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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 ADMITTING EXHIBIT CA-47 INTO THE RECORD AND DENYING THE OFFICE OF RATEPAYER ADVOCATES' MOTION TO STRIKE PORTIONS OF TESTIMONY FROM THE RECORD

During the evidentiary hearings held on May 26, 2016, California-American Water Company (Cal-Am) introduced and marked for identification Exhibit CA-47, titled "Agreement of California-American Water Company, Citizens for Public Water, City of Pacific Grove, Coalition of Peninsula Businesses, Division of Ratepayer Advocates, Monterey Peninsula Regional Water Authority, Monterey Peninsula Water Management District, Monterey Regional Water Pollution Control Agency, and Planning and Conservation League Foundation, on Pre-Construction Activities Related to Certain Pipeline Facilities" (Exhibit CA-47). All parties involved signed the Agreement on July 31, 2013.

After Exhibit CA-47 was identified, marked and Office of Ratepayer Advocates (ORA) witness Rose was cross-examined, Cal-Am sought to move Exhibit CA-47 into the record. ORA objected on the grounds that Exhibit CA-47 constituted a settlement agreement that was never submitted to the Commission

for approval and its admission would violate Commission Rule of Practice and Procedure (Rule) 12.6. ORA also moved to strike portions of the transcript related to the cross-examination. All parties were asked to address the admissibility of Exhibit CA-47 in their briefs. Only Marina Coast Water District (Marina), Cal-Am, Monterey Peninsula Water Management District, Monterey Regional Water Pollution Control Agency, Monterey Peninsula Regional Water Authority, and the Planning and Conservation League (collectively Joint Parties) and ORA provided comments on the issue.

Rule 12.6 states;

No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.

If a settlement is not adopted by the Commission, the terms of the proposed settlement is also inadmissible unless their admission is agreed to by all parties joining in the proposal.

In its briefs Marina states that Exhibit CA-47 appears to be a settlement agreement, however, the Commission may not have to apply Rule 12.6. Marina also notes that ORA failed to object to the use of Exhibit CA-47 until Cal-Am had finished its cross-examination on the exhibit and Marina had begun its own cross-examination. Marina asks that whatever is decided regarding the admissibility of Exhibit CA-47, that none of its cross-examination be stricken from the record.

In its briefs ORA argues that Exhibit CA-47 is a settlement agreement that was never submitted to the Commission for approval. ORA claims that the document reflects ORA's settlement position and embodies the product of settlement discussions. On that basis ORA asserts that Rule 12.6 requires the parties to keep the information confidential until it is submitted for Commission approval or ORA consents to its disclosure, which ORA does not.

ORA contends that to allow Exhibit CA-47, a confidential settlement document that was not submitted or approved by the Commission, to be used against a party in cross examination violates Rule 12.6 on its face and could have a chilling effect on future settlements. ORA also offers Black's Law Dictionary definitions of "settlement" and "agreement" to support its contention that Exhibit CA-47 is a settlement subject to Rule 12.6 and should be excluded from the record.

In their Opening Brief the Joint Parties maintain that Rule 12.6 does not apply because Exhibit CA-47 is a stand-alone, enforceable and admissible agreement regarding the benefit of moving forward with the "CAW-Only Facilities," signed by all parties involved.

The Joint Parties state that Exhibit CA-47 is not a concession or offer to settle made during negotiation on a settlement and therefore the first paragraph of Rule 12.6 does not apply. The Joint Parties stress that the words "settlement" or "settle" do not appear anywhere in the document and it contains no language that would indicate it was meant to resolve any issue or dispute pending before the Commission.

The Joint Parties assert that the second part of Rule 12.6 does not apply because it only comes into play if a document a party seeks to admit into

evidence is a settlement that was not adopted by the Commission, and CA-47 is neither.

The Joint parties also point out that Exhibit CA-47 contains no language regarding confidentiality or that it was made during or as part of any negotiation on a settlement. Additionally, the Joint Parties state that the document appears on the Monterey Peninsula Water Supply Project website.

Neither ORA nor the Joint Parties was able to cite Commission decisions offering direction on how to decide whether a document is protected by Rule 12.6. However, the Joint Parties cited several cases on the state and federal level that provide some guidance in this area.¹ In those cases the courts examined the language of the documents, rather than the subjective intent of the parties, to determine whether there was any indication that the document at issue reflected a settlement offer.

With that guidance in mind, the most persuasive argument against Exhibit CA-47 being a settlement is that it does not match the language or treatment of other documents that both the Joint Parties and ORA agree are settlements. The other documents, the Large Settlement Agreement and the Settlement Agreement on Plant Size and Level of Operation are both titled Settlement Agreement, include language that states the purpose of the agreement is to avoid the expense and uncertainty of litigation of the matters in dispute, reference settlement discussions, state that the agreements represent a compromise and that the parties will use their best efforts to obtain Commission approval of the agreements. None of this language appears on Exhibit CA-47.

¹ See *Civic Center Drive Apartments Ltd. Partnership v. Southwestern Bell Video Services* (N.D. Cal 2003)295 F.Supp.2d 1091, 1099 n.3 and *Preciado v. Wilde* (2006) 139 Cal.App.4th 321, 326.

ORA cites Black's Law Dictionary's definition of "settlement" as "an agreement ending a dispute or lawsuit." It defines "agreement" as "{a} mutual understanding between two or more persons about their respective rights and duties regarding past or future performance; a manifestation of mutual assent by two or more persons." Rather than support ORA's contention that Exhibit CA-47 should be excluded under Rule 12.6 as a settlement agreement, the definitions support the Joint Parties' position that not all agreements are settlement agreements nor do they require Commission approval. Further support for this position is a non-disclosure agreement. It does not settle a dispute between parties, but identifies rights and duties going forward and does not require Commission approval.

For these reasons ORA's objection to admitting Exhibit CA-47 into the record is overruled and its motion to strike portions of the transcript is denied.

IT IS RULED that Exhibit CA-47 is moved into the record as of May 26, 2016, and the Office of Ratepayer Advocate's motion to strike portions of the transcript is denied.

Dated August 30, 2016, at San Francisco, California.

/s/ GARY WEATHERFORD
Gary Weatherford
Administrative Law Judge