

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

3-17-14
04:59 PM

Application of California-American Water Company (U201W) for Authorization to Increase its Revenues for Water Service by \$18,473,900 or 9.55% in the year 2015, by \$8,264,700 or 3.90% in the year 2016, and by \$6,654,700 or 3.02% in the year 2017.

A.13-07-002
(Filed July 1, 2013)

**BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES
REGARDING THE ADMINISTRATIVE LAW JUDGE'S ORDER
TO SHOW CAUSE REGARDING CALIFORNIA-AMERICAN WATER
COMPANY'S VIOLATION OF RULE 1.1**

I. INTRODUCTION

On March 6, 2014, the California Public Utilities Commission ("Commission") held a hearing on Administrative Law Judge ("ALJ") Colbert's order to show cause ("OSC") why California-American Water Company ("Cal-Am") should not be sanctioned for possible Rule 1.1 violations in the instant proceeding. Pursuant to ALJ Colbert's instructions at the OSC hearing,¹ the Office of Ratepayer Advocates ("ORA") files this brief regarding Cal-Am's violation of Rule 1.1 of the Commission Rules of Practice and Procedure ("Rules").

In addition to the information provided in this brief, information supporting a Rule 1.1 violation was also included in ORA's moving papers² before the OSC was issued, and those moving papers are incorporated herein by reference.

¹ Order to Show Cause Hearing Transcript ("Hearing Tr."), March 6, 2014, at 91:12 – 13.

² Motion of the Office of Ratepayer Advocates For A Companion Order Instituting An Investigation Regarding California-American Water Company's Responses to Minimum Data Requirements And Whether The Company Violated Rule 1.1, filed November 12, 2013; The Office Of Ratepayer Advocates Reply In Support Of Its Motion For An Order Instituting A Companion Investigation Regarding California-American Water Company Minimum Data Request Responses And For Rule 1.1 Violations, filed December 8, 2013.

II. ANALYSIS

A. Cal-Am Admits That It Intended To Exclude Unbuilt Projects From Its Response To Minimum Data Requirement (“MDR”) II.D.5.

Pursuant to MDR II.D.5, Cal-Am must “[l]ist the plant improvements authorized in test years but not built.”³ Cal-Am’s purported interpretation of this simple mandate deviates so far from the plain language of the MDR as to constitute at least gross negligence.

The Rate Case Plan requires Cal-Am to file accurate MDR responses with its application. The Rate Case Plan does not permit Cal-Am to continually update its MDR responses. While the discovery process allows updated information to be obtained during the rate case, the MDR responses must be accurate as of the date they are filed. That is the issue before the Commission in this Rule 1 OSC.

Instead of listing all projects authorized in test years but not built, Cal-Am chose to only include a small number of projects a Cal-Am engineer thought would *never* be built, an interpretation that is contrary to the plain language of the MDR. Additionally, Cal-Am decided to exclude the following categories of projects in responding to the MDR: test year 2013 projects,⁴ advice letter projects,⁵ multi-year projects,⁶ and projects that were “still in progress.”⁷ The text of the MDR does not account for any of these contingencies or nuances. Instead it simply requires the utility to state whether a project authorized for a test year has been built. It is irrelevant whether Cal-Am thinks it will complete those projects in the future or *why* a project has not been built. Cal-Am should have included all of the projects in its MDR response that were authorized for a test year

³ D.07-05-062, APPENDIX A: Rate Case Plan and Minimum Data Requirements, at p. A-27.

⁴ Response of Cal-Am to the Motion of ORA for a Companion OII Regarding Cal-Am’s Responses to MDRs and Whether the Company Violated Rule 1.1 (Cal-Am’s Response), at 4; Hearing Tr., at 28:13 – 20, 58:13 – 17.

⁵ Cal-Am’s Response, at 4; Hearing Tr., at 32:13 – 26, 58:25 – 59:1.

⁶ Cal-Am’s Response, at 5; Hearing Tr., at 30:27 – 32:3, 59:2 – 17.

⁷ Cal-Am’s Response, at 6; Hearing Tr., at 56:1 – 57:14, 58:5 – 9, 65:11 – 21 (Eight multi-year projects and nine advice letter projects were not included in the MDR response, *see* OSC-3, at 4.)

but had not been completed at the time that Cal-Am filed its final application, July 1, 2013. It admittedly failed to do so, and intentionally did not list numerous projects that were authorized for a test year.

In filing its response to ORA's motion for an Order Instituting Investigation, Cal-Am argued that the test years at issue were 2011 and 2012.⁸ Cal-Am admitted that "there were eleven projects that the Commission authorized in rates for test years 2011 and 2012 that had not yet been completed," but were left off the MDR.⁹ At hearing however, Cal-Am's witnesses emphatically stated that 2013 was the last authorized test year.¹⁰ In other words, there were an additional 19 projects set to be completed in the 2013 test year that Cal-Am purposefully did not include in its MDR response.¹¹ At best, Cal-Am's decision not to include projects authorized for the test years is unsupported by the MDR and its own statements. Cal-Am's own witness acknowledged that 2013 was a test year. Nonetheless, Cal-Am decided not list projects that were scheduled to be built in 2013 that were never completed or even started.

Further, Cal-Am's arguments that it need not include advice letter projects, multi-year projects, and projects set for completion in test year 2013 is particularly inane when one of the few projects it actually chose to include in the MDR was a multi-year advice letter project set for completion in test year 2013.¹²

Cal-Am's testimony on this topic ignores the underlying problem: Cal-Am decided not to include projects that were not yet built because it thought they would likely be constructed eventually.¹³ Instead of acknowledging the problem, Cal-Am claims that the Commission can find the relevant information somewhere in Cal-Am's

⁸ Cal-Am's Response, at 4.

⁹ Cal-Am's Response, at 5.

¹⁰ Hearing Tr., at 16:22 – 17:2; 28:13 – 20; 82:14 – 17.

¹¹ See Cal-Am's Response at Attachment A; OSC-3, at 2.

¹² See OSC Exhibit 4 (excerpt from 2010 GRC Settlement Agreement showing that New ASR Well project was multi-year advice letter project set for completion in 2013); see also Hearing Tr. at 61 – 62.

¹³ See Hearing Tr. at 56:1-12.

application, if it looks hard enough.¹⁴ In illustrating its point that the projects are discussed somewhere in its application, Cal-Am prepared a document for the March 6, 2014 OSC hearing showing project references in Cal-Am’s Strategic Capital Expenditure Plan, testimony, and/or workpapers.¹⁵ This post-hoc approach to documentation is insufficient under the RCP, which requires utilities to cross-reference information contained in other sections of its application.¹⁶ Indeed other MDR responses from Cal-Am include such cross references.¹⁷

The Commission has previously fined utilities for excluding information from data request responses. In D.01-08-019, the Commission found that Sprint PCS violated Rule 1 after it failed to include multiple telephone codes in a data request asking for all codes under its control.¹⁸ The Commission found that even presuming Sprint PCS did not set out to intentionally mislead Commission staff, “the results of its actions did have the effect of misleading the staff.”¹⁹ The Commission found that the utility “should have made a more concerted effort to verify the accuracy and integrity of the data response,” and was “required to provide truthful and complete answers to the data requests propounded and to exercise due professional care to ensure the integrity of information.”²⁰ Finally, the Commission found that the utility’s:

purported interpretation of the staff’s data request is unduly narrow. The intent of the staff’s data request was to gain a comprehensive picture of how Sprint PCS was utilizing the numbering resources within its possession . . . Therefore, Sprint PCS should have identified [all access codes] in order

¹⁴ See Hearing Tr., 41:21 – 43:4.

¹⁵ OSC-3, Cal-Am’s Capital Projects in Data Request Response RRA-001 by Category (“OSC-3”); see Hearing Tr., at 41:18 - 4–:11.

¹⁶ D.07-05-062, APPENDIX A: Rate Case Plan and Minimum Data Requirements, at p. A-21.

¹⁷ See e.g., California American Water Company, Final Application, A.13-07-002 (July 1, 2013) Exhibit B, Minimum Data Requirements (Vol. 1 of 2) II.B.19, II.C.8, II.E.10, II.E.16, (examples of MDRs that include cross-reference to where requested information can be found in the Application).

¹⁸ D.01-08-019 at 21, COL 2.

¹⁹ D.01-08-019 at 8.

²⁰ D.01-08-019 at 15.

to provide a complete picture of numbering resources in response to the staff request.²¹

Here too, Cal-Am's actions had the effect of misleading staff, who reasonably presumed that only five projects authorized in the last GRC had not been built. Cal-Am's witness made an intentional effort to "selectively edit"²² the MDR to exclude the majority of unbuilt projects.²³ Mr. Schubert testified that there were no 2011 or 2012 test year projects unbuilt by February 2013 that were not included in his MDR response.²⁴ He later contradicted himself, indicating that there were projects authorized for 2011 and 2012 that were "very likely to be constructed in 2013."²⁵ In other words, those projects were not yet built.

As was noted earlier, under D.01-08-019 Cal-Am was required to make "a more concerted effort to verify the accuracy and integrity of the data response," and "to provide *truthful* and *complete* answers to the data requests."²⁶ As in D.01-08-019, the Commission should reject Cal-Am's unduly narrow interpretation of the MDR, particularly when that interpretation is contrary to the MDR's plain language. As in D.01-08-019, Cal-Am's failure to "provide a complete picture" in response to a simple data requirement is at least gross negligence and violates Rule 1.1.

B. MDR II.D.5 is an Important Method to Track the Accuracy of Cal-Am's Project Forecasts and Completion of Ratepayer-Funded Projects.

Cal-Am has a duty to this Commission and its ratepayers to demonstrate that the projects that it requests ratepayer funding for are used and useful, and that it responsibly manages ratepayers' funds in constructing new projects. MDR II.D.5 is one way the

²¹ D.01-08-019 at 9.

²² D.01-08-019 at 10.

²³ Hearing Tr., 56:1 – 12, 56:21 – 58:9.

²⁴ Hearing Tr., at 29:11 – 20.

²⁵ Hearing Tr., at 56:1 – 12.

²⁶ D.01-08-019 at 15 (emphasis added).

Commission and its staff can verify that Cal-Am is completing its requested projects on schedule to the benefit of ratepayers.

For instance, among the projects identified in Cal-Am's project reference document is the Redrill Richardson Well project.²⁷ In the prior Cal-Am General Rate Case, the Commission adopted a settlement between Cal-Am, ORA,²⁸ and The Utility Reform Network regarding revenue requirement issues.²⁹ The settlement included the Redrill Richardson Well project.³⁰ The project was identified as IP-0550-112, and was designated for completion in 2012.³¹ According to Cal-Am's data request response in the present proceeding, the Richardson Well Redrill project is still incomplete, and is now planned for completion in 2015.³² This project was not disclosed in Cal-Am's MDR response,³³ in spite of the fact that it was not yet built when Cal-Am filed its application.

This example demonstrates that Cal-Am's attempt to justify its MDR response ignores the inaccuracy of that MDR response.

C. The Commission Should Issue A Fine Of At Least \$100,000 To Deter Cal-Am From Providing Inaccurate And Misleading Information In The Future.

Under Public Utilities Code section 2107, the Commission may fine utilities between \$500 and \$50,000 per offense for "fail[ing] or neglect[ing] to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement

²⁷ OSC-3, at 1.

²⁸ Then known as the Division of Ratepayer Advocates.

²⁹ D.12-06-016, at 11, 87, Ordering Paragraph ("OP") 2.

³⁰ Partial Settlement Agreement Between The Division Of Ratepayer Advocates, The Utility Reform Network And California-American Water Company On Revenue Requirement Issues, filed July 28, 2010 in A.10-07-007 ("A.10-07-007 Settlement"), at 128-29 (referenced in D.12-06-016).

³¹ A.10-07-007 Settlement, at 128-29.

³² OSC-2, Cal-Am's Response to ORA Data Request RRA-001, at 2 (IP-0550-112 appears on the second line of the table attached to the data request response).

³³ OSC-1, Cal-Am's Response to MDR II.D.5, at 3.

of the commission.”³⁴ Each violation is a separate and distinct offense, and for any continuing violation, each day that the offense continues is a separate and distinct offense.³⁵ The goal of setting a penalty amount is to “effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California rather than to victims. Effective deterrence creates an incentive for public utilities to avoid violations.”³⁶ The Commission typically considers several factors in setting fines: “the severity of the offense, the conduct of the utility (before, during, and after the offense), the financial resources of the utility, and the totality of the circumstances related to the violation. The resulting fine should also be considered in the context of past Commission decisions.”³⁷

In a prior case where a utility provided inaccurate data request responses to Commission staff, the Commission found a Rule 1 violation and measured the number of offenses at issue “in terms of each separate data element that Sprint PCS failed to disclose in its data response. . . . The resulting penalty is \$200,000 (i.e., \$10,000 per offense times 20 offenses).”³⁸ In D.01-08-019, the Commission found that the utility’s violation “harms or undermines the regulatory process,” which resulted in a finding that the violation “should be considered a grave offense.”³⁹

In this proceeding, Cal-Am filed a misleading MDR response. It listed five unbuilt projects, which did not reflect how many projects were actually unbuilt at the time that Cal-Am filed its application. Cal-Am has acknowledged that seven additional projects authorized for test years 2011 and 2012 were not built when it prepared the

³⁴ Pub. Util. Code § 2107.

³⁵ See Pub. Util. Code § 2108.

³⁶ D.98-12-075, 1998 Cal. PUC LEXIS 1016, at *54.

³⁷ D.98-12-075, 1998 Cal. PUC LEXIS 1016, at *9.

³⁸ D.01-08-019, at 12.

³⁹ D.01-08-019, at 14.

MDR response, but were not included in that response.⁴⁰ In addition to those seven projects, Cal-Am admits it did not include any projects authorized for test year 2013 that had not been built at the time the application was filed.⁴¹ It also admits it did not include multi-year projects,⁴² advice letter projects,⁴³ and projects still in progress.⁴⁴ None of those exclusions are allowed under the Rate Case Plan.

Cal-Am’s misleading MDR response should be considered a “grave offense” because it “harms or undermines the regulatory process.”⁴⁵

Cal-Am still has not provided accurate information on the number of projects that the Commission authorized the construction of for the test years 2011-2013 that have not yet been built or have been cancelled outright. Instead, it responded to ORA’s data request on the issue with information unresponsive to the question asked.⁴⁶ Cal-Am should have responded to the data request with all projects authorized for test years 2011, 2012, and 2013 that had not been built when Cal-Am filed its application on July 1, 2013. Instead, it added in projects authorized for escalation year 2014, making an accounting of the number of inaccuracies in its MDR response difficult, if not impossible. Cal-Am’s burden is to make ORA’s review of its expenses easier to comprehend, not more challenging.

In filing its application and MDR responses, Cal-Am represented to the Commission, that there were five unbuilt projects that were authorized in the prior General Rate Case’s test years. It took approximately 100 days—after ORA noticed

⁴⁰ Hearing Tr., at 54:20 – 55:25 (listing eleven projects authorized in rates for test years 2011 and 2012 that had not been completed, **not** including the New ASR Well); OSC-1, at 3 (MDR response listing five projects authorized in test years but not yet built, **including** the New ASR well), 70:18 – 22.

⁴¹ Hearing Tr., at 28:13 – 20, 58:13 – 17.

⁴² Hearing Tr., at 30:27 – 32:3, 59:2 – 17.

⁴³ Hearing Tr., at 32:13 – 26, 58:25 – 59:1.

⁴⁴ Hearing Tr., at 56:1 – 57:14, 58:5 – 9, 65:11 – 21.

⁴⁵ D.01-08-019, at 14.

⁴⁶ Hearing Tr., at 17:12 – 17, 19:13 – 20.

unbuilt projects on site visits and issued a data request—for Cal-Am to provide a more complete list of unbuilt projects.⁴⁷

Cal-Am's inaccurate data request also caused additional work for ORA. First, ORA had to conduct additional discovery to obtain the correct information that should have been included in the MDR. Additionally, ORA had to devote t additional time, resources, and energy into verifying the accuracy of other information provided in Cal-Am's application and supporting papers, whereas under typical circumstances, this information would have been presumed to be accurate. It is difficult to quantify how much Cal-Am's incompetence and lack of candor has delayed ORA's review of Cal-Am's application, however, the person hours involved have been substantial and fully resolving this issue will require continuing efforts on the part of ORA and its counsel. This additional effort required ORA to forego putting staff time and resources into investigating other areas of Cal-Am's application and various requests. Moreover, the delay makes it more likely that ORA will have sufficient time to review all of the components of the application that it ordinarily would if this were a normal general rate case. Thus, not only are ORA and the Commission itself being inconvenienced by Cal-Am's substandard showing, but its ratepayers may suffer over the next three years because some of Cal-Am's requests will not receive the type of scrutiny they deserve. Instead, ORA will at least partially be preoccupied with ascertaining whether Cal-Am's filing is accurate or still incomplete. Providing accurate information is an essential component of any rate case, and a penalty under Rule 1.1 is appropriate where information provided proves to be thoroughly inaccurate.

The Commission could treat the inaccurate MDR as a continuing violation, in which case each day represents another violation. Even using only the seven 2011 and 2012 test year projects, the maximum possible penalty for seven violations over 100 days would be \$35 million.⁴⁸ In accordance with D.01-08-019, the Commission can treat each

⁴⁷ Counting from the July 1, 2013 filing date to the October 10, 2013 data response deadline totals 101 days.

⁴⁸ 100 days * 7 violations * \$50,000 maximum fine.

separate omission as a separate violation. Even if the Commission does not consider the violations continuing, a fine ranging from \$29,000⁴⁹ to \$2.9 million⁵⁰ is applicable.

Under the circumstances of this proceeding, a penalty in excess of \$100,000 is warranted to deter Cal-Am from future violations. A fine of \$100,000 is sufficient to deter Cal-Am from providing inaccurate data in the future, but compared to Cal-Am's revenue requirement of \$200 million, would not present financial harm to the utility and would be well within Cal-Am's resources to pay, as considered under D.98-12-074.

III. CONCLUSION

ORA respectfully requests that the Commission issue an order finding that Cal-Am violated Rule 1.1 by filing a misleading MDR response with the Commission, and sanctioning Cal-Am in excess of \$100,000 to deter such misleading responses in the future.

Respectfully submitted,

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March 17, 2014

⁴⁹ 58 violations (58 new projects disclosed in the data request but not included in the MDR) * \$500. It is reasonable to treat each listed project in the data request as a violation because Cal-Am provided unresponsive information to the data request, making it difficult to determine exactly how many projects should have been included in the MDR response.

⁵⁰ 58 violations * \$50,000.