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**BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

Order Instituting Investigation to Consider Policies to Achieve the Commission's Conservation Objectives for Class A Water Utilities.	Investigation 07-01-022 (Filed January 11, 2007)
In the Matter of the Application of Golden State Water Company (U 133 E) for Authority to Implement Changes in Ratesetting Mechanisms and Reallocation of Rates.	Application 06-09-006 (Filed September 6, 2006)
Application of California Water Service Company (U 60 W), a California Corporation, requesting an order from the California Public Utilities Commission Authorizing Applicant to Establish a Water Revenue Balancing Account, a Conservation Memorandum Account, and Implement Increasing Block Rates.	Application 06-10-026 (Filed October 23, 2006)
Application of Park Water Company (U 314 W) for Authority to Implement a Water Revenue Adjustment Mechanism, Increasing Block Rate Design and a Conservation Memorandum Account.	Application 06-11-009 (Filed November 20, 2006)
Application of Suburban Water Systems (U 339 W) for Authorization to Implement a Low Income Assistance Program, an Increasing Block Rate Design, and a Water Revenue Adjustment Mechanism.	Application 06-11-010 (Filed November 22, 2006)
Application of San Jose Water Company (U 168 W) for an Order Approving its Proposal to Implement the Objectives of the Water Action Plan	Application 07-03-019 (Filed March 19, 2007)

**COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON
THE PROPOSED DECISION OF
ADMINISTRATIVE LAW JUDGE GRAU**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. MODIFICATIONS TO THE PROPOSED DECISION.....	2
A. Although The PD States That It Limits The Waiver Of The Requirement To File An Advice Letter To Establish A Memorandum Account To This Proceeding, The PD Commits A Legal Error By Allowing Utilities To Make Requests for Memorandum Accounts Without Advice Letters In Future Proceedings.	2
B. The Commission Should Note That The Amounts Listed In The PD As Costs Of Participating In This Proceeding Are Estimates Provided By Utilities And Are Subject To Reasonableness Review.....	3
C. The Commission Should Amend Its Finding of Fact 9 To State That It Has Authorized Memorandum Accounts In The Past Without A Request Only In Limited Exigent Circumstances.....	4
D) The Factual Circumstances Of This Case Differ From The Drought OII And It Is A Legal Error For The Commission To Conclude That This Authorization Is Consistent With The Relief Accorded In The Drought OII.....	5
E) The Commission Should Use A Standard That Compares Expenses To Utilities Revenues To Determine If The Expense Amounts Are Substantial.....	8
F) The Commission’s Finding Of Fact 3 Should Accurately Cite The Commission’s Four-Prong Test, Or Simply Cite To The Test In Prior Commission Decisions.....	10
III. CONCLUSION	12

APPENDIX A: PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERING PARAGRAPHS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS

Investigation into Water Conservation

D.08-02-036	2, 3
D.09-06-053	2

Investigation into Drought

D.92-09-084	6
D.90-07-067	6
D.90-08-055	7
D.91-10-042	7

Rulemaking Adopting Rate Case Plan

D.04-06-018	9, 11
D.07-05-062	8, 11

Re California Water Service Company

D.02-08-054	8, 9, 11
-------------------	----------

Re California-American Water Company

D.02-07-011	9
-------------------	---

OTHER AUTHORITIES

Standard Practice U-27-W, Standard Practices for Processing Rate Offsets and Establishing and Amortizing Memorandum Accounts, May 2008	4, 9, 11
--	----------

Resolution W-4276, Order Authorizing a General Cost Memorandum Account, July 2001.	9, 11
--	-------

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**COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON
THE PROPOSED DECISION OF
ADMINISTRATIVE LAW JUDGE GRAU**

Pursuant to Rule 14.3 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, the Division of Ratepayer Advocates (“DRA”) respectfully submits its Comments on the Proposed Decision (“PD”) of Administrative Law Judge Grau, entitled, “Decision Authorizing Memorandum Account to Track Legal and Regulatory Expenses Incurred in this

Proceeding,” that was released for comment on January 26, 2010. DRA recommends the Commission revise the PD to reflect the changes set forth below.

I. INTRODUCTION

DRA strongly disagrees with ALJ Grau’s Proposed Decision (“PD”) authorizing all Class A water utilities, other than Suburban, to “establish memorandum accounts to track legal and related expenses for participating in this proceeding from the date of issuance of this Order Instituting Investigation.”¹ For the purposes of this limited rehearing² (as DRA discussed in its opening comments), DRA opposes approval of these memorandum accounts because they do not meet the Commission’s long-established four-prong test for authorizing memorandum accounts.³ Although DRA opposes the PD, DRA nevertheless recommends modifications to the PD to ensure that the final Commission decision in this rehearing is limited to the circumstances and scope of this proceeding.⁴

II. MODIFICATIONS TO THE PROPOSED DECISION

A. Although The PD States That It Limits The Waiver Of The Requirement To File An Advice Letter To Establish A Memorandum Account To This Proceeding, The PD Commits A Legal Error By Allowing Utilities To Make Requests for Memorandum Accounts Without Advice Letters In Future Proceedings

DRA fully supports the requirement made explicit in the PD and the Phase 1A decision in the Water Conservation Order Instituting Investigation (“OII”),

¹ Proposed Decision Authoring Memorandum Account to Track Legal and Regulatory Expenses Incurred in This Proceeding, Order Instituting Investigation 07-01-022, Ordering Paragraph 1, p. 17-18.

² D.09-06-053, Ordering Paragraph 1, granted a limited rehearing of D.08-02-036 solely regarding “extending memorandum account treatment to all Class A water utilities,” and denied rehearing of D.08-02-036 in all other respects.

³ For complete explanation see “Comments of The Division of Ratepayer Advocates On Extending Memorandum Account Treatment to All Class A Water Utilities” July 27, 2009.

⁴ D.09-06-053, Ordering Paragraph 1 defines the scope of this proceeding as “solely the issue of extending memorandum account treatment to all Class A water utilities.”

Decision (“D”) 08-02-036, that future requests for memorandum accounts to track costs associated with participating in generic proceedings are to be made by advice letter, and the Division of Water and Audits should prepare a resolution for Commission consideration of the request.⁵ The PD and D.08-02-036 also state that the approval of memorandum accounts to track legal and related costs of participating in this proceeding is limited to the circumstances of this proceeding.⁶ The PD states: “[w]e similarly limit the authorization of such memorandum accounts to the circumstances of this proceeding. As noted in D.08-02-036, future requests for memorandum accounts to track costs associated with participating in generic proceedings shall be made by advice letter.”⁷ However, this requirement is stated in the PD’s *dicta* and thus is not legally binding because it is not included in the PD’s Ordering Paragraph. As written, this PD allows water utilities seeking future similar requests for memorandum accounts to track costs associated with participating in generic proceedings to seek this approval without an advice letter.

The PD commits a legal error by allowing utilities to make requests for memorandum accounts via another method besides an advice letter filing. The Commission can rectify this error by adding to ordering paragraph 1 that:

“The waiver in this case from the requirement to file an advice letter to establish a memorandum account to track costs associated with participating in generic proceedings, is limited to this proceeding.”

B. The Commission Should Note That The Amounts Listed In The PD As Costs Of Participating In This Proceeding Are Estimates Provided By Utilities And Are Subject To Reasonableness Review

The Commission should note in the final decision that any amounts listed as expended on legal and related costs for participating in this proceeding by Class

⁵ PD, p. 2 and 15, and D.08-02-036, p. 46-47.

⁶ PD, p. 15, D. 08-02-036, p. 5.

⁷ PD, p. 15.

A water utilities⁸ are estimates made by the Class A water utilities, and that the actual amounts recorded in the memorandum accounts have not been reviewed by the Commission or DRA. It is the Commission’s general practice for authorizing amortization of memorandum account balances to require proof of reasonableness of the expenses.⁹ It is an error of fact for the Commission to cite the amounts the utilities have spent on the legal and related costs of participating in this proceeding without noting that these costs are estimates that have not yet been reviewed by the Commission.

The Commission should address this error by modifying finding of fact 6 in the following way (deletions in strikethrough, and additions in bold and italics):

“6. The amounts expended for legal and related costs for participating in this ongoing OII range from the \$30,000 and \$88,000 recorded by Apple Valley and Park (single district Class A water utilities) to over \$600,000 recorded by GSWC (a multi-district Class A). ***These amounts are estimated by Class A water utilities and are subject to reasonableness review.***”

C. The Commission Should Amend Its Finding of Fact 9 To State That It Has Authorized Memorandum Accounts In The Past Without A Request Only In Limited Exigent Circumstances

In Finding of Fact 9, the Commission states that “[t]he Commission has authorized memorandum accounts without a specific request in a number of resolutions, including Resolutions W-4089, W-3784, W-3940, W-4014 and E-3331.” However, this finding is incomplete because the memorandum accounts referred to were authorized under factually difference circumstances. The Commission should modify this Finding of Fact to note that in each of those cases, the Commission authorized the memorandum account without a request because

⁸ The PD lists these amounts on p. 8, p. 9, footnote 15, and Finding of Fact 6.

⁹ The Commission’s Standard Practice U-27-W, p. 7, states “28. Memo account balances earn at the 90-day commercial paper rate. . . . Advice letter memo account recovery requests require an earnings test and proof of reasonableness.”

of the following circumstances: (1) changes to State and Federal tax laws; (2) new national drinking water regulations; or (3) the filing of major civil lawsuits alleging negligence, wrongful death, and fraudulent concealment related to water contamination.¹⁰ As written, the PD would set a new precedent by authoring a memorandum account without a specific request in the absence of any of the above exigent circumstances. The Commission should modify Finding of Fact 9 as follows:

“9. The Commission has authorized memorandum accounts without a specific request ~~in a number of resolutions~~ *only in limited exigent circumstances that were unquestionably beyond the control of the utilities or the Commission*, including Resolutions W-4089, W-3784, W-3940, W-4014, and E-3331.

D. The Factual Circumstances Of This Case Differ From The Drought OII And It Is A Legal Error For The Commission To Conclude That This Authorization Is Consistent With The Relief Accorded In The Drought OII

In the PD, the Commission draws a parallel between the Commission’s authorization to track legal fees in a memorandum account during the Drought Order Instituting Investigation, (“Drought OII”),¹¹ and authorization to track legal fees in a memorandum account in this proceeding. However, the factual circumstances of this case differ from the Drought OII and it is a legal error for the Commission to state in the Conclusion of Law that this authorization is consistent with the relief accorded in the Drought OII.

¹⁰ These lawsuits were filed against several water companies, and the Commission extended memorandum account protection to additional Class A water utilities who pumped water from the same wells, (see Resolution W-4089, Finding and Conclusion #8 and Ordering Paragraph #3). Later the Commission extended memorandum account protection to all Class A water utilities after lawsuits had been filed against Southern California Water Company, San Gabriel Valley Water Company, Suburban Water Systems, and Citizens Utilities Company of California, and the Commission feared water contamination litigation could become widespread (see Resolution W-4094, Finding and Conclusion #3, Ordering Paragraph #1).

¹¹ I. 89-03-005.

In the Drought OII (D.92-09-084), when the Commission authorized utilities to include “legal fees attributable to the proceedings in Order Instituting Investigation (I.) 89-03-005,” the Commission had already authorized the establishment of the memo accounts in a previous decision,¹² unlike the circumstances in this proceeding. A memorandum account, by definition, is “an accounting device used by a utility to record various expenses it incurs. . . . Memo accounts allow the Commission to consider recovery of utility expenses that have occurred in the past without incurring retroactive ratemaking.”¹³ Therefore, PD errs in stating that in the Drought OII, the earlier creation of memorandum accounts for conservation expenses neither facilitated nor precluded the ability to book legal expenses for participating in that proceeding.¹⁴

A significant difference exists between the authorization to track legal expenses that accompanied the Drought OII and what the Commission approves in the PD in this proceeding. In D.92-09-084, the Commission stated that in previous decisions it:

“made it clear that water companies should be permitted to recover in rates reasonable lost revenue and reasonable costs caused by drought. The recovery is made through increased rates or surcharges reflecting these losses, less cost savings, up to a utility’s normalized sales level. So long as expenses are directly drought-related, are not otherwise recoverable, and are subject to review by staff to be certain that they are reasonable, we agree that they may properly be booked to the memorandum account.”¹⁵

Thus, the Commission had already permitted recovery of expenses attributable to the drought, and in D.92-09-084, the Commission explicitly noted that this included legal fees from the Drought OII proceeding.

¹² D.90-07-067.

¹³ Standard Practice U-27-W (<http://docs.cpuc.ca.gov/published/REPORT/94758.HTM>) last accessed 02/09/10.

¹⁴ PD p.14.

¹⁵ D.92-09-084, section 3.4.

Additionally, the PD omits other key differences between the Drought OII and the Phase 1A decision in this case. For example, in order for utilities to recover revenue from the memorandum accounts authorized in the Drought OII, the Commission required the utilities to develop and file applications for water management plans,¹⁶ and it required a reduction of the memorandum account balance by an amount equal to a 20-basis point reduction in return on equity to reflect reduced business risk represented by the memorandum account.¹⁷ The Commission also required a test to ensure that the memorandum account recovery did not cause the utility to “exceed the authorized rate of return for the utility district for the period covered by the memorandum account.”¹⁸

In light of the differences discussed above, the waiver affirmed in the PD of the requirement to file an advice letter to establish a memorandum account to track legal fees is not analogous to the factual circumstances that led to the authorization in the Drought OII to track legal fees in a memorandum account. Authorization of the tracking of legal and related expenses in the PD constitutes an unprecedented authorization to track costs where a memorandum account has not previously been established. Therefore, DRA recommends that Commission include the following modifications to the PD to correct factual and legal errors regarding the Commission’s authorization to track legal expenses in the Drought OII.

Proposed changes to Finding of Fact 8: “In D.92-09-084, after the issuance of the Drought OII, I.89-03-055, ***and after authorizing the establishment of memorandum accounts for expenses attributable to the drought,*** the Commission authorized the tracking of legal expenses in conservation memorandum accounts.”

Proposed changes to Conclusion of Law:
“Authorization of the memorandum accounts to track

¹⁶ D.90-08-055, Finding of Fact 4.

¹⁷ D.91-10-042, Ordering Paragraph 5.

¹⁸ *Id.*

legal and related costs incurred for participating in this proceeding from the issuance of the OII satisfies the *Commission's criteria for establishing memorandum accounts pursuant to D.04-06-018, D. 02-08-054, and Resolution W-4276 SP U-27-W* criteria and is consistent with the relief accorded in the Drought OII, and the Commission's authority to authorize memorandum accounts without a specific request.”

E. The Commission Should Use A Standard That Compares Expenses To Utilities Revenues To Determine If The Expense Amounts Are Substantial

In its opening comments, DRA recommended that the Commission assess whether the legal and related costs of participating in this proceeding equal at least 1% of the utilities' total revenues to determine if the expenses were “substantial.”¹⁹ The PD responds to this recommendation stating: “[a]lthough DRA advocates comparing the legal and related expenses to the utilities' revenues, the Commission has not used that standard to determine whether the amounts are substantial and we decline to do so here.” However, this statement is factually incorrect because the Commission applied this standard in D.02-08-054 and articulated this standard in the Rate Case Plan (D.07-05-062).

In D.02-08-054, the Commission authorized a memorandum account for California Water Service Company (“Cal Water”) to track costs associated with treating four well sites for contamination in the Salinas District. The Commission found that the estimated cost of a decontamination treatment was 5.6% of Cal Water's total operating revenues in the Salinas District. The Commission thereafter concluded that the expenses, which were more than 1% of Cal Water's operating revenue, were substantial.²⁰ Additionally, the Commission's Rate Case Plan for Class A Water Utilities states: “[a] significant expense is equal to or

¹⁹ Comments of the Division of Ratepayer Advocates on Extending Memorandum Account Treatment to All Class A Water Utilities. July 27, 2009, p. 13.

²⁰ D.02-08-054, p. 3.

greater than 1% of test year gross revenues.”²¹ Thus, the Commission should continue to use this standard as it is readily ascertainable and has been used previously by the Commission.

The PD states that the standard that the Commission has used to determine whether amounts are substantial is whether expenses are greater than 2% of projected annual operating costs.²² However, in the PD, the Commission declines to use that test in this case because no party has proposed use of that standard. In failing to apply any standard, the Commission commits legal error by not adhering to its own precedent. Furthermore, the Commission erroneously finds that the amounts expended on legal and related expenses are substantial, with no evidentiary basis for this finding. To resolve this legal error, the Commission should apply a standard to determine whether the legal and related costs of participating in this proceeding were substantial.

DRA notes that it is important for the Commission to use a standard to determine whether costs are substantial to ensure equitable and consistent regulatory decisions. As illustrated in Table 1, these expenses do not even come close to exceeding the 2% of annual operating expenses standard and the expenses do not exceed the 1% of annual revenues standard.²³ Table 1 demonstrates that these expenses are not substantial. Therefore, the expense to the Class A water utilities of participating in this proceeding does not meet the “substantial” prong of the Commission’s 4-pronged test.²⁴ The PD should be modified to refrain from stating that it is not applying a standard to determine whether the expense is “substantial.”²⁵

²¹ D.07-05-062 states that “significant” expenses are equal to or greater than 1% of test year gross revenues for the purposes of a) providing basic information in GRC testimony (p. A-22), and b) for preparing escalation year requests (p. A-19).

²² PD p. 9, footnote 16, citing D.02-07-011.

²³ “Comments of the Division of Ratepayer Advocates on Extending Memorandum Account Treatment to All Class A Water Utilities,” July 27, 2009, p. 13.

²⁴ See D.04-06-018, D. 02-08-054, Resolution W-4276, and the Commission’s Standard Practice U-27-W.

²⁵ PD, footnote 16.

Table 1: Estimated Cost to Class A Water Utilities of Participating in Proceeding OII 07-01-022.²⁶

Utility	Expense tracked 01/07 – 07/09 ²⁷	2008 Annual Operating Expenses ²⁸	Percent of Operating Expense
San Jose Water Company ²⁹	\$110,588	\$135,755,400	0.08%
California Water Service Company ³⁰	\$103,936	\$256,120,068	0.04%
Park Water Company ³¹	\$88,093	\$17,073,274	0.52%
Apple Valley Ranchos Water Company	\$29,512	\$12,029,003	0.25%
California American Water ³²	\$255,504.70	\$94,736,259	0.27%
Golden State Water Company ³³	\$606,831	\$129,686,691	0.47%

F. The Commission’s Finding Of Fact 3 Should Accurately Cite The Commission’s Four-Prong Test, Or Simply Cite To The Test In Prior Commission Decisions

Finding of Fact 3 in the PD states:

“SP U-27-W states memorandum accounts track costs that the Commission has directed to be tracked due to events of an exceptional nature that 1) are not under the utility’s control; 2) could not have been reasonably

²⁶ The estimated expenses were incurred over one and a half years, so the percentages in Table 1 are all conservatively overestimated by approximately 50%, and they still do not come close to the 2% standard.

²⁷ See DRA’s opening and reply comments.

²⁸ From each Class A water utility’s 2008 Annual Report to the Public Utilities Commission for the year ended December 31, 2008, Account 502, Operating Expenses including the following expenses: Source of supply, pumping, water treatment, transmission and distribution, customer accounts, sales, administrative and general, and miscellaneous.

²⁹ Response to DRA data request SJ-001

³⁰ Response to DRA Data Request CW-001

³¹ Response to DRA Data Request PWC-001

³² No response to DRA Data Request CAW-001

³³ No response to DRA Data Request GS-001

foreseen in the utility's last general rate case; 3) that will occur before the utility's next scheduled rate case; 4) are of a substantial nature in that the amount of money involved is worth the effort of processing a memo account; and 5) have ratepayer benefits.”

Unfortunately, this language quoted in the Standard Practice U-27-W, under Item #25, does not accurately restate Commission decisions and resolutions (D.04-06-018, D.02-08-054, Resolution W-4276). The correct language may be found under item #44 of Standard Practice U-27-W. In Finding of Fact 3, the PD quotes the incorrect language from item #25 of SP U-27-W; this language is so different from the test articulated in the above referenced decisions that it is essentially rewriting the Commission's test in this decision.³⁴ The Commission could resolve this issue by simply citing to D.04-06-018, D.02-08-054 or Resolution W-4276, where the Commission previously articulated its 4-pronged test for memorandum accounts. However, if the Commission does include Finding of Fact 3, the 4-prong test should be accurately quoted from prior Commission decisions: The test is as follows:

“ a. The expense is caused by an event of an exceptional nature that is not under the utility's control;
b. The expense cannot have been reasonably foreseen in the utility's last general rate case and will occur before the utility's next scheduled rate case;
c. The expense is of a substantial nature as to the amount of money involved; and
d. The ratepayers will benefit by the memo account treatment.”³⁵

³⁴ Not only is the test a 5-prong test instead of the Commission's 4-prong test, but it also misstates the final prong of the test. Rewriting this test is outside the scope of this limited rehearing, which is limited to the issue of extending memorandum account treatment to all Class A water utilities.

³⁵ D.04-06-018, D.02-08-054, Resolution W-4276.

III. CONCLUSION

In conclusion, DRA opposes approval of these memorandum accounts because they do not meet the Commission's four-prong test for authorizing memorandum accounts.³⁶ Although DRA opposes the PD, DRA urges the Commission to adopt the recommended modifications to the PD included in these comments in order to correct legal and factual errors in the PD and ensure that the final Commission decision in this rehearing is limited to the circumstances and scope of this proceeding.³⁷

Respectfully submitted,

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³⁶ For complete explanation see "Comments of The Division of Ratepayer Advocates On Extending Memorandum Account Treatment to All Class A Water Utilities" July 27, 2009.

³⁷ D.09-06-053, Ordering Paragraph 1 defines the scope of this proceeding as "solely the issue of extending memorandum account treatment to all Class A water utilities."

APPENDIX A

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

Note: Additions in bold and italics, deletions in strikethrough.

Proposed Findings of Fact

Finding of Fact 3: “~~D.04-06-018, D. 02-08-054, and Resolution W-4276 SP U 27-~~
~~W~~ states memorandum accounts track costs that the Commission has directed to be tracked *when: due to events of an exceptional nature that* 1) *The expense is caused by an event of an exceptional nature that is* are not under the utility’s control; 2) *The expense cannot* ~~could not~~ have been reasonably foreseen in the utility’s last general rate case; ~~3) that~~ *and* will occur before the utility’s next scheduled rate case; 4) ~~3) The expense is~~ are of a substantial nature ~~in that~~ *as to* the amount of money involved ~~is worth the effort of processing a memo account;~~ and ~~5) 4) The ratepayers will benefit by the memo account treatment~~ have ratepayer benefits.”

Finding of Fact 6: “The amounts expended for legal and related costs for participating in this ongoing OII range from the \$30,000 and \$88,000 recorded by Apple Valley and Park (single district Class A water utilities) to over \$600,000 recorded by GSWC (a multi-district Class A). *These amounts are estimated by Class A water utilities and are subject to reasonableness review.*”

Finding of Fact 8: “In D.92-09-084, after the issuance of the Drought OII, I.89-03-055, *and after authorizing the establishment of memorandum accounts for expenses attributable to the drought,* the Commission authorized the tracking of legal expenses in conservation memorandum accounts.”

Finding of Fact 9: “The Commission has authorized memorandum accounts without a specific request ~~in a number of resolutions~~ *only in limited exigent circumstances that were unquestionably beyond the control of the utilities or the Commission,* including Resolutions W-4089, W-3784, W-3940, W-4014, and E-3331.”

Proposed Conclusions of Law

Conclusion of Law: “Authorization of the memorandum accounts to track legal and related costs incurred for participating in this proceeding from the issuance of the OII satisfies the *Commission’s criteria for establishing memorandum accounts pursuant to D.04-06-018, D. 02-08-054, and Resolution W-4276 SP U 27 W* criteria and is consistent with the relief accorded in the Drought OII, and the Commission’s authority to authorize memorandum accounts without a specific request.”

Proposed Ordering Paragraphs

Ordering Paragraph 1: After the first sentence, add the following sentence: “*The waiver in this case from the requirement to file an advice letter to establish a memorandum account to track costs associated with participating in generic proceedings, is limited to this proceeding.*”

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE GRAU in I0701022, A0609006, A0610026, A0611009, A0611010, A0703019** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on February 16, 2010 at San Francisco, California.

/s/ NANCY SALYER

NANCY SALYER

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

Service List

I0701022, A0609006, A0610026, A0611009, A0611010, A0703019

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