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A Subsidiary of American States Water Company

October 5, 2022

Caroline Thomas Jacobs
Director
Office of Energy Infrastructure Safety
715 P Street, 20th Floor
Sacramento, California 95814

Re: BVES Opening Comments on Draft 2023 Executive Compensation Structure Submission Guidelines (Docket # 2023-EC)

Dear Director Thomas Jacobs:

On September 15, 2022, the Office of Energy Infrastructure Safety ("Energy Safety") issued draft Executive Compensation Structure Submission Guidelines ("ECSS Guidelines"). According to the September 15, 2022 cover letter, opening comments must be submitted no later than October 5, 2022. These comments are timely submitted.

The following Bear Valley Electric Service, Inc.'s ("BVES") comments will focus upon the new definitions of "Amended Contract" and "New Contract" in Attachment 2 of the draft ECSS Guidelines.[1]

ECSS Guidelines Appear to Suggest That Not All Electric Corporations Must Comply with Section 8389(e)(6)(A) Requirements.

The first bullet point of Section 7 Evaluation Criteria states that:

- All electrical corporations must comply with the requirements of Public Utilities Code section 8389(e)(4).

The second bullet point of Section 7 Evaluation Criteria states that:

- Electrical Corporations with new or amended contracts for executive officers must comply with the requirements of Public Utilities Code section 8389(e)(6)(A).[2]

Similarly, Attachment 1 to the ESCC Guidelines (Sections 1-4) states that:

[1] BVES reserves the right to expand, modify or amend its comments if or when Energy Safety adopts or revises the proposed Guidelines.
[2] ECSS Guidelines at p. 16.

> All electrical corporations must comply with the requirements of Public Utilities Code section 8389(e)(4).[3]

Attachment 1, ESCC Guidelines (Sections 5-7) similarly states:

> Electrical Corporations with new or amended contracts for executive officers must comply with the requirements of Public Utilities Code section 8389(e)(6)(A).[4]

The major sections of the ESCC Guidelines clearly treat the requirements of Section 8389(e)(4) as applying to *all* electrical corporations and properly reflect the statutory language that only electrical corporations with "new or amended contracts for executive officers" must comply with Section 8389(e)(6)(A).

Contrary to Law, New Proposed Interpretations of the Statutory Terms "Amended Contract" and "New Contract" Result in All Electrical Corporations Being Required to Comply with Section 8389(e)(6)(A).

For the first time, in Attachment 1 to the ESCC Guidelines, it is disclosed that Energy Safety has proposed to define what the statutory terms "new contract" and "amended contract" mean for purposes of the ESCC Guidelines.[5] In Attachment 2 (which contains terms, definitions and acronyms for the ESCC Guidelines) the definitions of "Amended Contract" and "New Contract" both contain the following text as the last sentence of those defined terms:

> For the purposes of compliance with section 8389(e)(6)(A), executive officers are presumed to have a compensation contract under California law.

The net effect of these newly proposed interpretations of the statutory terms "amended contract" and "new contract" result in the provisions of Section 8389(e)(6)(A) applying to *all* electrical, not to just those that *actually* have new or amended contracts with their executive officers.

For the reasons set forth below, the newly proposed interpretations of the statutory terms "amended contract" and "new contract" are not consistent with California law, and should be deleted from the final ESCC Guidelines adopted by Energy Safety.

Energy Safety's Interpretation of the Statutory Terms "Amended Contract" and "New Contract" Is Contrary to the California Rules of Statutory Interpretation.

[3] Id. at p. A-2.
[4] ESCC Guidelines at p. A-36.
[5] *Id*.

One of the California rules of statutory interpretation is that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.[6] A corollary to that rule is that, generally, if the Legislature chose to include language, it must be given some meaning. Laws should be interpreted to avoid rendering some words surplusage, null or absurd,[7] or suggests that the Legislature engaged in an "idle act."[8]

In addition, words in a statute should be given their plain and common sense meaning.[9] In the context of *executive officer* compensation, use of the term "contract" would most likely mean an *employment* contract.[10] To interpret it to mean some other type of contract, such as a "compensation contract," makes less or no common sense when used in the context of a statute dealing with *executive officer* compensation.

Section 8389(e)(6)(A) provides, in relevant part,

> [Energy Safety] shall issue a safety certification to an electrical corporation if the electrical corporation provides documentation . . . [that] the electrical corporation has established a compensation structure **for any new or amended contracts** for executive officers, as defined in Section 451.5, that is based upon the following principles: . . . (bolded added)

Energy Safety's claim that all executive officers are presumed to have a "compensation contract" under California law would, in effect, render the "for any new or amended contracts" language in Section 8389(e)(6)(A) null and surplusage. Such a result is contrary to well-established California rules of statutory interpretation. The bolded language is *limiting* language the Legislature used regarding the applicability of Section 8389(e)(6)(A). An interpretation effectively eliminating such limiting language broadens the applicability of that statute well beyond that which was intended by the Legislature. It is blackletter law in California that

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[6] *People v. Woodhead*, 43 Cal.3d 1002, 1010; *Moyer v. Workmen's Comp. Appeals Bd*., 10 Cal3d 222, 230; *Woosley v. State of California*, 3 Cal.4th 758, 775-776.
[7] *Ingredient Communications Council, Inc. v. Lungren*, 2 Cal App.4th 1480, 1492.
[8] *Elsner v. Uveges*, 34 Cal.4th 915, 935.
[9] *Mercer v. Dept. of Motor Vehicles*, 53 Cal. 3d 753, 763.
[10] A contract of employment is a contract by which one, the employer, engages another, the employee, to do something for the benefit of the employer or a third person. California Labor Code Section 2750; California Civil Code Section 1549.

administrative regulations that alter or amend a statute, or enlarges or impairs its scope, are void; and the courts not only may, but must, strike down such regulations.[11]

As California statutory construction rules require, the phrase "for any new or amended contracts" must be given some meaning. If properly read, it *limits* the requirement of a particular compensation structure to only those circumstances where executive officers have new or amended contracts with their electrical corporation. The ESCC Guidelines' unsupported claim that all executive officers are *presumed* to have "compensation contracts" under California law would render the limiting language meaningless and surplusage, which is contrary to the well-established rules of California statutory construction.

If the Legislature had intended to require electrical corporations to establish an executive officer compensation structure that applied to *all* executive officers, it would not have added the modifying and limiting language "for any new or amended contract" in front of the phrase "for executive officers, as defined in Section 451.5." If that were intended, the Legislature would simply not have included such language *at all*. But it did include such modifying and limiting language, and it is improper statutory construction to attempt to completely read out the phrase "for any new or amended contract" as if it does not exist by *presuming* that all executive officers have compensation contracts with their electrical corporations.

In summary, the proposed definitions of the statutory terms "amended contract" and "new contract" in the ESCC Guidelines are contrary to proper statutory construction under well-established California law. If adopted, the result is that *all* electrical corporations are subject to Section 8389(e)(6)(A) under the ESCC Guidelines, when the Legislature *expressly* limited the applicability of that statute to electrical corporations that have new or amended contracts for their executive officers.

ESCC Guideline's Presumption that All Executive Officers Are Presumed to Have a Compensation Contract Is Contrary to California Law.

California is an at-will employment state. California Labor Code Section 2922 provides that employment, having no specified term, may be terminated at the will of either party on notice to the other. The Supreme Court of California has stated that Section 2922 "establishes a

[11] *Steilberg v. Lakner*, 69 Ca.App.3d 784, 789; *Morris v. Williams*, 67 Cal.2d 733, 748; *Rosas v. Montgomery*, 10 Cal.App.3d 77, 88.

presumption of at-will employment."[12] In contrast, the ESCC Guidelines claim that there is a presumption under California law that all executive officers have a compensation contract with their electrical corporation. The claimed presumption in the ESCC Guidelines is inconsistent with the presumption declared by California's Supreme Court that employment in California presumes at-will employment. The ESCC Guidelines must yield to California's Supreme Court declaration of California law.

A Presumption Can Be Overcome With Facts to the Contrary, And The Facts Are That BVES Has No New or Amended Employment or Compensation Contracts With Its Executive Officer.

Assuming, *arguendo*, that the Guidelines are correct in claiming that there is a presumption under California law that all executive officers have a compensation contract with their electrical corporation, that presumption may be overcome with facts and evidence to the contrary.[13] In a June 30, 2020 offer letter from BVES to the current President of BVES, it states:

> No employment contract is created or implied. Employees of the Company are employed on an "at will" basis, and the relationship may be terminated by either the Company or you at any time with or without notice and with or without cause.[14]

The offer letter was signed by the President and an authorized representative of BVES. In addition, no employment or compensation contract of any nature has been offered or executed by BVES and its President since the offer letter was accepted.

In sum, *there is no express or implied compensation or employment contract that exists between BVES and its President, the only executive officer of BVES*. Therefore, any alleged presumption to the contrary is neither applicable nor valid.

Express Employment Contracts May Be Either Written or Oral, But None Exist Between BVES and Its President.

Under California law, an employment contract (or almost any contract, including a compensation contract) may be expressed via a written contract or through oral statements.[15] As stated above, there is no written employment or compensation contract between BVES and its

[12] *Foley v. Interactive Data Corp*., 765 P.2d 373, 47 Cal.3d 654, 677.
[13] *Foley v. Interactive Data Corp*., 765 P.2d 373, 47 Cal.3d 654, 681
[14] June 30, 2020 BVES offer letter to Paul Marconi, at p. 2.
[15] *Foley v. Interactive Data Corp*., 765 P.2d 373, 47 Cal.3d 654, 677; *Reynolds v. Electric & Engineering Co. v. W.C.A.B.* 55 Cal.2d 429, 433.

President. In addition, no oral statements between representatives of BVES and its President have created an express employment or compensation contract between BVES and its President. Thus, there is no express (written or oral) employment or compensation contract between BVES and its President, and any presumption to the contrary is neither applicable nor valid.

The Facts Do Not Establish an Implied-in-Fact Employment Contract Between BVES and Its President.

Absent an express employment contract, an implied-in-fact employment contract could nevertheless exist. But it must be based upon the totality of the facts and circumstances between the parties, not an alleged law-based presumption.[16] In the case of BVES and its President, both agree that there are no facts or circumstances between the parties that give rise to or support an implied-in-fact employment or compensation contract. Thus, even if ESCC Guidelines is correct that executive officers are presumed to have a compensation contract with their electric corporations under California law, that presumption is overcome by the evidence that no such employment or compensation contract exists, express or implied, between BVES and its President.

BVES Is Fundamentally Different Than the Large California Utilities

The concerns expressed by BVES regarding the applicability of Section 8389(e)(6)(A) to its executive compensation structure is not an inconsequential matter for BVES. It has very real consequences to the ability of BVES to recruit and retain highly competent, motivated senior executives.

BVES is materially different than the three large investor-owned electric utilities in California. It currently has only 48 employees and approximately 24,500 customers, with annual revenues of approximately $40 Million. In comparison, Southern California Edison Company has over 12,000 employees, with over 5 million customers and annual revenues of approximately $13 Billion. Relatively speaking, BVES has approximately 0.4% of Edison's workforce, approximately 0.5% of its customer base and approximately 0.3% of its annual revenues. The comparison of annual revenues is important because annual revenues of a corporation play a key role in identifying peer group companies in studies comparing top executives' total compensation. As can be seen by these numbers, the financial picture of BVES is starkly

[16] *Guz v. Bechtel Nat. Inc*., 24 Cal.4th 317, 336-337.

different than Southern California Edison's, as well as the other two large electric utilities whose annual revenues are also in the multi-billion dollar range.

BVES is the only small electric IOU in the state to apply for a Safety Certificate under the provisions of Section 8389. Accordingly, BVES is the only small electric utility in the state that must seek approval of Energy Safety for Bear Valley's executive compensation plan under the provisions of Section 8389.

The provision in Section 8389(e)(6)(A)(i)(I) requiring the primary portion of executive total compensation to be based upon achieving objective performance metrics is extremely difficult for a very small utility to comply with and still attract and retain competent executives that are incentivized to provide safe, reliable and cost-effective service to its customers. BVES and its customers must be allowed to have an executive compensation package that is structured and sized competitively with similarly-sized corporations. BVES should not be required to needlessly pay its executives more than the market requires when there are interpretations of statutory provisions which would avoid such an indefensible result.

BVES is very concerned that its fundamentally different circumstances, when compared with the three large California investor-owned electric utilities, are not being given the consideration they warrant. BVES' unique circumstances require recognition and reasonable accommodation to achieve important Legislative objectives without harming the utility and its customers.

Large Utility Executive Compensation Is, and Should Be, Materially Different Than BVES Executive Compensation

BVES recognizes that there is, and should be, a very substantial difference in total compensation paid to top executives of very large IOUs as compared to BVES executives. With compensation packages that have much higher total compensation, executives of the large IOUs may still receive a very substantial, and attractive, base salary while having a compensation package that still allocates the primary portion of total direct compensation to achieving objective performance metrics.

For example, a compensation package totaling in excess of $2,000,000 of compensation could provide an executive with a very attractive base salary of up to $1,000,000 and still be compliant with Section 8389. In contrast, if Bear Valley's executive's overall annual compensation is less than $400,000, then the requirements in Section 8389 would limit the base salary to under $200,000. BVES is very concerned that such a relatively modest base salary for

the President would not allow BVES to retain and recruit highly-competent, motivated utility executives. BVES needs such executives to not only help to ensure that BVES is operated safely and efficiently, but also to lead its efforts to develop and implement complex programs to reduce wildfire risks for the benefit of the state, BVES and its customers.

To Support the Ability of BVES to Retain and Recruit Highly Competent and Motivated Executives, Compensation Guidelines Must Recognize, and Accommodate, BVES' Unique Circumstances.

As indicated in Section 8389(e)(6), the executive incentive compensation structure is intended to promote safety as a priority and to ensure public safety. If Bear Valley's President is not highly competent and motivated, it undermines Bear Valley's ability to promote safety as a priority and to help ensure public safety by effectively, timely and efficiently implementing its wildfire mitigation plans and other crucial safety programs. Such a result would clearly be contrary to the Legislature's intent in crafting Section 8389.

It is not uncommon for the California Public Utilities Commission to effectively implement broad statutory requirements in a manner that recognizes and accommodates the material differences between large utilities and small utilities. Bear Valley urges Energy Safety to follow a similar course of action. The provisions of Section 8389 are sufficiently broad for Energy Safety to craft guidance for executive compensation plans that recognizes and accommodates Bear Valley's materially different circumstances while still achieving the Legislature's intent. Failing to do so poses real-world risks for Bear Valley's ability to retain and recruit highly competent and motivated executives. Such a result serves no one's best interests.

There Is No Employment or Compensation Contract, Express or Implied, Between BVES and Its Executive Officer, Which Means Section 8389(e)(6)(A) Is Not Applicable to BVES.

Claiming that California law presumes there is a compensation contract between all executive officers and their electric corporations is without clear legal support and results in violating well-established California law in interpreting statutory provisions. Moreover, even assuming, *arguendo*, that such a legal presumption does exist under California law, that alleged presumption is overcome by the indisputable fact that there is no express or implied employment or compensation contract between BVES and its sole executive officer, which is the President.

It is requested that the proposed definitions of the “new contract” and “amended contract” be removed from the 2023 ESCC Guidelines.

Sincerely,

/s/ Paul Marconi

Paul Marconi
President, Secretary and Treasurer
Bear Valley Electric Service, Inc.