

DISSENT OF COMMISSIONER MICHEL FLORIO TO DECISION 13-04-014

I dissent from the denial of rehearing. Rehearing is warranted based on (1) error in the conclusion that the Dam is used and useful at the time of the Decision, and (2) error in relying on that conclusion to award Cal-Am a full equity return on the removal project.

The basic used and useful principle “requires that utility property be actually in use and providing service in order to be in the utility’s ratebase.” (*LNG Cost Recovery* (1984) [D.84-09-089] 16 Cal.P.U.C.2d 205, 228.) It has been described as:

A test for determining the admissibility of utility plant as a component of rate base. Plant must be in use (not under construction or standing idle awaiting abandonment) and useful (actively helping the utility provide efficient service).

(“Glossary of Terms Used in Water Utility Regulation” (“*Glossary*”) (2010) MSU Janice Beecher, Ph.D.)

The used and useful principle is codified in the Public Utilities Code, particularly as it pertains to water utilities, which are still traditionally regulated. Section 701.10 (a)¹ directs the Commission to, “[p]rovide revenues and earnings sufficient to afford the utility an opportunity to earn a reasonable return on its used and useful investment....” (See also § 728 (e).)

Moreover, pursuant to section 455.5 (a):

In establishing rates for any ... water corporation, the commission may eliminate consideration of the value of any portion of any ... water generation or production facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility.... [T]he commission shall reduce the rates of the corporation accordingly.... When that portion of the utility is returned to useful service ... the corporation may apply to the

¹ All section references are to the Public Utilities Code, unless otherwise specified.

commission for the inclusion of its value and expenses related to its operation....

The basic reasoning behind the used and useful principle is that ratepayers should only pay for utility plant that is actually benefitting them. Although we have generally limited return on investment to those facilities which are “used and useful,” that limitation is not absolute. In some instances, we have allowed for a utility to earn a rate of return on facilities that are not used and useful. However, in those cases we have explained that an exception was being made to the used and useful doctrine, as well as the reason for that exception. (See *Re 2011 PG&E Rate Case (“Smartmeter Conversion”)* (2011) [D.11-05-018], at pp. 54-74.)

DRA is correct that the Decision’s conclusion that the Dam is used and useful is deficient. As the Decision acknowledges, since the 2002-2003 water year, the Dam has not provided any services related to water supply. The Decision concludes that the Dam is used and useful, however, because Cal-Am can use it for emergency water supply and because it has collected sediment that would be harmful if released. (Decision, at pp. 13-17.) Neither rationale is sufficient for a finding that the Dam is used and useful.

As the Decision notes, “a used and useful public utility asset is one that provides direct and ongoing benefit to customers.” (Decision, at p. 16.) However, this brief description does not mention the limitations, found in cases applying the doctrine, that: (1) the asset should benefit current customers during the period that it is found used and useful; and (2) the benefit should be related to the utility service provided. (See *LNG Cost Recovery* [D.84-09-089], *supra*, 16 Cal.P.U.C.2d at p. 228.)

Thus, the Decision’s conclusion that the Dam can provide emergency water supply and has permits to do so cannot support the Decision’s used and useful conclusion. As DRA notes, a facility will only be found used and useful based on its ability to provide emergency utility service when that emergency service is reasonably imminent. In this case, there has been no use of the Dam for a decade, for emergency or

other use, and since the Dam is being removed, it will not serve a utility purpose in the future. Thus, there is no imminent usage for the Dam.

Cal-Am cites cases where back-up facilities have been considered used and useful. (See *Re Apple Valley Ranchos Water Company* [D.05-12-020] [back-up generator used and useful]; *Re Southern California Edison Fuel Oil Pipeline and Storage* [D.94-10-044] [back-up fuel used and useful].) However, these cases are distinguishable because, unlike the current situation, the facilities were used to some degree. Here, the Dam has not been used for emergency water service in the past decade, and will not be in the future since it is being removed. Cal-Am provides no similar case where a facility has not been used at all for a decade, and will not be in the future, but has been considered used and useful.

It should be noted that DRA also argues that the Dam cannot be used for emergency service because Cal-Am's permits for the Carmel River water usage are already fully utilized. (DRA Rehg. App., at pp. 6-7.) In addition to the fact that the Dam cannot be viewed as used and useful as a matter of law, resolution of this factual issue is necessary prerequisite for a finding that the Dam is used and useful. Significantly, however, the Decision fails to resolve this contested factual issue.

The other basis for the Decision's used and useful conclusion is also misplaced. According to the Decision, the Dam is also used and useful because it holds in place accumulated sediment, a natural process resulting from the existence of the Dam. However beneficial this may be for the river and adjacent property, the sediment collection does not benefit utility customers in particular, and is not "actively helping the utility provide efficient service." (See *Glossary, supra.*) Although there was discussion during the proceeding concerning whether Cal-Am should be held responsible for contributing to the sediment issue, that issue is ultimately unimportant. Even if Cal-Am acted entirely prudently, handling sediment does not contribute directly to providing utility service.

It bears emphasis that the used and useful concept for utility ratemaking purposes is not just whether the Dam serves some broader useful purpose, or whether the

utility has been prudent. Even if the company is completely prudent, and the Dam is beneficial to the public, it will not be used and useful for utility purposes unless it is actively assisting the utility to *provide utility service*. (See *Glossary, supra.*)

Therefore, the Decision's conclusion that the Dam prior to its removal is used and useful is in error. Rehearing of the Decision is warranted in light of the fact that the Decision did not correctly determine whether the Dam was used and useful. (See §§ 455.5 (a), 701.10 (a), 728 (c).)

In addition, the Decision errs in basing the full rate of return for the removal project in part on the used and useful conclusion. Conclusion of Law 8 states that, "because [the Project] costs are for removal of plant in service," Cal-Am's shareholders should earn an equity return on the Project. (Decision, at p. 54, CL 8.) Because, as discussed, the Dam removal is not removal of plant in service, this conclusion should be corrected. Moreover, it is not clear, however, how or whether the Dam was in service would impact the equity return for its removal. Because the premise for granting the equity return on Cal-Am's project removal is at least partially in error, the Decision to award a full equity return on the removal should have been reevaluated.



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Commissioner

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