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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 SETTING EVIDENTIARY ISSUES
AND SCHEDULE TO COMPLETE THE RECORD FOR PHASES 1 AND 2**

Summary

This ruling sets the issues and schedule for evidentiary hearings to update cost estimates, provide current information concerning supply and demand, and do other things necessary to complete the record for both Phases 1 and 2.

1. Background

This proceeding is currently going forward in two phases. Phase 1 addresses issues regarding a Certificate of Public Convenience and Necessity (CPCN) for the Monterey Peninsula Water Supply Project (MPWSP). The MPWSP consists of a desalination plant and related facilities. Phase 2 addresses matters related to the Pure Water Monterey Groundwater Replenishment Project (GWR). If GWR advances and is built, California-American Water Company (Cal-Am or applicant) may be able to sign a water purchase agreement (WPA) with sellers of water from the GWR, thereby being able to build a smaller desalination plant. In Phase 2, the Commission will make findings concerning

GWR (discussed in more detail below), and ultimately decide whether or not to approve a possible WPA.

On September 24, 2015, a notice of Prehearing Conference (PHC) was filed. The PHC was called to explore the schedule with respect to Phase 2, the need to update cost estimates for the MPWSP as a whole, and related scheduling and procedural issues.

On October 8, 2015, sixteen parties filed a joint motion to modify the Phase 2 schedule and provide cost updates.¹ The jointly proposed schedule recommends submission of Phase 2 in April 2016, with a Commission decision in July 2016.

On October 12, 2015, the PHC was convened. A discussion was held regarding the Commission's interest in completing the entire proceeding as soon as possible. Parties were asked to prepare proposed schedules by October 20, 2015 that would allow completing not only the Phase 2 record but also all, or as much, of the Phase 1 record by April to May 2016. In addition, parties were directed to identify what evidence, if any, must be updated.

On October 13, 2015, an Administrative Law Judge's (ALJ) Ruling elaborated on the request. On October 20, 2015, three responses were submitted: (a) Joint Proposal to Complete the Record for Phase 1 and Phase 2 (joined by

¹ The 16 Joint Parties are: California-American Water Company, Coalition of Peninsula Businesses, County of Monterey, Monterey County Water Resources Agency, Land Watch Monterey County, Monterey Peninsula Regional Water Authority (Water Authority), Monterey County Farm Bureau (Farm Bureau), Monterey Peninsula Water Management District (MPWMD), City of Pacific Grove, Monterey Regional Water Pollution Control Agency (MRWPCA), Office of Ratepayer Advocates, Planning and Conservation League Foundation, Public Water Now (formerly Citizens for Public Water), Salinas Valley Water Coalition (SVWC), Sierra Club, and Surfrider Foundation.

sixteen parties),² (b) Separate Comments of Marina Coast Water District (MCWD), and (c) Water Plus' Amendment of the Joint Proposal.

The Joint Proposal recommends updating evidence on four items: (a) desalination project costs, (b) demand and supply relative to plant sizing, (c) brine discharge, and (d) return water to the Salinas Valley Groundwater Basin (SVGB). (See Joint Proposal at 2-4.) The Joint Proposal states that there are differences of opinion regarding permissible evidence on return water for the SVGB.

In its Separate Comments, MCWD says it understands that on October 9, 2015, the MRWPCA approved the GWR and certified the GWR Final Environmental Impact Report (FEIR). MCWD says it understands the only question before the Commission regarding GWR is whether or not a yet-to-be-proposed WPA should be approved by the Commission and entered into by Cal-Am. MCWD says the Commission should consider the WPA expeditiously, and recommends submission of a proposed WPA "with or before the service of testimony in January 2016." (Separate Comments at 2.)

Water Plus proposes three amendments to the Joint Proposal. These are: (a) a new issue, (b) more information on updated demand and supply, and (c) modification to criterion 4 of 9 for consideration of the GWR.³

² These are the same 16 parties who joined in the prior motion. See footnote 1.

³ Criterion 4 is one of nine proposed by several parties in a July 31, 2013 motion for approval of a Settlement Agreement (the "Large Settlement").

2. Discussion

2.1. Evidentiary Issues

The current record has substantial information and evidence.⁴ Critical water supply constraints in the Monterey District require that the Commission continue to proceed judiciously, efficiently, effectively, and without unnecessary delay.⁵ As such, Joint Parties are correct that updates to the record should be limited to those items which, due to changed circumstances, require new data in order to permit the Commission to make a timely, well-informed decision. With this in mind, updated evidence is needed in, but limited to, four areas.

2.1.1. Cost Estimates

The application (with the original cost estimates) was filed more than three and a half years ago. With this passage of time, there is a need to update estimated costs for the MPWSP, including all of its components. The Joint Proposal provides for “updating the record on the desalination project costs.” (Joint Proposal at 2.) In this case, the project is the entirety of the proposed MPWSP, not just the desalination plant. The Commission must have updated, reasonable, current cost estimates for the entire project in order to reach an informed decision. Applicant must provide those updates.

⁴ For example, over 10 days of evidentiary hearings were held in April and May 2013. Evidentiary hearing was also held on December 2, 2013 regarding two Settlement Agreements.

⁵ Applicant must cease diversions of Carmel River water by December 31, 2016. (State Water Resources Control Board Cease and Desist Order WR 95-10.) The Commission recognizes the “urgent need to find an alternative water supply to replace Cal-Am’s water supplies that are drawn from the Carmel River.” (Joint Proposal at 2, citing Decision (D.) 10-12-016 at 27 and 55.)

2.1.2. Demand and Supply

Updated regional water demand and supply data is another area for which evidence is needed. This evidence includes, but is not limited to, the last three years of system delivery data, the context and implications of that data, and other changes in present demand compared to demand reflected in the evidence introduced at the initial evidentiary hearings. Cal-Am shall, among other things, offer testimony regarding the data that is now available, including a technical memorandum on plant sizing that reflects that data.

MCWD asks that Cal-Am's updated demand and supply data be delineated by month (at a minimum), and that Cal-Am continually submit monthly updates throughout the proceeding. MCWD is right. Demand and supply data are very important in this proceeding. Cal-Am shall provide updated data, the data shall be delineated by no less a period than by month, the data will be updated monthly, and the updated data will be served each month on the service list.

2.1.3. Brine Discharge

Further evidence is needed with respect to Surfrider's "concerns relating to the potential environmental effects attendant to the brine discharge from the desalination project." (Joint Proposal at 3.) Joint Parties say that discussions are underway on a possible proposal for long-term monitoring and, if necessary, further mitigation measures. Parties should submit evidence regarding the appropriateness, scope, and cost of (a) post-approval monitoring of the impacts of brine disposal on the marine environment and organisms, and (b) measures to reduce or avoid impacts detected by such monitoring.

2.1.4. Return Water:

Joint Parties make the case for offering new evidence concerning additional options for return water to the SVGB.⁶ (*See* Joint Proposal at 3-6.) Joint Parties, however, state that there are two positions “on whether evidence should be submitted on the basis for California American Water to provide return water to the SVGB and, if so, how much, when, where, and upon what terms with the recipient(s)” (*Id.* at 4).

SVWC, Farm Bureau, and Landwatch seek to submit evidence on whether Cal-Am has a return obligation, the basis of the return obligation, and whether such obligation may constrain the form or manner of that return. They assert the factual question as to potential harm to groundwater rights remains open and must be resolved with new evidence not previously available. They further assert that without factual evidence as to the issue of potential harm to water rights, parties will be unable to brief the legal and policy issues related to the CPCN.

Cal-Am, Water Authority, and MPWMD do not oppose the submission of new evidence on the potential impacts of the source water wells on the SVGB in relation to return water rights, subject to several conditions. The conditions are that: (a) the evidence is new and was not available at the time of the previous evidentiary hearing in 2013, (b) it is evidence outside the DEIR, (c) the evidence

⁶ Applicant and some parties in the Joint Proposal indicate they have explored additional options to return water, and seek to present new information not known or available at the time of prior testimony. For example, parties state in the Joint Proposal that the option to return water through injection wells was dismissed in the Draft Environmental Impact Report (DEIR), and the return option under the GWR variant does not operate in normal to wet years (citing DEIR April 30, 2015 at Section 7.10.3.2). Other viable return locations and options must be considered.

must be included in the Phase I evidentiary proceeding (concluding with the April 2016 hearing), (d) the Commission make clear that the record on the Basin-impact/return water issue is closed at the conclusion of the Phase 1 evidentiary phase, (e) the record on the Basin-impact/return water issue not be reopened based on new evidence in the re-circulated Draft EIR and (f) objections to the DEIR be addressed in comments to the DEIR/DEIS (Draft Environmental Impact Statement) not in reopening the evidentiary record (with the evidentiary record closed in April 2016).

Cal-Am, with others, is correct. New evidence must be presented concerning additional options for return water to the SVGB, including new information that was not known or available at the time of prior testimony. That evidence, however, must be new, must not have been available at the time of the evidentiary hearings in 2013, and must not come from the DEIR.⁷ It must be included in the Phase I evidentiary proceeding. The record on the Basin-impact/return water issue will be closed at the conclusion of the Phase 1 evidentiary phase (absent a compelling motion to set aside submission and reopen the record on that issue). The record on the Basin-impact/return water issue will not be reopened based on new information in the upcoming

⁷ The Joint Proposal says that Cal-Am, Water Authority, and MPWMD “do not oppose the request by LandWatch and others to be afforded an opportunity to present evidence on the potential impacts of the source water wells on the SVGB in relation to return water requirements, provided that the parties seeking to submit such evidence make a preliminary showing...” (Joint Proposal at 5.) They request the preliminary showing demonstrate that the evidence is new, was not available at the time of hearings in 2013, and not part of the DEIR. The preliminary showing requirement is not adopted. Cal-Am and others may move to strike proposed testimony that they believe is not new, was previously available, and/or is from the DEIR. The burden will not be placed on the party proposing testimony to first make a preliminary showing.

recirculation of the DEIR. Parties must address environmental impact issues in comments on the DEIR.⁸

2.2. Scope of Phase 2

MCWD says it understands the only issue before the Commission in Phase 2 is whether or not a yet-to-be-proposed WPA should be approved by the Commission. That is incorrect. As Joint Parties say in the Joint Proposal, the Commission's review will include assessment of the GWR to determine whether certain findings can be made concerning schedule, cost, benefits, and feasibility of the GWR. These will inform, but are in addition to, a more narrow Commission decision limited to the WPA.

Parties in the Joint Proposal assert that the nine criteria in the Large Settlement should be the subject of the evidentiary hearings in April 2016 and the basis for the Phase 2 decision. This is partially incorrect. The Commission has not adopted the Large Settlement, and may or may not ultimately do so. The parties to the Joint Proposal are correct that the nine criteria are important elements in the consideration of the GWR, but MCWD is correct that the Commission's decision must rest on broader principles, including what is just, reasonable, and in the public interest.

2.3. Additional Evidentiary Hearings

MCWD asserts parties should be afforded no less than an additional thirty days following release of the FEIR to move for additional evidentiary hearings on specific topics "which have not been adequately addressed by prior hearings

⁸ See June 29, 2015 ALJ Ruling, which provides guidance on comments for the DEIR and issues for briefs.

or the Commission's environmental review." (Separate Comments at 2.) MCWD's request is not adopted. The schedule will not set aside time after release of the FEIR for parties to move for additional evidentiary hearings. Nonetheless, as and when appropriate, parties may employ Rule 13.14 (Submission and Reopening the Record).

2.3. Amendment to Joint Proposal

Water Plus proposes three amendments to the Joint Proposal. The proposed amendments are not adopted.

First, in addition to the updates proposed in the Joint Proposal (i.e., cost, demand/supply, brine discharge, return water), Water Plus recommends adding: "possible existence and impact of conflict of interest and data tampering in the design, modeling, and evaluation of slant-well intake." (Water Plus Amendments at 1.) This issue principally concerns the sufficiency of the EIR, as explained in the October 29, 2015 Administrative Law Judge's Ruling Denying Motion to Dismiss. As identified in that Ruling, when the Commission's Energy Division recirculates the DEIR, Water Plus may find its concerns are reasonably resolved.

If not, Water Plus may comment on this issue during the public comment period that will follow recirculation of the DEIR. Depending upon how the issue is treated in the FEIR, Water Plus may later argue that the Commission should not certify the FEIR. Should it make a timely request, for example, Water Plus is entitled to final oral argument on this issue (or any other issue within the scope of the proceeding). (See Rule 13.13(b).) In addition, when the Commission issues a proposed decision (PD) either certifying or declining to certify the FEIR, Water Plus may submit comments on the PD and raise the issue there. (See Rule 14.3.) In these ways parties, including Water Plus, have ample opportunity to raise this

issue under the existing CEQA process. Water Plus fails to make a compelling case that it must be considered in parallel as part of the CPCN process.⁹

Second, Water Plus argues that updated demand and supply data will not be complete without current unit cost analysis (supply-and-demand curves). In particular, Water Plus proposes that Cal-Am's upcoming testimony on supply and demand also include "analyses involving supply and demand related to unit cost (supply-and-demand curves)." (Water Plus Amendment at 2.) Water Plus may present analysis and evidence that includes supply-and-demand curves in its upcoming proposed testimony, but Water Plus fails to present a convincing case that applicant should be required to do so in its testimony.

Third, Water Plus proposes an amendment to the fourth of nine criteria in the July 31, 2013 Large Settlement (i.e., criteria that the Settling Parties in the Large Settlement recommend be used by the Commission for its decision on the GWR). The proposed amendment is not adopted. Water Plus is not a signatory to the Large Settlement. The Commission has not yet judged the merits of the Large Settlement, and will not address individual elements now. Water Plus may propose to settling party signatories to the Large Settlement that the fourth of nine criteria be amended. Alternatively, Water Plus may address its concerns in the broader principles to be used for Phase 2 (e.g., just, reasonable, in the public interest).

⁹ Also see June 29, 2015 ALJ Ruling, which provides guidance on comments for the DEIR and issues for briefs.

2.4. Adopted Schedule

Joint parties propose a schedule that runs concurrently in part, but keeps the two phases separate and independent while run on parallel tracks. This approach is largely adopted.

The adopted schedule keeps the two phases on the same schedule. The Commission's goal is to reach a single, comprehensive decision on all issues within this application. That decision will address all necessary matters including, but not limited to, the CPCN for the MPWSP, the WPA, and the certification of the FEIR.

The Commission does not intend to prepare a separate decision for Phase 2, and the adopted schedule does not anticipate that eventuality. Nonetheless, the adopted schedule recognizes that more than one decision may later become desirable. While the adopted schedule does not anticipate a separate Phase 2 decision, parties may file motions for a separate Phase 2 decision at the time of Phase 2 reply briefs (or at another reasonable time) if a separate decision can be argued to be reasonable and necessary (particularly if the Phase 1 schedule has lagged). Any party making such motion must be prepared to explain how the Phase 1 and Phase 2 issues, which appear to be substantially if not inextricably intertwined, would be reasonably and fairly treated in separate decisions.

The adopted schedule is:

**ADOPTED SCHEDULE FOR
A.12-04-019**

DATE	PHASE 1	PHASE 2
December 15, 2015	Supplemental testimony with updated MPWSP costs	
January 22, 2016	Supplemental testimony on demand and supply, brine discharge, and return water	Testimony, including the WPA and applicant's showing on the WPA
January to May 2016 [a]	Phase 1 settlement discussions	Phase 2 settlement discussions
March 22, 2016	Concurrent rebuttal testimony	Concurrent rebuttal testimony
April 14-15, 2016	Evidentiary hearings on Phase 1 updates	Evidentiary hearings for Phase 2
May 2016		Opening Brief on Phase 2
May 2016 (2 weeks following opening brief)		Reply Brief on Phase 2
Same date as Reply Brief		Motion for separate Phase 2 decision
July 2016		If two decisions: Target for Phase 2 Proposed Decision
August 2016		If two decisions: Target for Commission action on Phase 2 decision
TBD	CPUC's issuance of combined Draft EIR/EIS	
45 days after issuance of DEIR/DEIS	Close of comment period on DEIR/DEIS	
15 days after close of DEIR/DEIS comment period	Opening Legal and Policy Briefs	
30 days after close of DEIR/DEIS comment period	Reply Legal and Policy Brief	
TBD	If two decisions: Phase 1 PD	
TBD	If two decisions: Commission action on Phase 1 PD	

[a] Parties may engage in settlement discussions throughout the proceeding and may file a motion for Commission adoption of a settlement up to 30 days after the last day of hearing. (Rule 12.1.)

"TBD" is "to be determined."

IT IS RULED that:

1. Parties shall serve updated evidence in four areas: (a) cost estimates, (b) demand and supply, (c) brine discharge, and (d) return water. The updated evidence shall be in compliance, and consistent, with the descriptions in the body of this Ruling. Return water evidence must be new, and satisfy the other standards stated in the body of this Ruling.

2. Applicant shall provide updated demand and supply information that is delineated by no less a period than by month, the data will be updated monthly, and the updated data shall be served each month on the service list.

3. The schedule stated in the body of this Ruling is adopted.

Dated November 17, 2015, at San Francisco, California.

/s/ GARY WEATHERFORD
Gary Weatherford
Administrative Law Judge