STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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

September 8, 2004

TO: ALL PARTIES OF RECORD IN APPLICATION 02-11-057

Decision 04-09-025 is being mailed without the Dissent of Commissioner Loretta M. Lynch and without the Concurrences of President Michael R. Peevey and Commissioner Susan P. Kennedy. The Dissent and Concurrences will be mailed separately.

Very truly yours,

/s/ ANGELA K. MINKIN
ANGELA K. MINKIN, Chief
Administrative Law Judge

ANG/jva

Attachment

Decision 04-09-025 September 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Point Arena Water Works, Inc. for an order authorizing a rate increase in rates subject to refund producing additional annual revenues of $70,137 or 56.9% for the test year 2002.	Application 02-11-057 (Filed November 25, 2002)

FINAL OPINION APPROVING SETTLEMENT OF TEST YEAR 2002 GENERAL RATE CASE

A. Summary

This decision approves the "stipulation" between Point Arena Water Works (PAWW) and the City of Point Arena (City), whereby PAWW and the City propose to resolve all but one of the issues in PAWW's rate increase application. This decision also decides the one remaining issue. The stipulation is attached to this decision.

B. Background

In Resolution (Res.) W-4356, October 24, 2002, the Commission granted PAWW a $70,137 or 56.9% rate increase, subject to refund. About a year earlier, the Commission had also granted PAWW a $47,677 or 62.3% rate increase, also subject to refund, based on a finding that such an increase was necessary to provide sufficient funds to meet PAWW's cash operating expenses with no depreciation or rate of return on rate base. The Commission noted that PAWW's last rate case was in 1991, and that PAWW operated at a loss of $56,687 in 2000. As part of its review leading up to Res. W-4356, the staff conducted two public

meetings in Point Arena and prepared an extensive staff report with accompanying audit of the utility's 2000 books of account.

The City objected to the rate increases requested by PAWW and disagreed with staff's review. At the staff's recommendation, the Commission converted this advice letter rate case to a formal proceeding in Resolution W-4356.

PAWW, staff, and the City also differed regarding the proper ratemaking treatment of an income tax refund to PAWW from the early 1990's. The staff auditor concluded from PAWW's records that (1) the tax refund had been obtained by PAWW at its own expense, and (2) the money had been used to meet operation and maintenance expenses that utility revenue failed to cover. Accordingly, the auditor recommended the tax refund not be used to lower prospective rates. The City disagreed. In Res. W-4356, the Commission included this issue in the formal proceeding.

On March 20, 2003, the assigned Administrative Law Judge (ALJ) convened a prehearing conference (PHC). The tax refund was among the matters discussed at the PHC, and the ALJ set a briefing schedule regarding the refund. The ALJ also set a procedural schedule for the remainder of this proceeding. As noted above, the rate increase proposals at issue here have been through an extensive informal review process with our staff, including an audit and a staff report. PAWW and our staff indicated at the PHC that they would rely extensively on these previously prepared analyses to make the required showing.

On April 8, 2004, the City and PAWW filed a stipulation that resolved all issues in the 2002 test year rate case, with one exception. The stipulation provided that the one remaining issue, namely, refunds of certain overcharges, would be submitted to the assigned ALJ after briefing by the parties. PAWW

filed its opening brief on April 22, 2004, the City followed with its brief on April 29, 2004, and PAWW submitted its responsive brief on May 13, 2004.

1. Description of the Stipulation

The stipulation provides that, with specified exceptions, the parties will agree to and not challenge the conclusions and recommendations for PAWW's test year 2002 general rate case set forth in Water Division staff's report dated April 2003, with change pages dated April 25, 2004. We discuss these exceptions below.

Regarding the tax refund issue, the City and PAWW agreed to reduce PAWW's rate base by $34,405, which corresponds to the parties' estimates for tax refund amounts that could have been used for plant additions in year 1996 through 1999.

The parties also stipulated that should the Commission authorize rate recovery of any of the amounts recorded in the memorandum account for rate case expenses, such recovery would be over six years. Legal counsel costs after January 7, 2004, would be excluded from the memorandum account.

PAWW further agreed to submit an advice letter requesting Commission authorization to extend its service territory boundaries to include the Hay Industrial Park and adjoining property. PAWW will also notify potential customers that they have the option to contract with service providers other than PAWW for connection work, subject to inspection by PAWW. The parties also agreed that properties listed as "Inactive Meters Not In Service But In Place 1 Jan 03" shall not be charged facilities fees unless additional services or increases in connection size are requested by the property owners.

The parties did not reach agreement on the issue of refunds for overcharges to 5/8 x 3/4 inch meter customers. The parties did, however, agree

to an expedited process for the Commission to resolve the issue. The parties stated that the overcharges occurred over an approximately 10-year period and that PAWW has refunded all overcharges for the last three calendar years (1999, 2000, and 2001) preceding this application. PAWW believes that it has discharged its legal obligation to make refunds, and the City believes that all improperly collected funds should be refunded. The parties agreed that should any further refunds be required, they should be used as an offset to the memorandum account discussed above. The parties agreed to brief the issue and that they "will not attempt to otherwise influence the Commission's decision." We resolve the overcharge issue below.

C. Discussion

1. Settlement Criteria

The stipulation is properly characterized as an uncontested settlement.[1] In such cases, the Commission applies the standard set forth in Rule 51.1(e) of the Commission's Rules of Practice and Procedure, and applicable to both contested and uncontested settlement agreements, requires that the "settlement is reasonable in light of the whole record, consistent with law, and in the public interest."

The proposed stipulation was primarily negotiated between PAWW and the City, and mediated by the Director of the Commission's Water Division. PAWW was represented by its officers and counsel in the proceeding. On behalf of ratepayers, the City was represented by its Mayor and counsel. Both parties were actively involved in all phases of the proceeding. Thus, the sponsoring

[1] The Commission's Water Division participated in the proceeding but did not contest the stipulation.

parties for the stipulation are fairly representative of the affected interests, and they have been active advocates in this proceeding.

The stipulation sets forth the parties' final agreement on major issues, including Summary of Earnings, Tariff Rate Schedules, Comparison of Rates, and Adopted Quantities and Tax Calculations prepared by Water Division staff to reflect the rate-making provisions of the stipulation.

Pub. Util. Code § 454[2] provides that no public utility shall change any rate except upon a showing before the Commission and a finding by the Commission that the new rate is justified. In the stipulation and earlier filings, the parties have explained their initial positions and what adjustments have been made to arrive at the summaries of earning and revenue requirements set forth in the stipulation. The resulting rates will produce necessary and sufficient revenues for the test year. We find that the rates and the supporting revenue requirements are justified by the parties' showing and are in the interest of ratepayers and the public. Also, as indicated by the description of the stipulation, the documentation with regard to this matter is sufficient for the Commission to discharge its future regulatory obligations with respect to the parties and their interest. (See *San Diego & Electric,* 46 CPUC 2d 538, 550-55 (1992.)

The stipulation satisfies the Commission's requirements for settlements under Rule 51. The stipulation is reasonable in consideration of the whole record, consistent with the law, and in the public interest. We will therefore approve it.

[2] All statutory references are to the Public Utilities Code.

2. The Overcharge Issue

There is no dispute that PAWW overcharged the 5/8 x 3/4 inch meter customers for approximately 10 years, and refunded the overcharges for only three years. PAWW contends it owes no further refunds, pursuant to the three-year limitation period found in § 736.[3] The City argues that this statute of limitations does not apply when customers have not discovered the billing error. We find that PAWW's tariffs were publicly available to all customers, who could have determined that they were being charged an incorrect amount. Consequently, the three-year limitation applies, and PAWW has no obligation to make further refunds.

In Res. W-4356, the Commission summarizes the overcharge issue:

> In its investigation, the staff discovered that upon implementing its newly authorized rates pursuant to Res. W-3594, dated June 19, 1991, PAWW began incorrectly assessing its 5/8 X 3/4-inch metered customers with the ¾ -inch metered service charge rate, an initial overcharge of $3.15 per month per customer ($15.20 versus $12.05). The utility assessed this incorrect rate up until the interim rates authorized by Res. W-4308 were implemented in January 2002. It may be that the incorrect billing was inadvertent on the part of PAWW. However, even though the Staff's audit shows that PAWW has been losing money since 1994 (even with the incorrect billing), the utility still was in violation of Section 532 of the Pub. Util. Code. Therefore, the Division recommends that PAWW be required to refund three years (1999, 2000 and 2001) of the over-collection to each affected customer over a twelve-month period. This is consistent with Section 736 of the Pub. Util.

[3] Section 736 requires that "[a]ll complaints for damages arising from the violation of any of the provisions of Sections 494 or 532 shall either be filed with the commission, . . . [or] any court of competent jurisdiction within three years from the time the cause of action accrues, and not after." (Emphasis added.)

> Code that limits the claim for damages resulting from violations of any of the provisions of Section 532 of the Code to three years. The total over-collection from January 1, 1999 through December 31, 2001 was $17,965. The utility agrees with the reasonableness of this refund.

Accordingly, the Commission ordered PAWW to provide overcharge credits for 1999, 2000, and 2001 to the affected customers in installments of $9.57 per month for twelve months commencing with the first billing after the effective date of new rates authorized in the resolution. The Resolution is subject to modification consistent with the final opinion in this application.

In its opening brief, PAWW concurs with the staff report and the Resolution that § 736 limits PAWW's refund obligation to three years. By charging rates other than as set forth in its tariffs, PAWW violated § 532, which provides that "no public utility shall charge or receive a different compensation for any . . . service to be rendered, than the rates, tolls, rentals and charges applicable thereto as specified in its schedules on file and in effect at the time." PAWW concludes that by refunding the last three years of overcharges, it has fully discharged its refund obligation.

The City argues that PAWW's customers are legally entitled to recover refunds from PAWW from the beginning of the period in which these customers were overcharged, approximately seven additional years of refunds. The City contends that the statute of limitations found in § 736 is tolled "until ratepayers become aware, or should become of aware, of their injury" and that the Commission has consistently interpreted § 736 as being subject to this "discovery rule." The City points to *TURN v. Pacific B*ell, (1991) 54 CPUC2d 122, where the Commission ordered refunds of late payment fees charged over five years that were caused by Pacific Bell's "wrongdoing" in crediting payments.

The Commission has previously determined that "when a [public utility] customer files a complaint about inappropriate charges, the customer is limited by § 736 to overcharges accrued during the three years immediately preceding the time when it filed the complaint." *Homeowners Assn of Lamplighter v. Lamplighter Mobile Home Park*, (1999) 84 CPUC 2d 727, 731 (D.99-02-001). In the Lamplighter case, the mobile home park owners had assessed an illegal surcharge for facilities improvements for over 10 years. The residents, citing to *TURN v. Pacific Bell*, argued that they "could not have known that they were being unlawfully charged." The Commission rejected this analysis and stated:

> *TURN v. Pacific Bell* does not stand for the principle that a statute of limitations is tolled when a party does not understand its legal rights. We are unaware of legal precedent that would support such an argument. A statute of limitations is not created to preserve the rights of a complainant. It serves as protection for a defendant, whether or not an untimely claim would otherwise have legal merit. We do not conclude that a statute of limitations is tolled when one or more parties is unaware of its legal rights.

Id. at 733. See also, e.g., *Utility Audit Company, Inc. v. Southern California Gas Company*, (2003) Decision 03-09-053.

In *TURN v. Pacific Bell*, the Commission found that Pacific Bell instituted a series of unreasonable mail processing practices that led to recording timely payments as late, for which Pacific Bell then charged a late payment fee. In that decision, the Commission held that "ratepayers could not reasonably have become aware of their injury" and that therefore the otherwise applicable

three-year statute of limitations in § 736 was tolled.[4] Pacific Bell's actions, unlike PAWW's and Lamplighter Park's, were concealed from ratepayers and could not have been discovered. PAWW and Lamplighter Park openly charged improper rates and information was publicly available that showed the rates were illegal.

PAWW's customers reasonably could have become aware of their injury by inspecting PAWW's tariffs. All public utilities must "print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced." § 489. Commission General Order 96-A further requires that each public utility maintain, open for public inspection, copies of its complete tariff schedules and advice letters as filed with the Commission. Each public utility must also post a notice in its offices stating that the tariff schedules are on file, and "may be inspected by anyone desiring to do so." PAWW has confirmed to Commission staff that such a notice is posted in its offices.

PAWW was charging its 5/8 x 3/4 inch meter customers the tariff rate for 3/4-inch meters. A 5/8 x 3/4 inch meter customer could compare the bill to the tariff amount and discover that a higher rate was being charged. Accordingly, a customer could reasonably have discovered the injury. Therefore, the three-year limitation found in § 736 defines the time period over which PAWW is obligated

[4] The City cites to and quotes from California state court decisions which similarly limit the "discovery rule" to instances where the plaintiff could not become aware of the injury: "A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered though investigation of sources open to her." *Jolly v. Eli Lily Co.*, (1988) 44 Cal. 3d 1103. The discovery rule suspends the running of the statute of limitations until the plaintiff discovers the injury or "could have discovered the injury and the cause, through reasonable diligence." *Leaf v. San Mateo*, (1980) 104 Cal. App. 3d 298.

to make refunds. As PAWW has made refunds for three years worth of overcharges, we conclude that no further refunds are due.

D. Comments on Draft Decision

All parties in the proceeding have stipulated to waive both the 30-day review period under Section 311(g)(1) of the Public Utilities Code and the opportunity to file comments on the draft decision. Accordingly, this matter will be placed on the Commission's agenda directly for prompt action.

E. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. PAWW's last general rate case was in 1991.
2. Since some time after 1991, PAWW's rates have failed to generate sufficient revenue to meet reasonable expenses.
3. PAWW received extraordinary revenue in the form of income tax refunds over a multi-year period ending in 1995.
4. PAWW did not seek Commission direction as to the disposition of the income tax refunds.
5. PAWW and the City entered into a stipulation that resolved all but one issue in this proceeding.
6. The stipulation is unopposed.
7. The stipulating parties are fairly reflective of the affected interests in this proceeding.
8. No term of the stipulation contravenes statutory provisions or prior Commission decisions.

9. The stipulation conveys sufficient information to permit the Commission to discharge its future regulatory obligations with respect to the parties and their interests.

10. PAWW overcharged its 5/8 x 3/4 inch meter customers for approximately 10 years, and has refunded the overcharges for 1999, 2000, and 2001.

11. PAWW's correct tariff rate for 5/8 x 3/4 inch meter customers was approved by the Commission and included in PAWW's tariffs.

12. PAWW at all relevant times made publicly available the correct information regarding the tariff rate for 5/8 x 3/4 inch meter customers, so these customers discovered that they were being overcharged.

Conclusions of Law

1. The stipulation is an uncontested settlement as defined in Rule 51(f).

2. The stipulation is reasonable in consideration of the whole record, consistent with law, and in the public interest.

3. The stipulation should be adopted.

4. All public utilities must print and keep open to public inspection all schedules showing rates, charges, and classifications collected or enforced.

5. Section 736 provides that all claims against a public utility must be filed within three years.

6. A statute of limitations is not tolled when a party is unaware of its legal rights.

7. PAWW owes no further refunds for the 5/8 x 3/4 inch meter overcharges.

FINAL ORDER

IT IS ORDERED that:

1. The stipulation between Point Arena Water Works and the City of Point Arena, filed April 8, 2004, is approved and adopted. The parties shall comply with all provisions of the stipulation.

2. This proceeding is closed.

This order is effective today.

Dated September 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent.

/s/ CARL W. WOOD
Commissioner

I will file a concurrence.

/s/ SUSAN P. KENNEDY
Commissioner

I will file a dissent.

/s/ LORETTA M. LYNCH
Commissioner

I will file a concurrence.

/s/ MICHAEL R. PEEVEY
President

D0409025 Attachment A