Decision **PROPOSED DECISION OF ALJ WILSON** (Mailed 1/8/15)

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 (1) Approving a Settlement Agreement with the County of Monterey and the Monterey County Water Resources Agency to Settle and Resolve Claims and Issues Between the Parties and to Promote the Development, Construction and Operation of a Water Supply Project for Monterey County on an Expedited Basis, and (2) Authorizing the Transfer of Authorized Costs Related to the Settlement Agreement to Its Special Request 1 Surcharge Balancing Account.	Application 13-05-017 (Filed May 24, 2013)

DECISION ADOPTING, IN PART CALIFORNIA-AMERICAN WATER COMPANY'S REQUEST FOR ADOPTION OF THE SETTLEMENT AGREEMENT BETWEEN CALIFORNIA-AMERICAN WATER COMPANY, THE COUNTY OF MONTEREY, AND THE MONTEREY COUNTY WATER RESOURCES AGENCY

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DECISION ADOPTING, IN PART CALIFORNIA-AMERICAN WATER COMPANY'S REQUEST FOR ADOPTION OF THE SETTLEMENT AGREEMENT BETWEEN CALIFORNIA-AMERICAN WATER COMPANY, THE COUNTY OF MONTEREY, AND THE MONTEREY COUNTY WATER RESOURCES AGENCY

Summary

The Commission adopts the *Settlement Agreement and Mutual Release* and revision to rates requested by California-American Water Company (Cal-Am) in Application 13-05-017 as adjusted herein. The Commission authorizes Cal-Am recovery of $1,918,033, which equates to $2,682,590 minus $764,557. This disallowance does not prejudice or prejudge any future request by Cal-Am for recovery of the $764,557 in a future application.

1. Procedural Background

On May 24, 2013, California American Water Company (Cal-Am) filed Application (A.) 13-05-017 (Application). The Marina Coast Water District (MCWD) filed a motion for party status on June 20, 2013, and a Prehearing Conference (PHC) Statement on July 8, 2013. The assigned Administrative Law Judge (ALJ) granted MCWD party status via electronic mail (e-mail) on June 28, 2013.

On June 27, 2013, Resolution ALJ-176-3316 preliminarily determined that this proceeding was Ratesetting and that hearings would be necessary. On July 9, 2013, a PHC took place in San Francisco to establish the service list, discuss the scope, and develop a procedural timetable for the management of this proceeding. At the PHC, the assigned ALJ granted party status to the

Division of Ratepayer Advocates (ORA),[1] the MCWD, the Public Trust Alliance (PTA), and jointly to the County of Monterey and the Monterey County Water Resources Agency (County/MCWRA).

At the PHC, Cal-Am and the County/MCWRA requested that MCWD not be given party status, as it is not a customer. Rule 1.4 of the Commission's Rules of Practice and Procedure do not require that a party be a customer or customer representative, therefore, the assigned ALJ found that MCWD was a party. The assigned ALJ also granted party status to Water Plus and Citizens for Public Water (CPW) via e-mail on July 11 and 16, 2013, respectively. Protests were filed by Water Plus on July 12, 2013; CPW on July 14, 2013; and ORA, MCWD, and PTA on July 15, 2013. Cal-Am replied to these protests on July 25, 2014.

Opening and reply briefs were filed by Cal-Am, the County/MCWRA, ORA, and MCWD in May and June 2014.

All rulings by the assigned Commissioner and ALJ, including those regarding confidentiality discussed below, are affirmed herein.

2. Confidentiality

Numerous motions from a variety of parties requested confidential treatment of either Exhibit D to A.13-05-017 (Exhibit D) or documents that referred to the information in Exhibit D. These requests were made pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure (Rule), General Order (GO) 66-C, and Public Utilities (Pub. Util.) Code Section 583. As reference, Rule 11.4 addresses a party's leave to file under seal, what it believes is a

[1] During the progress of this proceeding, the Division of Ratepayer Advocates changed its name to the Office of Ratepayer Advocates (ORA). The Commission therefore refers to this party as Office of Ratepayer Advocates or ORA for the remainder of this decision.

confidential document; GO 66-C governs the procedures for obtaining documents, and Pub. Util. Code § 583 addresses what is a public document.

On May 24, 2013, Cal-Am filed a motion requesting that Exhibit D to A.13-05-017 be treated confidentially and filed under seal. Responses in opposition to the request were filed by Water Plus, CPW, MCWD, and PTA on July 19, 22, 22, and 23, 2013, respectively; and in support by the County/MCWRA on July 22, 2013. Cal-Am and MCWD replied to these responses on July 29, 2013.

On July 22, 2013, the County/MCWRA filed a motion for adoption of a protective order applicable to documents treated confidentially in the current proceeding. Responses in opposition to this request were filed by MCWD, PTA, and Water Plus on August 6, 8, and 19, 2013, respectively. County/MCWRA filed a reply on August 13, 2013.

By her ruling dated August 19, 2013, the assigned ALJ granted Cal-Am's motion to file Exhibit D to A.13-05-017 under seal; treat such information confidential; and approved the text of a Protective Order and Non-Disclosure Agreement (NDA) designed for use during this proceeding to protect the confidential material in Exhibit D to A.13-05-017. Signatories to the NDA include ORA and CPW.[2]

At the evidentiary hearings, concerns were raised by the parties as well as the assigned ALJ, that even the confidential version of Exhibit D was greatly redacted. The assigned ALJ requested that parties that had signed the NDA,

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[2] Cal-Am does not need to sign the NDA to access Exhibit D because it is their application. The County/MCWRA does not need to sign the NDA because the documents in Exhibit D are their documents.

Cal-Am, and the County/MCWRA, file briefs regarding this issue, in particular, that the parties state whether the redacted Exhibit D that was provided to them should be provided to them in an unredacted format. These opening and reply briefs regarding the confidentiality issue were filed in both public and confidential versions by Cal-Am, the County/MCWRA, and ORA on November 21, 2013 and November 25, 2013, respectively.

ORA also filed its Opening brief regarding this proceeding in both a public and confidential format.

The Commission affirms the assigned ALJ's previous ruling that Exhibit D be treated confidentially, and also grant such confidential treatment to the opening and reply briefs regarding the confidentiality issue filed by Cal-Am, the County/MCWRA, and ORA, as well as ORA's opening brief regarding this proceeding. In drafting its decision, the Commission has relied upon the same confidential information provided to parties under the Protective Order and NDA.

3. Responses for Information

On November 26, 2013, the assigned ALJ issued an e-mail ruling requesting information regarding payments made to and from Cal-Am, the County/MCWRA, and MCWD regarding the Regional Desalination Project (RDP); as well as payments by Cal-Am, for which it is requesting recovery in the current proceeding. On December 20, 2013, Cal-Am, the County/MCWRA, and MCWD filed responses.[3] On January 15, 2014, Cal-Am and MCWD filed a reply to the responses.

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[3] On December 23, 2013, MCWD filed an Amended Response.

On February 28, 2014, the assigned ALJ issued an e-mail ruling requesting parties' positions regarding whether an Order by the Superior Court of the State of California–County of San Francisco (Superior Court) will have an effect on the current proceeding, and what the potential dollar exposure to ratepayers would be if the suit in the Superior Court, goes to trial and is determined by the Superior Court. On March 14, 2014, responses were filed by ORA, MCWD, jointly by Cal-Am and County/MCWRA, and Water Plus. On March 21, 2014, responses were filed by MCWD and jointly by Cal-Am and the County/MCWRA.

4. Historical Background

In 1995 the State Water Resources Control Board (SWRCB) issued Order No. WR 95-10 (Order 95-10) citing Cal-Am for diverting water from the Carmel River, and requiring Cal-Am to develop an alternative water source. Over the years, Cal-Am proposed various solutions which never came to fruition. By A.04-09-019, Cal-Am proposed a long-term water supply project, known as the Coastal Water Project (CWP), which consisted of desalination treatment facilities, aquifer storage and recovery facilities, and associated transmission pipelines. In December of 2009, the Commission certified an Environmental Impact Report (EIR) for the CWP in compliance with the California Environmental Quality Act (CEQA).[4]

The CWP was succeeded by the RDP.[5] By Decision (D.) 10-12-016,[6] the Commission approved: 1) a settlement agreement among a number of interested

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[4] In D.09-12-017.

[5] Project Overview**:** The Regional Desalination Project is California American Water's proposed solution to the Monterey Peninsula's water supply shortage. The project consists of a seawater

Footnote continued on next page

parties to A.04-09-019;[7] 2) a Water Purchase Agreement (WPA);[8] 3) Cal-Am's participation in a RDP instead of the CWP;[9] and 4) a Certificate of Public Convenience and Necessity (CPCN) for Cal-Am to own and operate selected facilities as part of the RDP. Pursuant to D.10-08-008, Ordering Paragraph (OP) 3, and D.10-10-016, OP 1, Cal Am is authorized to recover $1,918,033.

In April 2011, claims were made that then-MCWRA Director Steve Collins had a potential conflict of interest regarding the WPA and other RDP-related agreements. This raised concerns regarding the legal validity of contracts entered into by MCWRA. Consequently, Cal-Am withdrew from the RDP, as acknowledged by the Commission in D.12-07-008 (as modified by D.12-11-031); 2) Superior Court litigation was initiated relating to the validity of the various RDP-related agreements; and 3) Cal-Am filed a new application (A.12-04-019) for a Cal-Am-only project which is now identified as the Monterey Peninsula Water Supply Project (MPWSP). Cal-Am has reached its own settlement with the County and MCWMD (the subject of the current application), but not MCWD.

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desalination plant and aquifer storage and recovery facilities. The project will replace water pumped from the Carmel River upon which the community has come to rely. The project is based upon the recommendation by an independent team of environmental consultants selected by the California Public Utilities Commission (CPUC) of how to best meet the community's water supply needs. After a series of public hearings and workshops, the Regional Desalination Project was suggested as the best alternative to a long-debated new dam and reservoir on the Carmel River. Key features of the proposed projects include: A
10 million-gallon-per-day Seawater desalination facility; Aquifer Storage and Recovery Facilities; Conveyance Pipeline; Storage Reservoirs; and a Pump Stations and connections to existing infrastructure

[6] Modified by D.11-04-035,

[7] Between Cal-Am and MCWRA.

[8] Between Cal-Am, MCWRA, and MCWD.

[9] The RDP is a joint project with local Monterey County public agencies, MCWRA and MCWD.

5. Cal-Am Request

Cal-Am requests that the Commission: 1) approve its Settlement Agreement and Mutual Release (Settlement Agreement) with the County and MCWRA; and 2) authorize the transfer of authorized costs totaling $2,682,590 associated with this Settlement Agreement to its Special Request 1 Surcharge Balancing Account (SR1 Account),[10] plus interest and fees pursuant to D.10-08-008 and D.11-09-039.

Pursuant to the procedures established by D.12-07-008 and D.12-11-031, Cal-Am filed the current Application for approval of the Settlement Agreement regarding disputed costs related to the RDP.

Cal-Am states that the Settlement Agreement resolves claims and issues between it and the County/MCWRA, and promotes a water supply project for Monterey County. Cal-Am also requests that the Commission address its request on an expedited basis, because one term of the Settlement Agreement

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[10] In D.06-12-040, the Commission established a procedure for Cal-Am to recovery costs tracked in the memorandum account authorized in D.03-09-022 (SR1 Account). Cal-Am could recover reasonable and prudent preconstruction costs through this account for the CWP. In D.10-08-008, the Commission approved the Reimbursement Agreement and authorized Cal-Am to record advances to MCWRA in the SR1 Account. If the RDP was built, the County/MCWRA would repay the advances, with interest, and "to the extent that these funds are not repaid, it is reasonable for ratepayers to be responsible for funding costs associated with the Environmental and Test Well Development Scopes of Work . . ." D.10-08-008 at 20. In D.12-07-008, the Commission found that Cal-Am should not pursue the RDP and closed A.04-09-019; and established how Cal-Am would recover costs incurred before and after January 17, 2012. Pursuant to OP 2 of D.12-07-008, as modified by D.12-11-031 "To the extent that there are disputed costs related to the Reimbursement Agreement or the Line of Credit under the [WPA] of the [RDP] . . . and associated cost recovery must be addressed by this Commission, [Cal-Am] should file a new application . . . The recoverability of costs that have been incurred in A.04-09-019 related to the [RDP] will be examined in other proceedings . . ." D.12-11-031, OP 2 at15; and *see* generally 14–16.

states that if the Settlement Agreement is not approved in a manner acceptable to the settling parties within 18 months of signing (December 4, 2012), either party may give notice of termination of the Settlement Agreement. By settling, Cal-Am believes that they avoid "costly and time-consuming litigation."

The $2,682,900[11] requested by Cal-Am represents $1,918,033 of costs advanced to MCWRA under the RDP Agreements,[12] and $764,557 due to MCWRA for costs not yet reimbursed.[13]

Cal-Am also plans to deposit $718,315.44[14] into a special trust/escrow account to be maintained by the Monterey County Auditor-Controller, but is not requesting recovery for this amount in the current application. These funds would be used to pay possible future claims of MCWRA contractors or consultants pursuant to the RDP or the RDP Agreements. Cal-Am believes that it is a prudent to reserve funds against the possibility, of an adverse judgment on any claims by MCWRA's consultants or contractors.

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[11] Pursuant to Paragraph 11 of the Settlement Agreement, amounts advanced by Cal-Am to MCWRA pursuant to the Reimbursement Agreement (RA), which is $1,173,744, will continue to accrue interest after the execution of the Settlement Agreement at the rate authorized for the RA in D.10-08-008 and D.11-09-039.

[12] This includes costs to pay outside legal fees, county counsel fees, employee labor costs, employee travel expenses, other expenses and other outside consultant expense, all of which were incurred with respect to the negotiation, approval, development, and implementation of the RDP Agreements and the RDP.

[13] This amount represents payments related to the negotiation, approval, development, and implementation of the RDP Agreements and the RDP, made by MCWRA to pay outside legal fees, county counsel fees, agency labor costs, agency employee travel expenses, other expenses and other outside consultant expense that are over and above those expenses that were previously funded by Cal-Am through the RDP Agreements. This amount does not include any costs incurred before January 1, 2009.

[14] Settlement Agreement at Paragraph 4C.

The Settling Parties agree that the Settlement Agreement complies with the Commission's standard of review. The Settlement Agreement includes but is not limited to the following major terms:

1. The County/MCWRA agree not to oppose the MPWSP;[15]
2. The County/MCWRA pledge to cooperate with Cal-Am in the processing of all applications necessary for the MPWSP and other project approvals as required. (Settlement Agreement);[16]
3. Cal-Am supports the Governance Committee of the Monterey Peninsula Regional Water Authority;[17]
4. In compliance with the agency act, Cal-Am agrees to develop, with public input, and pay for a groundwater monitoring plan;[18]
5. The Settling Parties agree to consult on other approvals or findings that may be necessary or appropriate for the MPWSP;[19] and
6. The Settling Parties agree that regardless of the outcome of any such challenge to D.12-10-030 (in which the Commission preempts Chapter 10.72 of the Monterey County Code) that decision remains binding on them with regard to the Settlement Agreement and MPWSP, and the County ordinance will not apply to the Company or the MPWSP.[20]

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[15] Settlement Agreement, Paragraphs 6E and 14 at 8 and 10.

[16] Paragraphs 4I, 5, and 6 of the Settlement Agreement.

[17] Settlement Agreement, Paragraph 4J at 6. This group also includes the MPWMD, and the County.

[18] Settlement Agreement, Paragraph 9 at 9.

[19] Settlement Agreement, Paragraph 10 at 7.

[20] Settlement Agreement, Paragraph 7 at 8.

7. The Settling Parties agree to broad mutual releases with certain reserved rights related to possible future litigation interpleading the funds in the Trust Account or against the Settling Parties by non-settling and other third parties.[21]
8. Upon Commission approval costs would be recovered from customers through a 15% monthly surcharge approved in D.11-09-039, or through another method approved by the Commission.
9. As part of the Settlement Agreement, Cal-Am forgives some amounts advanced to MCWRA that are disputed, instead of waiting for the resolution of the litigation.

In response to the assigned ALJ's e-mail ruling dated November 26, 2013, Cal-Am provided the decisions pursuant to which it had incurred the various costs it is requesting recovery for in the current proceeding. Cal-Am stated that its request for $1,918,033 is pursuant to D.10-08-008, Ordering Paragraph (OP) 3, and D.10-12-016, OP 1.

In their joint response to the assigned ALJ's February 28, 2014 ruling, Cal-Am and the County/MCWRA state that it is "impossible" to provide a dollar amount for the potential dollar exposure to ratepayers if the Superior Court suit goes to trial. The joint responders also state that the Superior Court's Order dated February 25, 2014, which denies MCWD's motion for summary judgment on its cross-complaint and grants MCWD's motion for summary adjudication of the first cause of action in Cal-Am's complaint, has no effect on the current request.

[21] Settlement Agreement, Paragraph 15 at 10–12.

6. Analysis and Conclusion

Cal-Am and the County/MCWRA argue that the Settlement Agreement, like settlements in general, removes the uncertainty and risk and costs of Cal-Am's litigation against the County/MCWRA and MCWD, and accordingly provides a benefit to Cal-Am and its ratepayers. This is correct, but there are aspects to this settlement that make it more difficult than usual for the Commission to determine the value of the settlement to Cal-Am's ratepayers.

First, the litigation that is to be settled is not at the Commission, but rather in Superior Court. This means that the Commission does not have before it the same amount of record information it would have in a Commission proceeding, and accordingly it is more difficult for the Commission to judge the value of the settlement compared to a litigated outcome. It also means that the settlement, while delivering potential savings to Cal-Am and its ratepayers, does not directly result in cost or resource savings to the Commission itself, or to parties in a Commission proceeding.

Second, the settlement does not completely resolve the Superior Court litigation, as MCWD has not settled, and has indicated that it intends to continue to litigate against Cal-Am and the County/MCWRA.[22] Accordingly, Cal-Am and its ratepayers would continue to have potential exposure relating to MCWD. We need to consider whether the removal of the County/MCWRA alone from the litigation benefits Cal-Am and its ratepayers, by reducing potential litigation costs, reducing potential liability of Cal-Am to the County/MCWRA, or by improving the odds of Cal-Am prevailing against MCWD.

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[22] MCWD Opening Brief at 9, 11.

Finally, the underlying fact situation is extraordinarily complex, and includes the criminal prosecution and conviction of MCWRA board member Stephen Collins, a Superior Court decision adverse to MCWD (finding that MCWD did not comply with CEQA for an approval related to the RDP) and subsequent appeals, and the involvement of multiple entities, including local government agencies.

The proposed settlement is opposed by ORA, MCWD, PTA, CPW, and Water Plus. ORA and MCWD in particular raise multiple arguments in opposition to the proposed settlement. Since PTA's, CPW's, and Water Plus' concerns are largely duplicative of ORA and MCWD's, and they did not submit briefs, we do not discuss them in detail here, but rely on our discussions of ORA and MCWD's arguments as responsive to the other parties concerns regarding reasonableness, public interest, cost, and compliance with the County's ordinance. To the limited extent that the arguments of those parties differ from or augment those of ORA and MCWD, while the Commission has considered all of the parties arguments in detail, we find it unnecessary to specifically address them here.

ORA makes some reasonable arguments, but undercuts those by also making more marginal arguments that are at best hyper-technical, and verge on being misleading. ORA's first and strongest argument is Cal-Am should not be allowed rate recovery for the proposed settlement because the value of the settlement is unknown.[23] According to ORA, Cal-Am and MCWRA "do not

[23] ORA Opening Brief at 3-7.

know the value of the litigation they are settling."[24] Whatever the state of Cal-Am and County/MCWRA's knowledge, the record before this Commission is indeed scant when it comes to quantification of the potential costs of the litigation. The cost of the proposed settlement is clear, but the potential cost of litigation remains largely unknown to the Commission, which makes it difficult for the Commission to weigh the two. ORA raises a valid point regarding the adequacy of the record, and we need to consider this in our evaluation of whether to approve the proposed settlement.

ORA's other arguments, however, are weaker. For example, ORA argues that costs attributable to MCWRA labor costs are not reasonable on two grounds. First, ORA argues that the time records for MCWRA costs are not detailed enough, and accordingly, Cal-Am has failed to show that the MCWRA labor costs are related to the RDP.[25] ORA's argument is that no MCWRA labor costs should be paid by ratepayers, since "the MCWRA employee timesheets are too vague to be found reasonable."[26] In essence, this is an argument about the sufficiency of the evidence presented by Cal-Am and MCWRA, as there is no question that during the period at issue MCWRA would have spent significant time and resources on the RDP, given the importance of the RDP and their role in its development. (*See*, e.g. D.10-12-016 at 22-23 and 58-60.)

ORA, however, couples this argument with a second argument that all MCWRA labor costs were "incurred in the normal course of business," and

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[24] ORA Opening Brief at 7.

[25] ORA Opening Brief at 8-11.

[26] ORA Opening Brief at 11.

accordingly cannot be attributed to the RDP.[27] ORA argues that no MCWRA employees were hired because of the RDP, and the MCWRA employees who worked on the RDP were generally ineligible for overtime pay, so therefore MCWRA employees would have been paid the same amount regardless of whether or not they were working on the RDP.[28] In other words, the RDP did not result in any incremental labor costs to MCWRA for its internal employees, so no internal expenses should be recovered.

County/MCWRA, however, argue that there is evidence to the contrary, and that MCWRA employees did in fact do work on the RDP that was beyond the normal scope of their employment.[29] The County/MCWRA and Cal Am contend that the costs being claimed are for work on the RDP. No party provided evidence of misrepresentation by the County/MCWRA and Cal Am regarding this contention. Furthermore, ORA's argument is inconsistent with ORA's acknowledgement that such costs were included in the Reimbursement Agreement (RA).

Thus, ORA supports the RA for the Local Agencies' reasonable and necessary expenses, including internal and external administrative, consultant, and legal expenses associated with the Environmental Scope of Work and the Test Well Scope of Work. However, ORA contends that funding the Local Agencies' internal and external administrative, consultant, and legal expenses associated with litigation in support of the Regional Project is very problematic.[30]

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[27] ORA Opening Brief at 15-17.

[28] ORA Opening Brief at 17.

[29] County Reply Brief at 7.

[30] D.10-08-008 at 14-15, emphasis added.

While ORA clearly did not like the fact that ratepayers might have to pay for certain internal labor expenses of MCWRA, it is also clear that they knew that such costs were included.

ORA dedicates a significant amount of its Opening Brief to a series of technical arguments that Cal-Am's authority to file this Application is "uncertain."[31] In various places in D.12-07-008, the Commission directed Cal-Am to file a "separate application" to deal with "disputed and undisputed costs, and associated cost recovery, relative to A.04-09-019."[32] Regarding the disputed interpretation of the requirements in the Water Purchase Agreement and the RA, the Commission stated:

> The parties have stated that they are meeting to discuss these issues and to determine whether they can be settled or must be litigated. We encourage the parties in their settlement discussions and can assign a neutral ALJ to assist in the mediations. To the extent that the disputed costs and associated cost recovery must be addressed by this Commission, Cal-Am should file a new application.[33]

The filing of a new application to address these issues, particularly cost recovery, was necessary because D.12-07-008 closed the prior proceeding.[34]

Regardless of how convoluted Cal-Am's arguments may be, it is clear that Cal-Am needed to file, and was directed to file, a separate application for cost recovery issues relating to A.04-09-019. In D.12-11-031, the Commission provided the minor clarification that:

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[31] ORA Opening Brief at 17–24.

[32] ORA Opening Brief at 2.

[33] ORA Opening Brief at 20.

[34] A.04-09-019.

> There ought to be a separate application filing for recovering RDP related legal costs, apart from pre-construction costs, irrespective of whether the RDP related legal costs were incurred before or after January 17, 2012.[35]

Again, Cal-Am has done what it was directed to do, file a separate application. Just because ORA may not like (and may have reason to oppose) the contents of the application does not mean that Cal-Am lacks authority to file the application.

MCWD vigorously opposes the settlement between Cal-Am and the County/MCWRA on a wide range of grounds. The most interesting aspect of MCWD's position, despite the variety of technical legal arguments it raises in opposition to the settlement, is that it actually tends to support approval of the settlement.

MCWD argues:

> It was always the intention of the parties to the Water Purchase Agreement ("WPA"), as well as the understanding of the Commission when it approved the WPA in D.10-12-016, that in the absence of a material breach, the public agencies would get back from Cal-Am all the RDP project-related costs.[36]

In fact, MCWD says that if they received the same terms as MCWRA would get under the settlement, which it characterizes as "recovery of virtually all of its RDP costs," then MCWD would be "more than willing to settle."[37]

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[35] A.04-09-019 at 13.

[36] MCWD Reply Brief at 3.

[37] MCWD Reply Brief at 3.

According to ORA, MCWD contends that this would be around $17 million.[38] In other words, all of MCWD's arguments against the settlement would go away if it was paid enough money. ORA argues that the settlement should be rejected to discourage Cal-Am from negotiating an (presumably similar) agreement with MCWD.[39] If indeed MCWD is seeking $17 million, we find it unlikely that Cal-Am would agree to such a settlement with MCWD.

It seems likely that MCWD prefers to have Cal-Am and the County/MCWRA fighting with each other as well as MCWD, rather than having them team up on MCWD. MCWD's vociferous opposition to a settlement that has no direct impact on MCWD would seem to indicate that the settlement may improve Cal-Am's odds in its litigation against MCWD. Again, this potential benefit is difficult to quantify, but we note that Cal-Am (and its ratepayers) appears to be facing a risk of significantly higher potential liability to MCWD than it would face against the County/MCWRA. Accordingly, it may make sense for Cal-Am to settle a relatively small claim from the County/MCWRA if that will help it defend against a larger claim by MCWD.

Because the validity of the various RDP-related agreements has not been determined in the Superior Court, there is no certainty regarding the potential costs of continued litigation. The value of the proposed settlement is that it provides avoidance of continued litigation and certain costs for most of the litigants in the Superior Court case. As a practical matter, if we reject the proposed settlement, we are, in effect, directing Cal-Am to continue litigation

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[38] ORA Reply Brief at 19.

[39] ORA Reply Brief at 19.

against the County/MCWRA, with corresponding costs and risks to Cal-Am ratepayers.[40] Also, resolution of the current application does not depend on the Superior Court determination of validity or invalidity of the agreements in question. What is at issue herein is whether costs incurred by Cal Am, some of which are previously authorized, should be included in the rates of Monterey District customers.

To be fair, the current proceeding is different than one involving litigation before this Commission. In Commission litigation, the Commission has a better idea of the range of possible outcomes, and can also better control (and accordingly predict) the process and its related costs. That does not mean, however, that the settlement at issue in this proceeding is too speculative for the Commission to grapple with it meaningfully.

We do note that the value of some of the non-financial provisions of the proposed settlement seem minimal at best. For example, the parties' agreement to follow D.12-10-030, which preempted the local desalination ordinance, does not add much value to ratepayers, nor does the county's agreement to expedite permit applications relating to the project, particularly when it appears that the county supports the project. We also clarify that this decision has no impact on the Commission's preemption of the local desalination ordinance pursuant to D.12-10-030, which is not at issue in the current proceeding. The fact that the County/MCWRA are agreeing in the Settlement Agreement to not enforce the local desalination ordinance is not a factor in our approval of the proposed

[40] There would also be costs to County taxpayers, many of whom are also Cal-Am ratepayers.

Settlement Agreement because the Commission has already preempted the local desalination order in D.12-10-030.

Pursuant to the Commission decisions referenced herein, and taking into consideration all of the above possibilities and uncertainties, we find that the Settlement Agreement is reasonable and consistent with the law, though it is difficult to quantify the value of the Settlement Agreement. Even though its benefits may be difficult to quantify, it is a certain amount, and it provides a benefit to ratepayers by providing more certainty of cost than the unknown expense of continued litigation between the parties. Accordingly, we approve a settlement, and corresponding rate recovery, as discussed below.

Since the Commission has not yet authorized recovery of the $764,557 due to MCWRA, and there is not sufficient information in the current proceeding for us to determine the reasonableness of the amount, we authorize Cal-Am recovery of $1,918,033, plus interest and fees pursuant to D.10-08-008 and D.11-09-039, through Cal-Am's SR1 Account, which equates to Cal-Am's original request of $2,682,590 minus $764,557. This disallowance does not prejudice or prejudge any future request by Cal-Am for recovery of the $764,557 in a future application.

7. Compliance with the Authority Granted Herein

In order to implement the authority granted herein, we require Cal-Am to file a Tier 1 Advice Letter (AL) within 30 days of the date of this decision. The tariff sheets filed in these ALs shall be effective on or after the date filed.

8. Comments on Proposed Decision

As provided by Rule 14.3 of our Rules of Practice and Procedure and Pub. Util. Code § 311(g) (1), the proposed decision of the ALJ in this matter was mailed to the parties on January 8, 2015. Opening Comments were filed on

January 28, 2015 by Cal-Am and the County/MCWRA (jointly), ORA, MCWD, PTA, and Water Plus; and Reply Comments were filed on February 2, 2015 by Cal-Am and the County/MCWRA (jointly), ORA, MCWD, and CPW.

9. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ in this proceeding.

Findings of Fact

1. Pursuant to the procedures established by D.12-07-008 and D.12-11-031, Cal-Am filed A.13-05-017 for approval of the Settlement Agreement regarding disputed costs related to the RDP.

2. Parties to A.13-05-07 include Cal-Am, the County/MCWRA, ORA, MCWD, PTA, CPW, and Water Plus.

3. Protests were filed by ORA, MCWD, PTA, CPW, and Water Plus.

4. Rule 11.4 addresses a party's leave to file under seal what it believes is a confidential document; GO 66-C governs the procedures for obtaining documents, and Pub. Util. Code § 583 addresses what is a public document.

5. On May 24, 2013, Cal-Am filed a motion requesting that Exhibit D to A.13-05-017 be treated confidentially and filed under seal. Responses in opposition to the request were filed by Water Plus, CPW, MCWD, and PTA; and in support by the County/MCWRA. Cal-Am and MCWD replied to these responses on July 29, 2013.

6. On June 27, 2013, Resolution ALJ-176-3316 preliminarily determined that this proceeding was ratesetting and that hearings would be necessary.

7. On July 22, 2013, the County/MCWRA filed a motion for adoption of a protective order applicable to documents treated confidentially in the current

proceeding. Responses in opposition to this request were filed by MCWD, PTA, and Water Plus. The County/MCWRA filed a reply on August 13, 2013.

8. By her ruling dated August 19, 2013, the assigned ALJ granted Cal-Am's motion to file Exhibit D to A.13-05-017 under seal; treat such information as confidential; and approved the text of a Protective Order and NDA, designed for use during this proceeding to protect the confidential material in Exhibit D to A.13-05-017. Signatories to the NDA include ORA and CPW.

9. Opening and reply briefs regarding the confidentiality issue were filed in both public and confidential versions by Cal-Am, the County/MCWRA, and ORA on November 21, 2013 and November 25, 2013, respectively.

10. Opening and reply briefs regarding this proceeding were filed by Cal-Am, the County/MCWRA, ORA, and MCWD in May and June 2014.

11. ORA filed its opening brief regarding this proceeding in both a public and confidential format.

12. Opening and reply briefs regarding this proceeding were filed by Cal-Am, the County/MCWRA, and ORA.

13. On November 26, 2013, the assigned ALJ issued an e-mail ruling requesting information regarding payments made to and from Cal-Am, the County/MCWRA, and MCWD regarding the RDP; as well as payments by Cal-Am, for which it is requesting recovery in the current proceeding. On December 20, 2013, Cal-Am, the County/MCWRA, and MCWD filed responses. On January 15, 2014, Cal-Am and MCWD filed a reply to the responses.

14. Cal-Am's request for $1,918,033 is pursuant to D.10-08-008, OP 3; and D.10-12-016, OP 1. Cal-Am's request for $764,557 has not yet been authorized for recovery.

15. On February 28, 2014, the assigned ALJ issued an e-mail ruling requesting parties positions regarding whether an Order by the Superior Court will have an effect on the current proceeding, and what the potential dollar exposure to ratepayers would be if the suit in the Superior Court go to trial and are determined by the Superior Court. On March 14, 2014, responses were filed by ORA, MCWD, jointly by Cal-Am and the County/MCWRA, and Water Plus. On March 21, 2014, responses were filed by MCWD and jointly by Cal-Am and the County/MCWRA.

16. In 1995 the SWRCB issued Order 95-10, citing Cal-Am for diverting water from the Carmel River, and requiring Cal-Am to develop an alternative water source. Over the years, Cal-Am proposed various solutions which never came to fruition.

17. By A.04-09-019, Cal-Am proposed a long-term water supply project, known as the CWP, which consisted of desalination treatment facilities, aquifer storage and recovery facilities, and associated transmission pipelines. In December of 2009, the Commission certified an EIR for the CWP in compliance with the CEQA.

18. The CWP was succeeded by the RDP. By D.10-12-016, the Commission approved: 1) a settlement agreement among a number of interested parties to A.04-09-019; 2) a WPA; 3) Cal-Am's participation in a RDP instead of the CWP; and 4) a CPCN for Cal-Am to own and operate selected facilities as part of the RDP.

19. In April 2011, claims were made that then MCWRA Director, Steve Collins had a potential conflict of interest regarding the WPA and other RDP-related agreements. This raised concerns regarding the legal validity of contracts entered into by MCWRA. Consequently, Cal-Am withdrew from the RDP, as

acknowledged by the Commission in D.12-07-008 (as modified by D.12-11-031) 2) Superior Court litigation was initiated relating to the validity of the various RDP-related agreements; and 3) Cal-Am filed a new application (A.12-04-019) for a Cal-Am-only project which is now identified as the Monterey Peninsula Water Supply Project (MPWSP). Cal-Am has reached its own settlement with the County and MCWMD (the subject of the current application), but not MCWD.

20. In July 2013, Cal-Am and other interested parties, including ORA, MCWRA, and the County, submitted a settlement in A.12-04-019, which provided, in part, the creation of a new project identified as the MPWSP.

21. Because the validity of the various RDP-related agreements has not been determined in the Superior Court, there is no certainty regarding the potential costs of continued litigation.

22. The value of the proposed settlement is that it provides avoidance of continued litigation and certain costs for most of the litigants in the Superior Court case.

23. Resolution of the current application does not depend on the Superior Court determination of validity or invalidity of the agreements in question. What is at issue herein is whether costs incurred by Cal Am, some of which are previously authorized, should be included in the rates of Monterey District customers.

24. The litigation that is to be settled by approval of this application is not at the Commission, but rather in Superior Court.

25. The County/MCWRA and Cal Am contend that the costs being claimed are for work on the RDP. No party provided evidence of misrepresentation by the County/MCWRA and Cal Am regarding this contention.

26. By filing the current application, Cal-Am was following the requirements of D.12-07-008 and D.12-11-031.

27. ORA supports the RA for the Local Agencies' reasonable and necessary expenses, including internal and external administrative, consultant, and legal expenses associated with the Environmental Scope of Work and the Test Well Scope of Work.

28. The Settlement Agreement does not completely resolve the Superior Court litigation, as MCWD has not settled, and has indicated that it intends to continue to litigate against Cal-Am and the County.

29. Approval of the Settlement Agreement would resolve Cal-Am's Superior Court litigation with the County/MCWRA.

Conclusions of Law

1. As adjusted herein regarding the rates charged to Cal-Am's Monterey District ratepayers, A.13-05-017 and the associated Settlement Agreement are reasonable, in compliance with the law, in the public interest, and should be adopted.

2. Since the Commission has not yet authorized recovery of the $764,557 which Cal-Am proposes is due to MCWRA, and there is not sufficient information in the current proceeding for us to determine the reasonableness of that amount, we should authorize Cal-Am recovery of $1,918,033, plus interest and fees pursuant to D.10-08-008 and D.11-09-039, through Cal-Am's SR1 Account, which equates to its request of $2,682,590minus $764,557. This disallowance should not prejudice or prejudge any future request by Cal-Am for recovery of the $764,557 in a future application.

3. During the period at issue MCWRA would have spent significant time and resources on the RDP, given the importance of the RDP and their role in its development.

4. The cost of the Settlement Agreement is clear, but the potential cost of litigation remains largely unknown.

5. Approval of the Settlement Agreement has no direct impact on MCWD.

6. Cal-Am (and its ratepayers) face a risk of significantly higher potential liability to MCWD ($17 million) than it would face against the County/MCWRA. Accordingly, it makes sense for Cal-Am to settle a relatively small claim from the County/MCWRA if that will help it defend against a larger claim by MCWD.

7. The litigation resolved by the Settlement Agreement is different than one involving litigation before this Commission, in which the Commission has a better idea of the range of possible outcomes, and can also better control (and accordingly predict) the process and its related costs.

8. The value of some of the non-financial provisions of the proposed settlement is minimal.

9. In order to implement the authority granted herein, Cal-Am should file a Tier 1 AL within 30 days of the date of this decision. The tariff sheets filed in these ALs shall be effective on or after the date filed.

10. The Commission affirms all rulings made by the assigned Commissioner and the assigned ALJ.

11. The Commission affirms the assigned ALJ's previous ruling that Exhibit D be treated confidentially; grants such confidential treatment to the opening and reply briefs regarding the confidentiality issue filed by Cal-Am, the County/MCWRA, and ORA; and grants such confidential treatment to ORA's opening brief regarding this proceeding.

O R D E R

IT IS ORDERED that:

1. As adjusted in Ordering Paragraph 2 regarding the rates charged to California-American Water Company's Monterey District ratepayers, Application 13-05-017 and the associated *Settlement Agreement and Mutual Release* are reasonable, in compliance with the law, in the public interest, and adopted.

2. The Commission authorizes California-American Water Company's (Cal-Am's) to recovery of $1,918,033, plus interest and fees pursuant to Decision 10-08-008 and Decision 11-09-039, through Cal-Am's Special Request 1 Surcharge Balancing Account, which equates to its request of $2,682,590 minus $764,557. This disallowance does not prejudice or prejudge any future request by Cal-Am for recovery of the $764,557 in a future application.

3. In order to implement the authority granted herein, California-American Water Company shall file a Tier 1 Advice Letter (AL) within 30 days of the date of this decision. The tariff sheets filed in these ALs shall be effective on or after the date filed.

4. The Commission affirms the assigned Administrative Law Judge's (ALJ) previous ruling that Exhibit D to California-American Water Company's (Cal-Am) Application 13-05-017 be treated confidentially. The information will remain sealed and confidential for a period of three years after the date of this order. During this three-year period, this information may not be viewed by any person other than the Commission staff or on the further order or ruling of the Commission, the assigned Commissioner, the assigned ALJ, the Assistant Chief ALJ, or the Chief ALJ, except as agreed to in writing by Cal-Am, or as ordered by a court of competent jurisdiction. If Cal-Am believes that it is necessary for this

information to remain under seal for longer than three years, Cal-Am may file a new motion at least 30 days before the expiration of this limited protective order.

5. California-American Water Company's (Cal-Am) request to treat as confidential and seal the confidential versions of its opening and reply briefs regarding the confidentiality issue is granted. The information will remain sealed and confidential for a period of three years after the date of this order. and shall not be made accessible or disclosed to anyone other than the Commission staff or on the further order or ruling of the Commission, assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion Judge, the Chief Judge, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction. If Cal-Am believes that it is necessary for this information to remain under seal for longer than three years, Cal-Am may file a new motion stating the justification of further withholding of the information from public inspection. This motion shall be filed at least 30 days before the expiration of today's limited protective order.

6. The County of Monterey and the Monterey County Water Resources Agency's (County/MCWRA), request to treat as confidential and seal the confidential versions of its opening and reply briefs regarding the confidentiality issue is granted. The information will remain sealed and confidential for a period of three years after the date of this order. and shall not be made accessible or disclosed to anyone other than the Commission staff or on the further order or ruling of the Commission, assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion Judge, the Chief Judge, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction. If the County/MCWRA believes that it is necessary for this information to remain under seal for longer than three years, the County/MCWRA may file a new

motion stating the justification of further withholding of the information from public inspection. This motion shall be filed at least 30 days before the expiration of today's limited protective order.

7. The Office of Ratepayer Advocate's (ORA) request to treat as confidential and seal the confidential versions of its opening and reply briefs regarding the confidentiality issue is granted. The information will remain sealed and confidential for a period of three years after the date of this order. and shall not be made accessible or disclosed to anyone other than the Commission staff or on the further order or ruling of the Commission, assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion Judge, the Chief Judge, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction. If ORA believes that it is necessary for this information to remain under seal for longer than three years, ORA may file a new motion stating the justification of further withholding of the information from public inspection. This motion shall be filed at least 30 days before the expiration of today's limited protective order.

8. The Office of Ratepayer Advocate's (ORA) request to treat as confidential and seal the confidential versions of its opening briefs regarding this proceeding is granted. The information will remain sealed and confidential for a period of three years after the date of this order. and shall not be made accessible or disclosed to anyone other than the Commission staff or on the further order or ruling of the Commission, assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion Judge, the Chief Judge, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction. If ORA believes that it is necessary for this information to remain under seal for longer than three years, ORA may file a new motion stating the justification of further withholding

of the information from public inspection. This motion shall be filed at least 30 days before the expiration of today's limited protective order.

9. Application 13-05-017 is closed

   This order is effective today.

   Dated _____, at San Francisco, California.