pilot program allows utilities to elect to file an Advice Letter instead of a Section 851 application for small transactions.

8. Condemnation/threat of condemnation/inverse condemnation/service duplication proceeds shall be governed by Pub. Util. Code § 790.

9. Rulemaking 04-09-003 is closed.

This order is effective today.

Dated September 6, 2007, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

APPENDIX A
COMMENTS RECEIVED¹ – PHASE TWO GAIN ON SALE
R.04-09-003

OPENING COMMENTS

1. Comments of California-American Water Company in Response to June 29, 2006 ALJ's Ruling Regarding Allocation of Gains on Sale of Utility Assets, filed 7/20/2006
2. Opening Comments of California Water Association in Response to ALJ's Ruling, filed 7/20/2006
3. Comments of Park Water Company on the Issues Raised in the ALJ's Ruling Regarding Allocation of Gains on Sale of Utility Assets Issued by ALJ Thomas on June 29, 2006, filed 7/20/2006
4. Joint Comments of the Division of Ratepayer Advocates and The Utility Reform Network on ALJ's Ruling Regarding Allocation of Gains on Sale of Utility Assets, filed 7/20/2006
5. Comments of Aglet Consumer Alliance, filed 7/20/2006
6. Joint Comments of Southern California Edison Company, Pacific Gas And Electric Company, San Diego Gas & Electric Company And Southern California Gas Company Proposing A Definition For "Major Facility" As Used In Pub. Util. Code § 455.5, filed 7/20/2006

REPLY COMMENTS

7. SCE's Reply Comments Proposing a Consensus Definition for "Major Facility" as Used in Pub. Util. Code § 455.5, filed 9/8/2006
8. Reply Comments of SDG&E and SoCalGas Regarding the Definition of "Major Facility" as Used in Pub. Util. Code § 455.5, filed 9/8/2006
9. Reply Comments of PG&E re Definition for "Major Facility" as Used in Pub. Util. Code § 455.5, filed 9/8/2006
10. Reply Comments of Division of Ratepayer Advocates, filed 9/8/2006
11. Reply Comments of PacifiCorp on the Definition for "Major Facility" as Used in Pub. Util. Code § 455.5, filed 9/8/2006
12. Further Reply Comments of Park Water Company on Issue (A) Raised in the ALJ's Ruling Regarding Allocation of Gains on Sale of Utility Assets Issued by ALJ Thomas on June 29, 2006, filed 9/8/2006
13. Further Reply Comments of California Water Association in Response to ALJ's Ruling, filed 9/8/2006
14. Reply Comments of Aglet Consumer Alliance, filed 9/8/2006

¹ In this decision, we refer to each set of comments by the abbreviated name of the party filing it and the date filed.

15. Reply Comments of California Water Association in Response to ALJ's Ruling, filed 8/21/2006
16. Reply Comments of DRA, filed 8/21/2006
17. Initial Reply Comments of Aglet Consumer Alliance, filed 8/21/2006
18. Reply Comments of California-American Water Company in Response to June 29, 2006
Administrative Law Judge's Ruling Regarding Allocation of Gains on Sale of Utility Assets, filed
8/21/2006
19. Original Reply Comments of Park Water Company on Issues (B) and (C) Raised in the ALJ's Ruling
Regarding Allocation of Gains on Sale of Utility Assets Issued by ALJ Thomas on June 29, 2006, filed
8/21/2006

OTHER COMMENTS

20. Partial Withdrawal of Comments of California-American Water Company filed July 20, 2006, filed
3/7/2007

(END OF APPENDIX A)