

Decision 13-01-040

January 24, 2013

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
California-American Water Company
(U210W) for an Order Authorizing the
Collection and Remittance of the Monterey
Peninsula Water Management District User
Fee.

Application 10-01-012
(Filed January 5, 2010)

**ORDER MODIFYING DECISION (D.) 11-03-035 AND
DENYING REHEARING, AS MODIFIED**

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 11-03-035 (or “Decision”) filed by the Monterey Peninsula Water Management District (“the District” or “MPWMD”).

For several years California-American Water Company (“Cal-Am”) has diverted water from the Carmel River to help provide adequate water supply to its Monterey Peninsula customers. In 1995, the State Water Resources Control Board (“SWRCB”) determined that Cal-Am has no legal right to that water, and that its actions were adversely affecting public trust resources within the river.¹ Accordingly, Cal-Am was ordered to cease and desist the water diversions,² and remediate river impacts by implementing a Mitigation Program and Aquifer Storage and Recovery Program (“ASR

¹ See e.g., SWRCB Order No. WR 95-10 (“Order 95-10”), dated July 6, 1995, at pp. ii, 39 [Conclusion Numbers 2 & 3], & p. 40 [Ordering Paragraph Number 2].

² Order 95-10, at p. 40 [Ordering Paragraph Number 1].

Program”).³ Although Cal-Am is legally responsible for the programs,⁴ the District currently performs most of the program functions and it has historically collected its costs to do so via a User Fee that is recovered from Cal-Am’s ratepayers.

On January 5, 2010, Cal-Am filed an application seeking authorization for collection and remittance of the District’s current proposed User Fee.⁵ Subsequently, on May 18, 2010, Cal-Am, the District, and the Division of Ratepayer Advocates (“DRA”) filed a proposed settlement.⁶ Both the application and settlement proposed approval of a User Fee set at 8.325% of Cal-Am’s total revenues, approximately \$3.5 million.⁷

In reviewing the application and settlement, we were guided by D.09-07-021.⁸ (D.11-03-035, at pp. 1-4, 11-17.) That decision had also considered the District’s proposed User Fee, and deferred approval citing concerns including: a lack of evidence explaining program costs;⁹ the District’s choice to set the User Fee as a percent of Cal-Am’s revenue (8.325%) rather than using a cost-based methodology; and the

³ Order 95-10, at pp. 30-32, 39 [Ordering Paragraph Number 3]. See also, SWRCB Order No. WR 2009-0060 (“Order 2009-0060”) at pp. 118-120 [Ordering Paragraph Number 3(c)]; and *Application of California-American Water Company for Authorization to Increase its Revenues for Water Service in its Monterey District by \$24,718,200 or 80.30% in the Year 2009; \$6,503,900 or 11.72% in the Year 2010; and \$7,598,300 or 12.25% in the Year 2011 Under the Current Rate Design and to Increase its Revenues for Water Service in the Toro Service Area of its Monterey District by \$354,324 or 114.97% in the Year 2009; \$25,000 or 3.77% in the Year 2010; and \$46,500 or 6.76% in the Year 2011 Under the Current Rate Design* [D.09-07-021] (2009) __ Cal.P.U.C.3d __, at pp. 116-118 (slip op.).

⁴ Order 95-10, at p. 43 [Ordering Paragraph Number 11].

⁵ See In the Matter of the Application of California-American Water Company for an Order Authorizing the Collection and Remittance of the Monterey Peninsula Water Management District User Fee, dated January 5, 2010 (“Cal-Am Application”).

⁶ Motion to Approve Settlement Agreement Between the Division of Ratepayer Advocates, the Monterey Peninsula Water Management District and California-American Water Company (“Motion to Approve Settlement Agreement”), filed May 18, 2010.

⁷ The 8.325% User Fee would be split as 7.125% for the Mitigation Program and 1.2% for the ASR Program. (D.11-03-035, at pp. 1-3; MPWMD/Dickhaut, at p. 4.) Cal-Am’s current test year 2009 operating revenues are approximately \$42 million, resulting in the total User Fee charge of approximately \$3.5 million. (D.11-03-035, at p. 3; MPWMD/Dickhaut, at p. 6.)

⁸ D.09-07-021, *supra*, at pp. 116-123 (slip op.).

⁹ D.09-07-021, *supra*, at p. 120 (slip op.).

increase in costs over past User Fee levels.¹⁰ Accordingly, in D.09-07-021, we directed the parties to provide evidence to support the proposed User Fee in this proceeding.¹¹

Despite expressing support for the User Fee programs, the Decision challenged here found that the application and proposed settlement still failed to adequately justify the proposed costs. Accordingly, we authorized Cal-Am to amend its application to submit either: (1) a joint program proposal based on an updated version of the budget; or (2) an implementation plan for Cal-Am to assume direct responsibility for program measures should the District cease to perform program activities. (D.11-03-035, at pp. 11-17, 22 [Conclusion of Law Numbers 3 & 4]; & p. 23 [Ordering Paragraph Number 2].)

The District filed a timely application for rehearing, challenging the Decision on the grounds that the Commission: (1) unlawfully interfered with the District's statutory authority to impose a User Fee; (2) failed to adhere to established procedural requirements; (2) failed to provide adequate findings of fact and conclusions of law on all material issues pursuant Public Utilities Code Section 1705,¹² (3) failed to support its findings with sufficient evidence; and (5) failed to adequately weigh the evidence. No responses were filed.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that while the Decision is lawful, it would benefit from modifications to more closely conform the formal findings of fact and conclusions of law with the Decision text. We will modify the Decision as set forth in the Ordering Paragraphs below. However, good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.11-03-035, as modified herein, because no legal error has been shown.

¹⁰ D.09-07-021, *supra*, at pp. 120-121 (slip op.).

¹¹ D.09-07-021, *supra*, at pp. 119-123 (slip op.).

¹² All subsequent section references are to the Public Utilities Code, unless otherwise stated.

II. DISCUSSION

A. Alleged Interference with the District's Collection of the User Fee

1. District Authority

The District states it has independent and express statutory authority to set and collect a User Fee under the Monterey Peninsula Water Management District Law ("District Law").¹³ Pursuant to that authority, the District argues it may fix rates and charges for its services,¹⁴ and collect those charges via public utility bills.¹⁵ The District reasons that rejection of the settlement unlawfully interfered with its authority to collect a User Fee because Commission jurisdiction extends only to the regulation of investor-owned public utilities. (Rhg. App., at pp. 13-17, citing *Los Angeles Metropolitan Transit Authority v. Public Utilities Commission* (1959) 52 Cal.2d 655, 661; *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154, 167; *Santa Clara Valley Transportation Authority v. Public Utilities Commission* (2004) 124 Cal.App.4th 346, 356, 364.)¹⁶

¹³ See District Law (Cal. Water Code Appendix, Chapter 118-1 to 118-901 (Stats. 1977, ch. 527)). See e.g., Sections 118-325. See also D.09-07-021, at p. 117 (slip op.). The District's purpose is generally to conserve and augment peninsula water supply, control and conserve storm and waste water, and promote the reuse and reclamation of water. (See e.g., D.09-07-021, *supra*, at p. 117 (slip op.).)

¹⁴ District Law, Section 118-326(b) stating:

Sec. 326. The district shall have the power:

- (b) To fix, revise, and collect rates and charges for the services, facilities, or water furnished by it.

¹⁵ District Law, Section 118-326(d) stating:

Sec. 326. The district shall have the power:

- (d) To provide that charges for any of its services or facilities may be collected together with, and not separately from, the charges for other services or facilities rendered by it, or it may contract that all such charges be collected by any other private or public utility, and that such charges be billed upon the same bill and collected as one item.

¹⁶ Also citing *Sullivan v. Delta Airlines* (1997) 15 Cal.4th 288, fn. 9; and *PG&E Corporation v. Public Utilities Commission* ("PG&E Corp.") (2004) 118 Cal.App.4th 1174, 1194-1195. The principles referenced in these cases are valid. However, as explained herein, we did not attempt to assert jurisdiction over the District.

The District's claim is premised on the notion that the Decision asserted jurisdiction over the District. It did not. Nor did the Decision contest or negate any lawful authority the District may have to impose a User Fee that would be collected by Cal-Am from the utility's customers.¹⁷ This Commission has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities or their customers.¹⁸ We recognize that local taxing authority is properly the domain of the Superior Court.¹⁹ Thus, for purposes of D.11-03-035, we presumed the District's authority is sound.

That said, it is within our jurisdiction to protect the public interest in matters pertaining to utility regulation. That jurisdiction includes exclusive authority over public utility rates and cost recovery,²⁰ and the duty to ensure those rates and costs are just, reasonable, and nondiscriminatory.²¹ Because Cal-Am would be recovering the proposed User Fee from its customers, it was within the Commission's jurisdiction and responsibility to review the proposed User Fee costs.

Even the District concedes this point, stating: “[T]he Commission may ensure that Cal-Am is not charging ‘unreasonable’ rates by insuring that Cal-Am is not

¹⁷ The District argues: “the net effect of the revised PD [Decision] was to leave MPWMD without a practical means of collecting its User Fee...” (Rhg. App., at p. 11.) That is not correct. As evidenced by its passage of local Ordinance Number 152 on June 27, 2012, the District does have an independent means of collecting a User Fee. (See Ordinance No. 152, Exhibit 4-A, located at: <http://www.mpwmd.dst.ca.us/asd/board/boardpacket/2012/20120627/04/item4.htm>).

¹⁸ See e.g., *Packard v. PG&E Co.* [D.77800] (1970) 71 Cal.P.U.C. 469, 472; *Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities* [D.89-05-063] (1989) 32 Cal.P.U.C.2d 60, 69 [“This Commission does not dispute the authority or right of any local government entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general law or judicial decision, has jurisdiction to impose....”], & pp. 71-72 [Findings of Fact Numbers 9 & 10].)

¹⁹ D.77800, *supra*, 71 Cal.P.U.C. at p. 472; D.89-05-063, *supra*, 32 Cal.P.U.C.2d at p. 69. The District's authority to collect the User Fee at issue in this proceeding is currently a question before the Superior Court. (See *California-American Water Company v. Monterey Peninsula Water Management District*, Monterey Superior Court Case No. M113336.)

²⁰ Cal. Const., art. XII, §§ 1-6. See also *Consumers Lobby Against Monopolies v. Public Utilities Commission* (“CLAM”) (1979) 25 Cal.3d 891, 905-906.

²¹ D.89-05-063, *supra*, 32 Cal.P.U.C.2d at pp. 69, 71-72.

recovering . . . costs borne not by Cal-Am but by MPWMD (and funded through the User Fee).” (Rhg. App., at p. 17.) For these reasons, it was a legitimate exercise of our authority to review the proposed User Fee and determine whether the evidence was sufficient to establish the proposed costs were reasonable.²²

2. Conflict of Law

The District contends that a conflict of law and authority would arise here “if the Commission purports to pass on the wisdom of its [the District’s] expenditures.” In that event, the District asserts that statutory interpretation principles establish that its authority under the later enacted and more specific District Law, would prevail.²³ (Rhg. App., at pp. 17-20, citing *Orange County Air Pollution District v. Public Utilities Commission* (“*Orange County*”) (1971) 4 Cal.3d 945, 954, fn. 8; *People ex rel. Public Utilities Commission v. City of Fresno* (“*City of Fresno*”) (1967) 254 Cal.App.2d 76.)

This issue is moot because as the District itself acknowledges, there is no actual statutory conflict in this case. (Rhg. App., at p. 17.) The District merely speculates that the Decision could be interpreted to reject outright the amount of the User

²² The District contends we should have presumed the proposed User Fee costs were reasonable because its budget is subject to a local public process. In addition, the District argues the Decision failed to identify Commission ratemaking requirements. (Rhg. App., at p. 18, fn. 67.) Our statutory obligation to ensure utility rates and cost recovery are just and reasonable is independent of any public notice and/or vetting process the District may have to follow. Further, the fundamental ratemaking requirement applicable to utility rates and charges is long-standing and well established. Authorized rates and charges must be demonstrably based on the actual cost of service. (See e.g., *Southern California Gas Company v. Public Utilities Commission* (1979) 23 Cal.3d 470, 474-475, 476-478; *City and County of San Francisco v. Public Utilities Commission* (1971) 6 Cal.3d 119, 129.)

²³ The Public Utilities Code was first enacted in 1911, and later recodified in 1951 (Stats. 1951, ch. 764.) The District Law was enacted in 1967.

Fee, and/or a percent of revenue versus cost-based methodology. But it did not. The Decision merely found the evidence was not adequate to resolve the issues raised in D.09-07-021 and show that the proposed costs were reasonable.²⁴

3. Commission Precedent

The District contends the Decision ran counter to established Commission precedent, which recognizes that the Commission cannot interfere with a local entity's authority to collect taxes, fees, and charges. (Rhg. App., at pp. 20-22, citing e.g., D.77800, *supra*, 71 Cal.P.U.C. at pp. 469 & 472)

Aside from the District's incorrect jurisdictional claim, it goes on to suggest it has authority under the District Law and Proposition 218 to impose charges and fees using any method it chooses, and regardless of cost.²⁵ However, the District points to nothing in the District Law that confers such unfettered authority. Moreover, Proposition 218 somewhat limits local government taxation by requiring voter approval to impose, extend, or increase taxes.²⁶ The law also contemplates that fee calculation methodologies chosen by local entities may be limited or restricted by other relevant state, federal, or local laws.²⁷

Finally, the District suggests that even if there are duplicative costs as between Cal-Am and the District, our only recourse is to adjust Cal-Am's portion of approved rates. (Rhg. App., at p. 21.) The limitation the District suggests would mean that the Commission could only adjust Cal-Am's costs, even if were District's costs that were found to be unreasonable. Such a position cannot be reconciled with the District's

²⁴ The District also argues Commission authority to review third party charges on utility bills must be expressly granted by the Legislature. (Rhg. App., at p. 19, citing Section 2889.9(b).) Section 2889.9(b) offers no guidance here. The cited statute applies only to the authority to impose penalties in connection with third party billing of telephone customer/subscriber services. It has no bearing on our authority under Section 451.

²⁵ Proposition 218 amended Government Code Section 53750.

²⁶ *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 755-756, 760.)

²⁷ *Id.*, at pp. 763-764.

own admission that we have a statutory duty to ensure Cal-Am's rates (including the User Fee), are just and reasonable, and it would run afoul of our statutory obligations.

B. Procedural Requirements

The District contends the Decision failed to follow relevant procedural statutes and rules regarding: (1) scoping memos; (2) prehearing conferences; (3) the disposition of settlement agreements; (4) dismissal of motions/applications; (5) final oral arguments; (6) evidentiary hearings; and (7) the submission of proceedings. As discussed below, these allegations of error are without merit.

1. Scoping Memo

The District contends the Commission failed to issue a scoping memo as required under Section 1701.1(b) and Commission Rule of Practice and Procedure 7.3. (Rhg. App., at pp. 22-23.)

Section 1701.1(b) and Rule 7.3 state in relevant part that an assigned Commissioner for a proceeding shall prepare a scoping memo "that describes the issues to be considered."

The District's reliance on section 1701.1(b) and Rule 7.3 is misplaced because no scoping memo was required in this instance. A key purpose of a scoping memo is to provide notice of the issues to be considered. The District claims the lack of scoping memo in this case deprived it of proper notice of the issues to be considered.

That argument fails because Cal-Am's initial application was merely a compliance filing ordered by D.09-07-021.²⁸ That decision had already clearly identified the issues to be considered, and it identified the type of evidence the Commission required.²⁹ In addition, the parties (including the District), acknowledged their filings

²⁸ D.09-07-021, *supra*, at pp. 116-117, 151 [Conclusion of Law Numbers 48 & 49], & pp. 56-57 [Ordering Paragraph Numbers 24 & 25] (slip op.). See also, Cal-Am Application, dated January 5, 2010, at p. 1; and Motion to Approve Settlement, filed May 18, 2010, at pp. 2-3.

²⁹ D.09-07-021, *supra*, at pp. 119-123 (slip op.).

were made in compliance with D.09-07-021.³⁰ Thus, there is no credible claim that a scoping memo was needed in order for the District to have notice regarding the issues to be considered.³¹

The District similarly claims it was not afforded an opportunity to address or provide evidence concerning the relevant issues. (Rhg. App., at p. 23.) For the reasons discussed above, this argument is without merit. Further, the parties did in fact submit evidence intended to address the issues raised in D.09-07-021 and considered in this proceeding.³² That the District did not expect that its evidence would be found lacking does not mean it had no notice and opportunity to address the relevant issues.

The District next suggests it was entitled to, and deprived of, an opportunity to submit briefs regarding the dispositive issues.³³ (Rhg. App., at p. 24.) No authority provides such an entitlement. The only Commission rule regarding briefs is Rule 13.11, which states in pertinent part: “[T]he Administrative Law Judge or presiding officer, as applicable, ‘may fix the time for filing briefs.’”

This language is arguably permissive, and establishes no set requirement or entitlement for briefing. Further, as a practical matter briefs are generally useful only

³⁰ Cal-Am Application, dated January 5, 2010, at p. 1; and Motion to Approve Settlement, filed May 18, 2010, at pp. 2-3.

³¹ The District also claims rehearing is warranted here for the same reasons rehearing was granted in D.11-01-029. (Rhg. App., at p. 25, fn. 92, citing *Application of California Water Service Company, a California Corporation, for Authorization (i) to Require the Current or Future Owners of the Parcels Known as the “Trend Homes Properties” to Pay a \$40,000 Developer Contribution; and (ii) to Reimburse Dwight Nelson with that \$40,000 Payment* [D.11-01-029] (2011) __ Cal.P.U.C.3d __.) D.11-01-029 is not analogous. There, rehearing was warranted because the decision resolved an issue not previously identified for resolution. Thus, parties had no opportunity to comment prior to the proposed decision. The District did have notice of the issues to be addressed here and the District availed itself of the opportunity to do so.

³² See e.g., MPWMD/Christensen; MPWMD/Urquhart; MPWMD/Prasad; MPWMD/Oliver; MPWMD/Hampson; MPWMD/Fuerst; Cal-Am/Stephenson; Cal-Am/Kilpatrick; Cal-Am/Schubert; and MPWMD/Dickhaut.

³³ The District asserts: “one presumes that in enacting SB 960, the Legislature expected the Commission to ask for briefing” before it acted in a matter. (Rhg. App., at p. 23, fn. 86.) Nothing in SB 960 (Stats. 1995, ch. 856) supports such a conclusion. The Bill clearly states that the Legislature’s intent was merely to enhance Commissioner involvement in proceedings, and establish reasonable time frames for proceedings to be completed. (SB 960, Section 1.) The Bill is silent regarding briefs.

when points of law are dispositive. Here, the dispositive issues were evidentiary in nature.

Finally, the District wrongly argues that *Southern California Edison Company v. Public Utilities Commission* (“*Edison v. PUC*”) (2006) 140 Cal.App.4th 1085 applies here to show that a scoping memo was required. (Rhg. App., at pp. 24-25.).

The issue in *Edison v. PUC* was that parties had been prejudiced by a decision which resolved an issue that was not included in the scoping memo, and thus, the parties had no notice that the issue would be decided. No similar violation occurred here because the parties did have adequate notice of the issues to be decided.

2. Prehearing Conference

The District contends the Commission failed to conduct a prehearing conference (“PHC”) as required by Section 1701.1(b) and Rule 7.2. (Rhg. App., at pp. 25-27.)

Section 1701.1 states in relevant part that “upon initiating a hearing...the assigned commissioner shall schedule a prehearing conference....” Rule 7.2 similarly states that: “[I]n any proceeding in which it is preliminarily determined that a hearing is needed, the assigned Commissioner shall set a prehearing conference....the [prehearing conference] statements may address the issues to be considered....”

These provisions do contemplate that PHC’s are generally required. However, like a scoping memo, a PHC serves primarily to identify the issues to be considered. As discussed above, that was not necessary in this case. The District’s sole argument is that because there was no PHC, it was “left guessing” regarding the issues to be considered. That claim is plainly without merit.

3. Disposition of Settlement Agreements

The District contends the Decision is unlawful because in rejecting the settlement, the Commission failed to propose an alternative enumerated under Rule 12.4. (Rhg. App., at pp. 27-28.) This argument is without merit.

Rule 12.4 provides that if the Commission determines that a proposed settlement is not in the public interest, it may reject the settlement and it also “may take various steps, *including*” to hold hearings, allow the parties time to renegotiate the settlement, or propose alternative terms to the parties to the settlement which are acceptable to the Commission.

Our Decision found that the proposed settlement was not in the public interest. (D.11-03-035, at pp. 15, 22 [Conclusion of Law Number 2].) Rather than choose an alternative under Rule 12.4, we determined it would be more useful to authorize Cal-Am to amend its application to provide specific information suited to moving forward in this matter. (D.11-03-035, at pp. 17, 23 [Ordering Paragraph Number 2].) That direction was both lawful and reasonable.

The plain language Rule 12.4 states only that the alternatives specifically listed are steps the Commission “may” take. The language is discretionary and affords the Commission flexibility to devise any other alternatives that are deemed appropriate. And that is all the Decision did.

4. Dismissal

The District contends the Decision failed to follow precedent regarding the handling of motions to dismiss pursuant to Code of Civil Procedure (“CCP”) Section 437c. (Rhig. App., at pp. 28-31.)

Section 437c governs motions for summary judgment in civil court. CCP Section 437c is not controlling in Commission proceedings, except that the Commission can look to the statute as guidance. Furthermore, the statute is not applicable or relevant since even the District concedes, no motion for summary judgment was filed in this proceeding.³⁴ Even if such a motion had been filed, summary judgments are only relevant where the contested matter turns on questions of law rather than questions of

³⁴ The Commission’s rules also provide for motions to dismiss a proceeding based on the pleadings. (Rule 11.2; Cal. Code of Regs., tit. 20, § 11.2.) However, no party filed such a motion in this proceeding.

fact.³⁵ The dispositive issues in this proceeding did not involve questions of law. Thus, the referenced procedure is simply not relevant.

In addition, the District's argument is based on speculation that we may have believed no facts were at issue, and so dismissed the matter "*sua sponte*." Speculation concerning our belief or intent does not establish legal error.

The District also wrongly argues the matter was dismissed without explanation. As discussed herein, the Decision did explain why the application and proposed settlement were deemed inadequate. Thus, the Decision gave Cal-Am leave to amend its application. (D.11-03-035, at pp. 10-17, 23 [Ordering Paragraph Number 2].) Should Cal-Am decline to do that, the Decision stated that then the matter may be dismissed. The District fails to establish that dismissal at that juncture would be either inappropriate or unlawful in that event. (D.11-03-035, at p. 23 [Ordering Paragraph Number 2].)

Second, as discussed in part II.C. below, the Decision did explain why it was reasonable and necessary to reject the proposed settlement in this proceeding.

5. Oral Arguments

The District contends the Commission failed to hold final oral arguments as required by Rule 13.13 and Section 1701.3. (Rhg. App., at pp. 25, fn. 93, 31-33.)

Rule 13.13(a) provides in relevant part that "[T]he Commission may, on its own motion or upon recommendation of the assigned Commissioner or Administrative Law Judge, direct the presentation of oral argument before it. Rule 13.13(b) goes on to state that in a ratesetting or quasi-legislative proceeding "in which hearings were held, a party has the right to make a final oral argument before the Commission, if the party so requests...."

Rule 13.13 established no right to oral argument in this proceeding. The plain language of subdivision (a) is clearly discretionary. And subdivision (b)

³⁵ See e.g., *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 889; *Omniphone, Inc. v. Pacific Bell* [D.91-10-040] (1991) 41 Cal.P.U.C.2d 495, 496.

contemplates oral arguments only when one is requested by a party. No timely request was made in this proceeding.

Section 1701.3 similarly provides that if the Commission has determined an evidentiary hearing is required, a party has a right to an oral argument if requested. No party timely requested oral argument in this matter. Thus, the circumstances contemplated by the statute never occurred here.

6. Evidentiary Hearings

The District contends it was prejudiced by a failure to hold evidentiary hearings, which it argues deprived it of the opportunity to “clarify and amplify” its position on the relevant issues. (Rhig. App., at pp. 33-36.)

No rule or statute requires the Commission to hold an evidentiary hearing. The District merely reargues evidence submitted in this proceeding in an attempt to achieve a different outcome. Rehearing is not afforded as an opportunity for a party to reargue the evidence or so that the Commission might reweigh the evidence. Rehearing applications are limited by Section 1732 to specifications of legal error, and the District identifies none.³⁶

Further, even if we could have conducted such hearings on the proposed settlement, nothing suggests they would have resulted in any different outcome. The Decision determined that the record evidence was simply inadequate to support the requested costs or resolve the concerns raised in D.09-07-021. Evidentiary hearings to “clarify and amplify” what was deficient is not a substitute for the additional evidence deemed necessary to resolve this matter. And case law supports a conclusion that hearings are not required in such circumstances.³⁷

³⁶ Pub. Util. Code, § 1732.

³⁷ See e.g., *Georgia Pacific Corporation v. United States Environmental Protection Agency* (1982) 671 F.2d 1235, 1241.

7. Submission of Proceedings

The District contends the proceeding was not “submitted for decision” as required by 13.14.³⁸ (Rhg. App., at p. 37.)

Rule 13.14 provides in relevant part that “[A] proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed.”

The District contends this proceeding was never properly submitted because there was no taking of evidence, filing of briefs, or presentation of oral argument. However, the occurrence of those actions is not required for a matter to be submitted. The plain language of the Rule merely states that those actions “may” have taken place and would naturally precede submission of a case.

Further, it is not unusual that after filing of a settlement, the Commission directly proceeds to issue its decision. Submission of a settlement may itself effectively act to submit the matter for decision. Here, we properly accepted the parties’ evidence in order to render our determination. (D.11-03-035, at p. 23 [Ordering Paragraph Number 4].³⁹ It was also not unlawful, as the District suggests, that it was not explicitly notified the matter was submitted. There is no legal requirement for such notice and the Commission does not issue such notifications.

C. Findings of Fact and Conclusions of Law

The District contends the Decision: (1) it failed to provide adequate findings of fact and conclusions of law on all material issues as required by Section 1705;

³⁸ See also Pub. Util. Code, § 311, subd. (d) [Requiring, among other things, that a matter be “submitted for decision” before a proposed decision is issued.].

³⁹ The District argues when no evidentiary hearings occur, a motion is required to admit prepared testimony and the rules do not provide any other means to take evidence other than at such hearings. It appears to suggest no such motion was filed here. (Rhg. App., at p. 37, fn. 123, citing Rule 13.8(d).) However, the Motion to Approve Settlement did request that the Commission introduce into the record all the evidence that was offered by the parties. (Motion to Approve Settlement, dated May 18, 2010, at p. 2.) And even if no motion had been filed, nothing precludes the Commission from accepting evidence of its own accord.

and (2) failed to set forth adequate findings to explain the outcome. (Rhg. App., at pp. 38-44.)

1. Section 1705

Section 1705 requires that a Commission decision contain separately stated findings of fact and conclusions of law on all issues material to the decision.⁴⁰ Relevant case law also provides that a decision must:

[A]fford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist the parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and to service to help the commission avoid careless or arbitrary action.

(*Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813.)⁴¹

The District argues the Decision failed to meet this standard because it failed to address or explain the Commission's legal authority (under Section 451) to prevent the District collecting a User Fee it is otherwise authorized to assess under the District Law. (Rhg. App., at p. 40.)

The District again misreads the Decision. It did not challenge or negate the District's statutory authority to assess and collect a User Fee.⁴² The Decision did not address that question at all. As discussed above, the Commission presumes local entities such as the District have such authority. Thus, it was not a material issue which required

⁴⁰ Pub. Util. Code, § 1705, stating in relevant part: "...the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."

⁴¹ See also *California Motor Transport Company v. Public Utilities Commission* (1963) 59 Cal.2d 270, 274-275.

⁴² Similarly, the District contends the findings did not explain why restricting its authority was required to avoid a double collection of revenues. (Rhg. App., at p. 41.) The Decision did not restrict the District's authority. However, the Decision did reasonably explain that Section 451 requires all rates and charges received by a public utility to be just and reasonable. (D.11-03-035, at p. 14, fn. 20.) Because the User Fee was to be recovered from Cal-Am's ratepayers, those costs were inescapably subject to the just and reasonable requirement. Any duplication of costs leading to a double collection of revenues would quite obviously be unreasonable, contrary to, and impermissible under Section 451.

any explanation, finding or conclusion pursuant to Section 1705. The issue does not now become material because the District claims it was.⁴³

Consistent with the requisite legal standard, the Decision properly identified the material issues necessary to resolve this matter (D.11-03-035, at pp. 1-4), and it explained the relevant criteria for evaluating settlement agreements. (D.11-03-035, at pp. 10-11.) The Decision also provided a rational basis for rejecting the proposed settlement. In particular, it explained the following evidentiary deficiencies and findings:

- a lack of identifiable ratemaking or programmatic limitations on User Fee costs, raising cost-effectiveness issues (D.11-03-035, at pp. 11-12.);
- no explanation of, or cost justification for, the substantial increase in annual User Fee costs since 2006 (D.11-03-035, at p. 12.);
- possible duplication of activities and costs as between Cal-Am and the District (D.11-03-035, at pp. 12-13.);
- no explanation for how endangered species costs (steelhead) are divided between the relevant agencies, and no evidence to show how Cal-Am is managing those costs for ratepayers (D.11-03-035, at p. 13.);
- no cost justification for certain components of the User Fee (D.11-03-035, at p. 14.);
- no explanation or evidence to show why a percent of revenue derived fee is more cost-effective than a cost-based fee (D.11-03-035, at pp. 11-12.)⁴⁴

The District may disagree with these findings and conclusions. However, disagreement does not establish legal error.⁴⁵ The findings were sufficient to reasonably apprise a reviewing Court and the parties of the principles we relied upon in reaching our determination.

⁴³ Even the District concedes the Commission has discretion to determine what issues are material to a decision. (See also, *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337.)

⁴⁴ See also D.11-03-035, at p. 21 [Finding of Fact Numbers 6 & 7], & p. 22 [Conclusion of Law Number 2].

⁴⁵ *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8.

That said, the relevant findings in this proceeding were mainly discussed in the Decision's text. However, for purpose of precision and clarity, we will modify the formal findings of fact and conclusions to more closely mirror the Decision text. The modifications appear in the ordering paragraphs of this Order.

2. Disputed Findings

The District contends the Decision was flawed in light of its objections to the Commission's specific formal findings of fact ("FOF"). (Rhg. App., at pp. 41-45.) The District's objections are discussed below.

FOF Number 1 states:

1. Cal-Am must implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District.

(D.11-03-035, at p. 20.)

The District objects to this finding by arguing that no evidence showed it is *not* implementing the Mitigation Measures. (Rhg. App., at p. 41.) That is not the point.

FOF Number 1 merely paraphrases Order 95-10, and nothing in the Decision suggested the District is not currently implementing those measures.⁴⁶

FOF Numbers 2, 3 & 4 are challenged for similar reasons, and state:

2. The Mitigation Program for the District's Water allocation Program Environmental Impact Report is comprised of mitigation measures for fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife.
3. The Management District's 2007-2008 Annual Report for the Mitigation program Shows that the Management District allocated nearly \$1 million of costs of its new office building to the Mitigation Program.

⁴⁶ See Order 95-10, at p. 43 [Ordering Paragraph Number 11].

4. The Management District's 2007-2008 Annual Report for the Mitigation Program shows the Aquifer Storage and Recovery project as a component of the user fee Mitigation program costs and also as a stand-alone additional user fee.

(D.11-03-035, at pp. 20-21.)

The District argues these findings "imply" certain costs are too high or should not be recovered. It argues it would have justified those costs had the Commission held hearings on the matter. (Rhg. App., at pp. 42-43.)

The District's speculation as to an alleged hidden meaning or implication behind our statements does not establish legal error. Like FOF 1, these findings merely paraphrase and restate information contained in the record evidence. Evidentiary hearings were not necessary to simply restate the evidence.

FOF Number 5 states:

5. Cal-Am is actively pursuing water supply augmentation through its Coastal Water Project and the Management District need not act on Cal-Am's behalf.

(D.11-03-035, at p. 21.)

The District objects to FOF 5 by arguing it is inaccurate to assert that its efforts are done solely on Cal-Am's behalf. (Rhg. app., at p. 43.)

FOF 5 merely reflects a point of view, and it was not material to rendering the ultimate determination. Nevertheless, to alleviate any confusion, we modify FOF Number 5 as set forth in the ordering paragraphs of this Order.

FOF Numbers 6 & 7 are challenged on the same ground, and state:

6. The rebate program, salaries for the Conservation Office Staff and project expenditures for ordinance enforcement are booked as part of the Mitigation Program, even though such costs are not included in the Management District's 2007-2008 Annual Report for the Mitigation Program. The Management District did not explain whether these booked costs are included in the user fee even though the Commission has approved and separately funded a joint conservation program with the management District which may include some of the same costs.

7. The testimony supporting the application shows accounting treatment inconsistent with Commission ratemaking standards.

(D.11-03-035, at p. 21.)

The District objects to these findings by arguing it would have presented evidence to support its cost requests if there had been evidentiary hearings. (Rhg. app., at pp. 43-44.) As already discussed, the District was aware of the evidentiary requirements in this proceeding and it is not error on the part of the Commission that the evidence the parties provided was inadequate. The District offers no authority which suggests in such circumstances we must allow evidentiary hearings so that a party can try and rehabilitate their evidence. Nevertheless, to complete the statement in FOF 7 and related text, we modify the Decision as set forth in the ordering paragraphs of this Order.

FOF Number 8 states:

8. The user fee and Carmel River Mitigation Program have a unique history, including particularly that the funds have been remitted to a government agency, that render reasonable Cal-Am's request to recover the amounts recorded in the account.

(D.11-03-035, at p. 21.)

The District objects to this finding by arguing its view that FOF 8 should have been applied broadly to approve the User Fee. It also points out that Cal-Am does not retain any User Fee "proceeds." (Rhg. App., at pp. 44-45.)

That Cal-Am has in the past remitted the User Fee to the District (a government agency) does not establish that the Commission should have concluded the proposed settlement here was reasonable. Further, the District's reference to "proceeds" is troubling. If the proposed User Fee would result in "proceeds" (i.e., profits), it would further support our conclusion that it was correct to question the settlement.

D. Sufficiency of the Record Evidence

The District asserts the Decision erred because the findings were not supported by the record evidence. (Rhg. App., at pp. 45-50, citing e.g., *City of Vernon v. Public Utilities Commission* (2001) 88 Cal.App. 4th 672, 678.)

The District argues the requirement was not met here because the record was never even completely established in this proceeding. To support that allegation, it reiterates its argument that it did not know of the relevant issues, it was deprived of the opportunity to present evidence and brief, and it had no opportunity to defend its proposal in hearings. For the reasons already discussed in this Order, this allegation is without merit.

The District also claims the Decision erred because it made certain inaccurate statements or assumptions. (Rhg. App., at pp. 47-50.) For example, the District suggests we wrongly presumed the User Fee is a “Cal-Am charge” rather than a “District charge.” (Rhg. App., at p. 47.) That is incorrect. We clearly understood that distinction as evidenced by our statement that Cal-Am would merely collect fee for the District, but that it is the District which originates the charge. (D.11-03-035, at p. 1.)

What the District ignores is that the fee is still a charge that would billed and recovered from Cal-Am customer. As such, the “charge,” regardless of the originator, was properly subject to the Section 451 review.⁴⁷

The District next contends we ignored evidence establishing there was no improper duplication of efforts or costs.⁴⁸ To support this claim, it points to testimony which stated: “I have not observed any duplication of effort between the District and California American Water in achieving the stated goals for Phase 1 ASR.” (Rhg. App., at p. 49, relying on Cal-Am/Shubert, at p. 12.)

We did not ignore that testimony. But we were not persuaded that no duplication existed based on that one observation when there were other evidentiary concerns noted in the Decision. (D.11-03-035, at pp. 12-13.)

⁴⁷ Section 451 states in pertinent part: “All charges demanded or received by a utility...” must be just and reasonable.”

⁴⁸ The District also suggests that the Commission had the burden to prove the District’s cost request was unreasonable. That is incorrect. The proponent of a request always carries the burden to prove its request is reasonable. (See e.g., *Re Southern California Edison Company* [D.83-05-036] (1983) 11 Cal.P.U.C.2d 474, 475.)

Similarly, the District claims we failed to recognize that escalation of the 1990 costs (as provided in the evidence) was necessary to justify the requested 2010-2011 levels. (Rhg. App., at pp. 49-50.)

Contrary to the District's claim, we were cognizant of the fact some escalation and updating of costs was necessary. For example, the Decision explicitly noted that "up-to-date cost and budget data" was required. (D.11-03-035, at p. 16.) And one of the things Cal-Am was directed to provide with any amended application was an updated version of the budget to support current cost levels. (D.11-03-035, at p. 17.)

The District also contends the Decision erroneously stated the 1990 Environmental Impact Report ("EIR") was attached to its District Manager's testimony. (Rhg. App., at p. 50.) That is not actually what the Decision said.

The Decision stated that the "1990 EIR document *referenced in the Board's decision*" [SWRCB Order No. WR 95-10] was attached to the District manager's testimony. The referenced document was a November 5, 1990, District document.⁴⁹ That document was in fact attached to the District Manager's testimony as Exhibit DF-1.

Finally, the District claims the Decision confused the EIR Mitigation Program with the Five-Year Mitigation Program. (Rhg. App., at p. 50.) It did not. The relevant discussion in the Decision merely mentioned the Water Allocation Mitigation Program measures that are Cal-Am's responsibility under Order 95-10, and noted that those measures were "similar to" those in the EIR Mitigation Program. (D.11-03-035, at p. 15.) It did not confuse the two or say they were one and the same.

E. Duty to Weigh the Relevant Evidence

The District contends the Commission failed to adequately weigh the evidence consistent with relevant case law. (Rhg. App., at pp. 47-50, relying on *Industrial Communications Systems, Inc. v. Public Utilities Commission* ("Industrial

⁴⁹ See Order 95-10, at p. 43, fn. 25.

Communications”) (1978) 22 Cal.3d 572, 582-583; *United States Steel Corporation v. Public Utilities Commission* (“*U.S. Steel*”) (1981) 29 Cal.3d 603, 609.)

It is well established that an agency’s duty is to weigh the relevant evidence provided in a proceeding.⁵⁰ The District offers nothing to show we failed to consider all the relevant evidence in this proceeding. The District merely reargues evidence it deems dispositive and argues the Commission should have found differently. As previously noted, an application for rehearing is not a permissible vehicle to merely reargue the evidence or ask the Commission to reweigh that evidence. Nevertheless, we will address the District’s specific challenges below.

First, the District asserts we relied largely on an old and out-of-date annual report, and that it should have been allowed to present more recent and relevant annual reports, budgets, and other evidence.

It is true we did reference an old annual report (2007-2008) that was among the evidence. (See e.g., D.11-03-035, at pp. 11-16.) However, as indicated above we also recognized certain updating of information was necessary, but was not available. Further, that *is* the information the parties chose to submit. Arguably, the District’s current (2010-2011) fee request should have been supported by the most recent and relevant evidence the District had available. That it chose not to submit more recent information with the settlement does not mean we erred by considering what was provided.

The District also suggests the Commission failed to consider evidence showing there was effective collaboration between the parties, which it argues would help support a conclusion that the proposed costs were cost-effective. (Rhg. App., at p. 51, fns. 156-158, citing *Cal-Am/Schubert*, at pp. 4, A 17; *MPWMD/Fuerst*, at p. A 8.)

The District fails to establish how effective collaboration, even if true, equates to proof that specific program costs are cost-effective. It simply means the

⁵⁰ See also *Bixby v. Pierno* (1971) 4 Cal.3d 130, 149; *County of San Diego v. Assessment Appeals Board No 2 of San Diego County* (1983) 148 Cal.App.3d 548, 554-555.

parties work well together. Further, the evidence the District cites to was not particularly insightful. The referenced evidence merely identified certain project activities and stated that they were cost-effective, and set out an overview of the District and its budget process. There was no actual corresponding cost data.

III. CONCLUSION

For the reasons stated above, D.11-03-035 is modified to reflect the clarifications specified below. The application for rehearing of D.11-03-035, as modified, is denied because no legal error has been shown.

Therefore **IT IS ORDERED** that:

1. D.11-03-035 is modified as follows:
 - a. Pages 21-22 are modified to add the following Findings of Fact:
 9. Public Utilities Code Section 451 requires that all rates and charges demanded or received by a public utility be just and reasonable.
 10. Commission Rule of Practice and Procedure 12.1 provides that a settlement agreement shall not be approved unless it is reasonable in light of the whole record, consistent with the law, and in the public interest.
 11. Decision 09-07-021 identified the issues and evidence required to support approval of the District's User Fee as a component of California-American's rates.
 - b. Page 22, Conclusion of Law Number 2 is deleted and replaced as follows:
 2. The evidence in this proceeding failed to: demonstrate the cost-effectiveness of the proposed program costs; explain the increase in annual program costs; resolve questions concerning possible duplication of certain costs and activities; explain certain User Fee cost components; and demonstrate that the calculation methodology derived a fee that represents the actual cost to implement the Mitigation and ASR programs.

c. Page 22, Conclusion of Law Number 3 is deleted and replaced as follows:

3. The evidence failed to establish the proposed settlement agreement is just and reasonable pursuant to Public Utilities Code Section 451.

d. Page 22, Conclusion of Law Number 4 is deleted and replaced as follows:

4. The evidence failed to establish the proposed settlement agreement is reasonable in light of the whole record, consistent with the law, and in the public interest pursuant to Rule of Practice and Procedure 12.1.

e. Page 22, Conclusion of Law Number 5 is deleted and replaced as follows:

5. California-American Water Company should be authorized to amend this application within 60 days of the effective date of today's decision by filing and serving one of the following:
 - A. A joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or
 - B. An implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to fund the measures.

f. Page 22 is modified to add Conclusion of Law Number 6 as follows:

6. The Monterey Peninsula Water Management District User Fee Memorandum Account should close 60 days after the effective date of this Order. California-American should be authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

g. Page 22 is modified to add Conclusion of Law Number 7 as follows:

7. The proposed settlement agreement should not be approved.

- f. Page 5, Finding of Fact Number 5 is modified as follows:
 - 5. Cal-Am is actively pursuing water supply augmentation through its Coastal Water Project.
- g. The last sentence of the first paragraph on page 12 is modified to state:

This does not appear to be consistent with the Commission's cost of service ratemaking standards.
- h. Page 21, Finding of Fact Number 7 is modified to state:
 - 7. The testimony supporting the application shows accounting treatment which appears to be inconsistent with the Commission's cost of service ratemaking standards.

This order is effective today.

Dated January 24, 2013, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
CARLA J. PETERMAN
Commissioners