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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  
RULING DENYING MOTION TO DISMISS**

**Summary**

Water Plus has filed a motion to dismiss this Application (A.) 12-04-019. This ruling denies the motion to dismiss because: (1) the motion does not state the law supporting the motion and the ruling requested; (2) the papers filed by the parties disclose, on their face, that triable issues of material fact remain; and (3) even construing the facts in the manner most favorable to Water Plus, Water Plus would not be entitled to judgment as a matter of law.

**1. Background**

In April 2012, the California-American Water Company (Cal-Am) filed an application to build and operate a desalination plant and related facilities in Monterey County, and to recover its costs in rates. This project is called the Monterey Peninsula Water Supply Project (MPWSP).

When Cal-Am filed its application, the California Public Utilities Commission (Commission) determined that the California Environmental

Quality Act (CEQA) applied, and that the Commission was the appropriate Lead Agency. (*See* Pub. Resources Code § 21080(a) (CEQA generally applies to "discretionary projects to be . . . approved by public agencies . . ."); CEQA Guidelines § 15051(b) ("If the project is to be carried out by a nongovernmental person or entity, the Lead Agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.")) As the Lead Agency, the Commission determined that an Environmental Impact Report (EIR) was necessary, and was obliged to "cause the document to be prepared." (CEQA Guidelines § 15367.)

The Commission's Energy Division issued a Draft Environmental Impact Report (DEIR) in April 2015. On September 9, 2015, Energy Division announced that it would be recirculating the DEIR. (*See* CEQA Guidelines § 15088.5 (discussing recirculation of EIR prior to certification).) Among the reasons given for recirculation, Energy Division explained that questions had arisen concerning the accuracy and reliability of some of the hydrogeological modelling and analysis contained in the DEIR, and that it would be "appropriate to revise the DEIR to update groundwater modeling with a new groundwater modeling consultant . . . ." (Notice to all Parties, Commission Energy Division (Sept. 9, 2015).)

On October 1, 2015, Ron Weitzman, representing Water Plus, filed the Motion to Dismiss the Proceeding on the MPWSP Because of Data Tampering (Motion). The Motion states that the Project "has now become questionable as the result of not only a conflict of interest compromising the project's ... 'DEIR' but also evidence, provided here, of data tampering on the project's evaluation." (Motion at 1.) The Motion further alleges the project is "an extremely costly and

risky experiment funded by ratepayers who are neither entrepreneurs nor venture capitalists." (*Id.*)

The Motion argues that one of what may be more examples of data tampering in this proceeding should be an adequate basis for terminating the project. (*Id.* at 2.) The specific tampering alleged, cited, and analyzed by Water Plus relates to a scatter plot of measurements and calibrated model predictions of 32 years of monthly water elevations in 17 wells in 3 aquifers. (*Id.* at 3, and Appendix A.) Water Plus notes what it finds to be differences between the concept of "relative error" apparently employed in hydrogeology and traditional statistics. (*Id.* at 3-5.) Of the 3 aquifers, the 180-foot aquifer and the Dune Sand reportedly are directly accessible by the test well but only data points from the 180-foot aquifer are included in the "relative error" negative correlation of -0.45 computed by Water Plus and cited by it as "solid evidence of data tampering to improve the goodness of fit of the model to the water elevation measurements obtained in the 180-foot aquifer." (*Id.* at 7.)

On October 9, 2015, Cal-Am filed its Response to Water Plus's Motion to Dismiss (Cal-Am Response). The Response argues that the motion to dismiss is "baseless and irresponsible" (Cal-Am Response at 1), shows "a fundamental lack of understanding of hydrological analysis" (*Id.* at 1-2), and "unfairly denigrates the work of the Commission and its environmental consultants." (*Id.* at 1.)

Marina Coast Water District (MCWD), on October 16, 2015, filed its Response (MCWD Response) to the Motion. Noting that dismissal is a "particularly harsh sanction" (MCWD Response at 1), MCWD cites authorities supporting its argument that it lies with the Commission "to determine whether there is merit to the matters raised in the Motion, and on that basis whether the continuing processing of the instant application is in the public interest." (*Id.*)

After reviewing the motion and Appendix E2, MCWD states that it “cannot confirm that any data was tampered with” but does find that Figure 37 and Appendix E2 “have a strong potential to mislead” due to aquifer data points being shown “solely collectively” and “temporal residuals” not being evaluated for each well. (*Id.* at 2.)

By e-mails dated Friday, October 9, and Tuesday, October 20, Water Plus requested permission to reply to the Cal-Am and MCWD Responses under Rule 11.1(f) of the Commission's Rules of Practice and Procedure ("Rules").<sup>1</sup> Because I find, as explained below, that the Motion should be denied as a matter of law, further briefing on this matter is unnecessary, and Water Plus's request to reply to the Responses is denied. (See Rule 11.1(g) ("Nothing in this rule prevents the . . . Administrative Law Judge from ruling on a motion before . . . replies are filed.").)

## **2. Discussion**

Water Plus has not shown that it is entitled to the ruling it seeks. Among other things, a motion “must concisely state the . . . law supporting the motion.” Rule 11.1(d). That provision was not followed as the Motion does not state any supporting law.

That notwithstanding, the Commission has also stated that a motion to dismiss under Rule 11.1(d) is similar to a summary judgment motion in civil court. (*Campbell v. So. Cal. Edison Co.*, Decision (D.) 15-07-009, mimeo at 6.)

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<sup>1</sup> Rule 11.1(f) provides in part: "With the permission of the Administrative Law Judge (ALJ), the moving party may reply to responses to the motion."

The "purpose of both types of motions is to permit determination of whether there are any triable issues of material fact before proceeding to trial, thus promoting and protecting efficiency in the administration of cases by eliminating needless litigation." (*Id.*) A motion to dismiss "requires the Commission to determine whether the party bringing the motion prevails solely on undisputed facts and matters of law." (*Id.*, citing *Raw Bandwidth Communications, Inc. v. SBC California, Inc.*, D.04-05-006, mimeo at 8.) As the Commission has previously explained:

"Under the summary judgment procedure, the moving party has the burden of showing that there are no disputed facts by means of 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.' The opposition to the motion must state which facts are still in dispute. The motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied." (*Qwest Communications Corp. v. Pac. Bell Tel. Co.*, D.06-08-006, mimeo at 5-6, quoting *Westcom Long Distance v. Pac. Bell Tel. Co.* (1994) 54 CPUC 2d 244, 249.)

Water Plus has not met its burden, so the Motion must be denied. First, it is clear from the papers filed by the parties that there remain disputed issues of material fact in this proceeding. Water Plus asserts that the modelling data has been tampered with, Cal-Am denies it, and MCWD is unable to say one way or another. In considering motions for summary judgment, courts do not "resolve conflicting factual allegations, for the purpose of the procedure is to discover whether the parties have evidence requiring assessment at a trial." (*R.D. Reeder Lathing Co. v. Allen* (1967) 66 Cal.2d 373, 376.) The rule is the same for motions to dismiss before this Commission.

Second, even if the parties' filings did not on their face disclose the existence of remaining triable facts, Water Plus would not be entitled to judgment as a matter of law. Even if the allegations made by Water Plus were both entirely correct and uncontroverted, those allegations only go to the sufficiency of the CEQA document, which the Commission can weigh when it decides whether or not to certify the EIR. And even if the CEQA document is insufficient as a result, that would not be fatal to the application as a whole because the Energy Division can recirculate the CEQA document, and is in fact doing so in this case. So even construing the facts in the manner most favorable to Water Plus (which inverts the normal presumption in motions to dismiss),<sup>2</sup> those allegations are not sufficient to decide, as a matter of law, that the application should be dismissed.

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<sup>2</sup> In considering motions for summary judgment, "the affidavits of the moving party are strictly construed and those of his opponent, even if in conclusionary terms, are liberally construed." (*R.D. Reeder Lathing Co.*, *supra*, 66 Cal.2d at 376; *see also, e.g., Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805 ("We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.").)

**IT IS RULED** that for the foregoing reasons, the Motion to Dismiss is denied.

Dated October 29, 2015, at San Francisco, California.

/s/ GARY WEATHERFORD  
Gary Weatherford  
Administrative Law Judge