



**FILED**

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

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.

Application 12-04-019  
(Filed April 23, 2012)

**ADMINISTRATIVE LAW JUDGE'S DIRECTIVES TO APPLICANT  
AND RULING ON MOTIONS CONCERNING SCOPE, SCHEDULE AND  
OFFICIAL NOTICE**

**1. Summary**

This ruling addresses motions to modify the Scoping Memo and Ruling and for official notice, revises the schedule of the proceedings, directs that certain actions be taken by the Applicant, schedules the next workshop, and notifies the parties of the Administrative Law Judge's (ALJ) intention to seek the collaboration of the State Water Resources Control Board concerning the slant well water rights issue and to recommend a resolution of the preemption issue through a Proposed Decision.

**2. Background**

Motions are pending bearing on the scope and schedule of the proceeding. A request for official notice is also pending. Areas of legitimate inquiry and concern arose in the July 26-27, 2012 Workshop that warrant further consideration. The schedules for the Certificate of Public Convenience and Necessity (CPCN) and California Environmental Quality Act (CEQA) tracks need to be coordinated. The threshold issue of whether Commission authority

and jurisdiction preempts the Monterey County Desalination Facility Ordinance has been raised and briefed in this proceeding, and has been presented to the Superior Court of the County of San Francisco. It warrants being considered by the Commission in a timely manner. Briefing on the slant well water rights issue indicates that the Commission should work collaboratively with the State Water Resources Control Board to address this complex issue. These subjects are ruled on below.

### **3. Discussion**

#### **3.1. Ruling on the Motions of Marina Coast Water District and the Surfrider Foundation Concerning the Scoping Memo and Schedule<sup>1</sup>**

##### **3.1.1. Motions and Positions of Parties**

Marina Coast Water District (MCWD) filed a motion on July 6, 2012 to modify and clarify the June 28, 2012, scoping memo, contending that a legally correct statement of scope would track § 1001, Pub. Util. Code<sup>2</sup> and pose the question “whether, considering all relevant factors, ‘the present or future convenience and necessity require or will require’ the construction of the proposed project.”<sup>3</sup>

. . . [T]he Commission may not grant the application unless it determines that the proposed project *is the single project* that best

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<sup>1</sup> The Assigned Commissioner’s Scoping Memo and Ruling at 2 provided that the assigned ALJ “may make any revisions or provide further direction regarding the manner in which issues are to be addressed, as necessary for a full and complete development of the record.”

<sup>2</sup> Unless otherwise indicated, citations to code sections refer to the Pub. Util. Code.

<sup>3</sup> MCWD Motion, at 1.

serves the public interest, *whether or not it is a reasonable and prudent means of securing replacement water for the Monterey District.*<sup>4</sup>

In addition, MCWD argued that all feasible, mutually-exclusive alternatives to the proposed project have to be addressed in the evidentiary phases of the proceeding and in the Commission's CPCN determination, citing *Ashbacker Radio Corp. v. F.C.C.* (1945) 326 U.S. 327,<sup>5</sup> and that, similarly, so must the environmental impacts of the project.<sup>6</sup>

Finally, MCWD urges that neither interim rate relief nor the proposed test well should be allowed before there has been legal briefing and a Commission determination concerning the legal feasibility of the project.<sup>7</sup>

The Monterey County Farm Bureau (Farm Bureau), and the Salinas Valley Water Coalition (Salinas Valley) subsequently joined MCWD's motion. California-American Water Company (Cal-Am) and the Planning and Conservation League filed responses opposing the motion.

Separately, the Surfrider Foundation (Surfrider) filed a motion to amend the Scoping Memo on July 20, 2012, a submission that was later joined by Monterey County Landwatch (Landwatch), MCWD, Farm Bureau and Salinas Valley. Surfrider's motion seeks a revision in the schedule to assure that the draft environmental report on the proposed project is available in advance of the

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<sup>4</sup> *Ibid.* at 1-2.

<sup>5</sup> *Ibid.* at 2-3.

<sup>6</sup> *Ibid.* at 4-5.

<sup>7</sup> *Ibid.* at 5-7.

evidentiary hearings and that the environmental review and CPCN schedule be fully integrated.<sup>8</sup>

Cal-Am filed a response countering the above-mentioned motions on August 6, 2012. Cal-Am argues that, under § 1001, “any improvement that is highly important to the public convenience and desirable for the public welfare may be regarded as necessary.”<sup>9</sup> The Ashbacker case cited by MCWD has no applicability, according to Cal-Am, because that matter was governed by a federal communications act having no bearing on the Commission and it involved two competing applications, whereas here the Commission has only one application before it.<sup>10</sup>

Cal-Am wants the current schedule kept, taking issue with MCWD’s position that a *final* Environmental Impact Report (EIR) should precede *both* testimony and the evidentiary hearings, as well as Surfrider’s position that a *draft* EIR should precede the evidentiary hearings.<sup>11</sup> Cal-Am contends the practice of having a draft EIR precede evidentiary hearings in electric transmission projects is inapposite.<sup>12</sup> Cal-Am asserts that if the schedule were modified per MCWD’s and Surfrider’s positions,

[CPCN and CEQA review] would be [a] two-year (or longer) process and could result in California American Water not

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<sup>8</sup> Surfrider Motion at 1-4.

<sup>9</sup> Cal-Am Response at 2-3.

<sup>10</sup> *Ibid.* at 3-4.

<sup>11</sup> *See* Cal-Am Response to Motions at 4-7.

<sup>12</sup> *Ibid.* at 5-6.

meeting the SWRCB December 2016 deadline, with serious negative consequences for California American Water, its customers, and the community.<sup>13</sup>

In reply to Cal-Am, MCWD invokes Ashbacker again and reiterates its position that

completing environmental review prior to conducting an evidentiary hearing, while perhaps more burdensome at the outset, will prove to be the most prudent and effective method of ensuring that all aspects of the potential environmental impacts of the proposed project and the feasible, cost-effective alternatives are fully weighed by the Commission.<sup>14</sup>

Surfrider's reply to Cal-Am cites § 1002(a)'s requirement that the Commission consider "[i]nfluence on environment" among other factors in granting a CPCN. Predicting that "mitigation measures identified in a draft EIR will substantially impact the project's cost,"<sup>15</sup> Surfrider argues that such data should inform the CPCN hearings and that Cal-Am has failed "to identify any principled reason" for not following the same course as in electric transmission projects where a draft EIR is released before evidentiary hearings are held.<sup>16</sup>

### **3.1.2. Modification of Scope and Schedule**

While there is no legal requirement that the requisite finding for a CPCN (namely certification under § 1001 "that the present or future public convenience

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<sup>13</sup> *Ibid.* at 6.

<sup>14</sup> MCWD's Reply at 3-4.

<sup>15</sup> Surfrider's Reply at 2.

<sup>16</sup> *Id.*

and necessity require or will require such construction”) be recited in the statement of scope, the scoping statement<sup>17</sup> issued on June 28, 2012 would be enhanced by the following modification (in italics) which expressly places the proposed project in the CPCN context:

- Is the proposed Monterey Peninsula Water Supply Project
- *required for public convenience and necessity*
  - and a reasonable and prudent means of securing replacement water for the Monterey District of Cal-Am; and would the granting of the application be in the public interest?

MCWD’s argument, to the effect that the instant project application cannot be granted unless the Commission “determines that the proposed project is *the single project* that best serves the public interest” in terms of public convenience and necessity,<sup>18</sup> is rejected here, however. Cal-Am’s points and authorities are persuasive that MCWD’s argument is based on a cramped and unjustified reading of § 1001.<sup>19</sup> The Commission has broad discretion with respect to making findings of public convenience and necessity.

On the question, relevant to scheduling, of how the Commission’s consideration of alternative projects should occur, what was said in the

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<sup>17</sup> Commissioner’s Scoping Memo and Ruling at 2:

Is the proposed Monterey Peninsula Water Supply Project a reasonable and prudent means of securing replacement water for the Monterey District of Cal-Am, and would the granting of the application be in the public interest?

<sup>18</sup> MCWD’s Motion at 1-2 (italics in original).

<sup>19</sup> See Cal-Am’s Response at 2-3.

Commissioner's Scoping ruling is confirmed: alternatives to the proposed project will be considered in the CEQA process and by the Commission in its deliberations over the Proposed Decision.<sup>20</sup> The 1945 Ashbacker Radio Corp. case cited by MCWD<sup>21</sup> has no applicability here. Ashbacker held that

. . . where two bona fide applications [for a broadcast operating license] are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him [under the Federal Communications Act].<sup>22</sup>

Here, one project application is under review pursuant to state law. The CEQA process, where the consideration of alternatives occurs, involves public scoping meetings and opportunities for public comment. CEQA does not require evidentiary hearings.

Review of the competing arguments prompts a finding that the deferral of prepared testimony or evidentiary hearings, or both, in the CPCN track until after the issuance of either the draft or final EIR is not in the public interest because it would substantially increase the risk of non-compliance by Cal-Am with the December 2016 state-mandated deadline. The schedule is being revised, however, to provide that a scoping report identifying alternatives be issued expeditiously after the scoping meetings and that the deadlines for the Applicant's supplemental testimony and intervenor testimony be set for dates falling after that scoping report.

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<sup>20</sup> Scoping Memo and Ruling at 2.

<sup>21</sup> 326 U.S. 327. See MCWD's Motion at 2-3 and Reply to Cal-Am's Response at 2.

<sup>22</sup> 326 U.S. at 333.

In addition, a workshop on project cost, cost impact of contingencies and related financial modeling is being added to the schedule as a result of suggestions made at the July 26-27 Workshop.

The revised schedule follows.

CPCN Process		CEQA Process	
September-October, 2012	Discovery, voluntary meetings among parties, and mailing of PD on preemption issue	September-October, 2012	Continue preliminary work on Draft EIR
October 1, 2012	Public agency participation proposals, if any, due		
October 26, 2012	Cal-Am Compliance Progress Report on any public agency participation proposals	October 24-25, 2012	Scoping Meetings, Monterey
November 1, 2012	Cal-Am Compliance Report on contingency plans	November 28, 2012	Scoping Report identifying alternatives
November 15, 2012	Cal-Am Compliance Report on financial models		
December 11 (11 a.m.-5 p.m.), 12 (9:30 a.m.-5 p.m.) and 13 (9:30 a.m.-12:30 p.m.), 2012	Workshop, on Project Cost/ Cost Impact of Contingencies/Related Financial Modeling, CPUC Auditorium		Continue work on Draft EIR

January 11, 2013	Cal-Am Supplemental Testimony		Continue work on Draft EIR
January 16 (2 p.m. and 7 p.m), 2013	Public Participation Hearings, Monterey		Continue work on Draft EIR
February 22, 2013	DRA/Intervenor Testimony		
March 8, 2013	Cal-Am Reply Testimony		
April 2-11, 2013	Evidentiary Hearings, CPUC hearing room, San Francisco, CA		
May 24, 2013	Common Outline Opening Briefs		
June 7, 2013	Reply Briefs		
		July 1, 2013	Draft EIR circulated for comment
		November 15, 2013	Final EIR published
November-December, 2013	Proposed Decision mailed for comment		
December, 2013-January, 2014	Commission action on Proposed Decision		

### **3.2. Post-Workshop Guidance and Directions**

The July 26-27, 2012 Technical Workshop,<sup>23</sup> facilitated by Peter Allen of the Legal Division and Ravi Kumra of the Division of Water and Audits, addressed a wide range of issues, some of which are best further explored sooner than later.

#### **3.2.1. Potential for Public Agency Role in Project**

While the Application contemplates some complementary public agency projects (groundwater replenishment and aquifer storage and recovery), there may be opportunities for one or more public agencies to have a direct role in the Monterey Peninsula Water Supply Project itself. The idea of a private-public partnership in the area of financing was floated in the Workshop, for example. Other areas of possible collaboration may exist, and it is reasonable to consider those to the extent that they are feasible and sufficiently developed to allow implementation in a timely manner. While Cal-Am may believe that the window for altering the project to include public agency participation has closed, Cal-Am should be open to and seriously consider in good faith any public agency proposal for direct participation in the MPWSP made to it no later than October 1, 2012. Any such proposals must be adequately detailed to show that they are technically, legally and economically feasible. Cal-Am shall file a progress compliance report by October 26, 2012 on any public agency participation proposals.

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<sup>23</sup> Topics covered were demand projections; available water supply; project sizing, costs and ratepayer impacts; project governance; and contingency planning in light of possible impediments to project completion and to meeting the December 2016 deadline. The workshop was video-taped and is viewable by scrolling down to “CPUC Workshop – Technical Issues in Cal-Am Request for Water Supply Project, July 26 and 27, 2012” at this website address: <http://www.californiaadmin.com/cpuc.shtml>.

### **3.2.2. Contingency Plans**

Numerous possible barriers to project approval, construction and deadline compliance have been identified in filed documents and in the Workshop. Among them are unfavorable test well results; water right issues; outfall capacity issues; relocation of facilities due to environmental, hydrological or geological causes; unavailability of low-interest loans or other financing; and litigation staying or delaying construction. In light of the serious consequences that could flow from significant project delay or failure, more contingency analysis and planning than that allowed for or revealed at the Workshop is in order. Accordingly, Cal-Am will be directed soon in a separate ALJ ruling to submit a compliance report by November 1, 2012 on its contingency plans in regard to particular potential barriers in the path of the project. That report should be useful at the workshop scheduled for December 11, 12 and 13, 2012.

### **3.2.3. Cost and Financial Model Workshop**

The next workshop, December 11-13, 2012, will focus on project cost, cost impacts of contingencies, and related financial modeling. Parties interested in those subjects will be encouraged to develop jointly, under Cal-Am's leadership, a financial model, or optional models, that can be used for computing revenue requirements for the project (taking into account contingency costs). Cal-Am is directed to file a compliance report on that model, or models, by November 15, 2012 and to join with the participating parties in sharing the analysis underlying the model or models at that workshop.

### **3.3. Preemption Issue**

Briefing by the Parties has been completed on the issue of whether Commission authority and jurisdiction preempts the Monterey County Desalination Ordinance in regards to the instant Application. This will notify the

Parties that a Proposed Decision on this subject can be expected in the near future.

### **3.4. Slant Well Water Rights Issue**

Briefing by the Parties also has been completed on the issue of Cal-Am's claim to a right to extract water through the proposed slant wells. This issue is of sufficient complexity that the Commission is working collaboratively with the State Water Resources Control Board to address this issue, particularly as it relates to the legal feasibility of the proposed Monterey Peninsula Water Supply Project.

### **3.5. Ruling Memorializing Previous E-mail Rulings**

This will confirm and memorialize my August 3, 2012 email ruling that eliminated from the schedule opening and reply comments on interim rate relief and the test well<sup>24</sup> and postponed the amended/supplemental Applicant

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<sup>24</sup> August 3, 2012 e-mail ruling at numbered paragraph 1:

Cal-Am requests that the Commission issue an interim decision addressing the ability to track test well and other pre-construction costs related to the Monterey Peninsula Water Supply Project in the existing memorandum account authorized by the Commission in D.03-09-022. (A. 12-04-019 at p.15). An interim order in this regard is not required. Authority already exists for Cal-Am to track these types of costs related to a long-term water supply solution in the existing Commission-authorized memorandum account. As Cal-Am indicates at page 15 of A.12-04-019, test well and other pre-construction costs related to the Monterey Peninsula Water Supply Project should be tracked in a separate sub-account in the existing memorandum account. The ratemaking treatment for recovery of the costs booked to this separate sub-account will be addressed by the Commission through a subsequent decision in this proceeding.

testimony and the DRA/Intervenor testimony.<sup>25</sup> The email ruling noted that further changes in the schedule, if any, would be addressed and resolved in an upcoming ruling on the then pending motions to modify the Commissioner's Scoping Memo and Ruling. That is accomplished here.

### **3.6. Response to Requests for Official Notice**

Official notice of facts is allowed under our Rules of Practice and Procedure<sup>26</sup> as permitted in the Cal. Evidence Code, the relevant provisions of which are set out in the footnote below.<sup>27</sup>

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<sup>25</sup> *Ibid.* at numbered paragraph 2:

The optional Amended/Supplemental Applicant Testimony previously set for August 16, 2012, and the DRA/Intervenor Testimony set for September 18, 2012, are hereby postponed to a date uncertain but to be determined. This is being done because the Technical Workshop sessions on July 26 and 27, 2012, raised numerous issues either not addressed or inadequately addressed by the Application which would benefit from further consideration at this juncture without the immediate distraction of those particular deadlines. The resetting of those deadlines may occur in an upcoming ruling on the pending motions to modify the Commissioner's Scoping Memo and Ruling.

<sup>26</sup> Rule 13.9: "Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."

<sup>27</sup> § 450. Judicial notice may not be taken of a matter unless authorized or required by law.

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§ 452. Judicial notice may be taken of the following matters to the extent that they are not embraced within [the prior section]:

*Footnote continued on next page*

On July 25, 2012, Salinas Valley Water Coalition filed a motion for official notice of a 1995 contract between the U. S. Bureau of Reclamation and the Monterey County Water Resources Agency.<sup>28</sup> In order to defer issues concerning the admissibility of evidence to the evidentiary phase of this proceeding, the

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(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States and of any state of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. \*\*\*

(d) Records of (1) any court of this state or (2) any Court of record of the United States or of any State of the United States. \*\*\*

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(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

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§ 453. The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

- (a) Gives each adverse party sufficient notice of the requests, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
- (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

<sup>28</sup> U.S. Bureau of Reclamation Contract No. 5-07-20-W1283, dated May 26, 1995.

motion is denied at this time, without prejudice to an opportunity to either renew the motion or proffer the information and allegations in testimony.<sup>29</sup>

WaterPlus filed a motion for official notice of facts on August 2, 2012, to which Cal-Am and Monterey Peninsula Water Management District (MPWMD) responded on August 17, 2012. That motion is denied because the two documents<sup>30</sup> WaterPlus seeks to have officially noticed are not eligible for that treatment. The "Questions and Answers" document authored by MPWMD and the Timothy J. Durbin manuscript, as well as the allegations in the motion, are reasonably "subject to dispute" and not "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (§ 452 (g) and (h), Evidence Code).<sup>31</sup> This denial of Water Plus' motion is without prejudice to an opportunity to proffer the information and allegations in testimony.<sup>32</sup>

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<sup>29</sup> The subject document can be incorporated, referred to and/or attached to the Party's testimony for which admission into the record will be sought.

<sup>30</sup> A September 11, 2008, "Questions and Answers" document prepared by MPWMD, pertaining to the Seaside Groundwater Basin, and an October 26, 2007, manuscript by Timothy J. Durbin entitled "Groundwater Flow and Transport Model: Seaside Groundwater Basin."

<sup>31</sup> See Cal-Am and MPWMD Response Opposing Motion of WaterPlus for Official Notice of Facts at 2-6.

<sup>32</sup> The subject documents can be incorporated, referred to and/or attached to the Party's testimony for which admission into the record will be sought.

**IT IS RULED** that:

1. The statement of scope of the Application 12-04-019 proceeding is modified to read:

Is the proposed Monterey Peninsula Water Supply Project

- required for public convenience and necessity
- and a reasonable and prudent means of securing replacement water for the Monterey District of Cal-Am; and would the granting of the application be in the public interest?

2. The schedule of the proceeding is modified as set out on pages 8-9 of this ruling.

3. California-American Water Company (Cal-Am) is directed to seriously consider in good faith any public agency proposal for direct participation in the Monterey Peninsula Water Supply Project (MPWSP) that is feasible and sufficiently developed to allow implementation in a timely manner and that is made by October 1, 2012. Cal-Am shall file a compliance progress report on the status of any such deliberations by October 26, 2012.

4. Parties interested in the subjects of the December 11-13, 2012 workshop (project cost, cost impacts of contingencies, and related financial modeling) are encouraged to develop jointly, under Cal-Am's leadership, a financial model, or optional models, that can be used for computing revenue requirements for the project (taking into account contingency costs). Cal-Am is directed to file a compliance report on that model, or models, by November 15, 2012 and to join with the participating parties in sharing the analysis underlying the model or models at that workshop.

5. In a separate Administrative Law Judge (ALJ) ruling, Cal-Am will soon be directed to develop reasonably detailed contingency plans in regards to the select

potential barriers to the MPWSP project and set out those plans in a compliance report by November 1, 2012.

6. The August 3, 2012 ALJ e-mail ruling is confirmed and memorialized.

7. The July 25, 2012 Salinas Valley Water Coalition's motion for official notice of facts is denied without prejudice.

8. The August 2, 2012 WaterPlus motion for official notice of facts is denied.

Dated August 29, 2012 at San Francisco, California.

/s/ GARY WEATHERFORD

Gary Weatherford

Administrative Law Judge