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07-25-12

04:59 PM

**BEFORE THE  
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates	Application 12-04-019  (Filed April 23, 2012)
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**REPLY BRIEF ON WATER RIGHTS AND DESAL OWNERSHIP  
BY CITIZENS FOR PUBLIC WATER**

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**JULY 24, 2012**

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Citizens For Public Water makes these points in response.

**Water Rights:** Throughout the process of developing the Regional Desal Project (A04-09-019), the three partners (Cal Am, Monterey County Water Resources Agency, Marina Coast Water District) knew the Salinas River Basin was over-drafted. Furthermore, MCWRA insisted that ground water rights were not a stumbling block. All parties knew the importance of clarifying water rights, but not one of the parties insisted on clarification. This lack of due diligence, if not misrepresentation on that issue, haunts the the North Marina site today. Cal Am, having known about the lack of water rights, still advocates a project that flaunts the lack of those water rights.

The Monterey County Water Resources Agency finally acknowledged the lack of water rights in 2010. A letter from the law offices of Michael Stamp dated March 3, 2010 requested clarification of an earlier statement by then MCWRA General Manager Curtis

Weeks that MCWRA had the right to pump groundwater from the Salinas Basin for the RDP. A MCWRA letter in response dated March 24, 2010, stated “...MCWRA intends to acquire an easement, including rights to ground water, from the necessary property owner(s) to install the desalination wells. These rights have not been perfected to date, hence no records can be produced.”

These letters are included here as ATTACHMENT A—Stamp-MCWRA letters, March 2010.

Furthermore, and as a reminder, when a public agency or a regulated utility sells bonds or offers Certificates of Participation to fund capital facilities projects, the Purchasers of the bonds or C.O.P.’s rely on the truthful representations made by the offerer. CPW believes the CPUC has an obligation and an express duty to require full and complete documentation and public disclosure and representations of the source and legality of appropriation of the groundwater, or the lack thereof, by Cal-Am BEFORE the CPUC takes any action on Cal-Am’s proposed project. It is important to point out that challenges to illegal appropriations of groundwater by overlying land owners may lawfully be filed against Cal-Am for up to five (5) years after the initiation of the pumping of the water. Loss by Cal-Am of a suit in the Superior Court (beyond the control of the CPUC) against Cal-Am for illegal takings or wrongful prescriptive appropriations of groundwater rights from private landowners four or five years after the project is built would expose Cal-Am’s ratepayers to the position of owing tens of millions of dollars to Cal-Am’s bond holders, and Cal-Am would, once again, if recent history is repeated, not be held accountable. The ratepayers would pay!

**County Ownership Ordinance:** The applicability of Monterey County Ordinance Health and Safety 10.72 is disputed by Cal Am and CPUC.

A. Ordinance represents more than ownership: From the ratepayer point of view, the ordinance represents far more than simple ownership. It reassures the ratepayer that a public partner would bring public financing, lower interest costs, access to public loans and grants, resulting in lower costs to all water customers. It represents an assurance of

the application of laws governing transparency, access, public meetings, public agendas, records retention, rights to record access, local elected governance, local control, public accountability and local oversight. It forges an emphasis on the community value of local political and governmental commitment and responsibility to deliver a reliable and cost effective supply.

B. Cal Am has history of resisting/opposing partnerships: It is disingenuous for Cal Am to claim its estrangement from a local government partnership is based on its experience with the Regional Desal Project. Cal Am is notorious for preferring to operate independently and without partners of any type. 1) It proposed its own independent Carmel River Dam in the 1990s after an earlier dam proposal by the Water Management District failed. Cal Am's proposal failed too. 2) Cal Am was very slow to join with MPWMD in its first Aquifer Storage and Recovery project in late 1990s. 3) Cal Am failed to partner with MPWMD in the early desal planning in 2001. 4) Cal Am proposed its independent Moss Landing desal project in 2004, following the order of CPUC and state legislation. It was dragged into the Regional Desal Project in 2007 after it saw its independent effort at Moss Landing flounder. 5) Cal Am was very reluctant to join with public partners for rerouting the San Clemente Dam.

C. Cal Am seeks to avoid competition: Pre-empting the County Ordinance will help clear out competition. Such an easier track, within CPUC discretionary prerogatives, will penalize any other project that comes before the CPUC. For the first time, ever, there is viable competition for the desal water supply business, and on a scale that can meet Monterey Peninsula needs. Not one, but two, separate entrepreneurial investment entities have developed desal options. Both propose a site at Moss Landing, once the preferred site for the state legislature, CPUC and Cal Am. Both have made public proposals that are one-half the cost estimate of Cal Am for its desal. Again, that is ONE HALF THE CAL AM COST ESTIMATE! Just this month, on July 16, 2012, Richard Svindland, Cal Am director of engineering, stated to the Mayors Technical Advisory Committee that Cal Am's estimate for the 9000 afy desal is \$5000/af, and more if the smaller 5400afy desal is build.

This statement (fact?) alone shouts out for CPUC attention. This cannot be ignored. Despite the possible bypass of the ordinance, it does not change the fact that there are two competing desal projects, and both are currently estimated to cost ratepayers far less than Cal Am's proposal.

Removing the competition will benefit the higher cost Cal Am project, and penalize the ratepayer who expects a fair evaluation by CPUC in order to set fair rates.

D. Cal Am seeks preferential treatment within CPUC procedures: The first responsibility of CPUC is to its investor owned utilities. The CPUC policy on rates and charges is prescribed in CA Public Utilities Code 701.10, shown below:

701.10. The policy of the State of California is that rates and charges established by the commission for water service provided by water corporations shall do all of the following:

(a) Provide revenues and earnings sufficient to afford the utility an opportunity to earn a reasonable return on its used and useful investment, to attract capital for investment on reasonable terms and to ensure the financial integrity of the utility.

(b) Minimize the long-term cost of reliable water service to water customers.

(c) Provide appropriate incentives to water utilities and customers for conservation of water resources.

(d) Provide for equity between present and future users of water service.

(e) Promote the long-term stabilization of rates in order to avoid steep increases in rates.

(f) Be based on the cost of providing the water service including, to the extent consistent with the above policies, appropriate coverage of fixed costs with fixed revenues.

In sub-section (a), Cal Am will be protected since the CPUC will guarantee decisions that allow a profit opportunity, capital investment, and financial integrity. In sub-section (b), CPUC intends to minimize long term cost of water service.

Citizens for Public Water worries that a CPUC decision to pre-empt the County Ownership Ordinance will benefit Cal Am unfairly, place Cal Am welfare ahead of all

others, and ultimately cause the CPUC to fail in sub-section (b) responsibility to protect ratepayers.

E. Cal Am seeks to override community sentiment: Up until 2007 when the Regional Desal Project (RDP) started to take shape, most observers and participants in the water supply sweepstakes did not believe the Monterey Peninsula community would ever agree on water. As it turned out, many elements of the community ultimately did support the RDP. Why do you think that happened? Because it was regional in concept, had public partners, expected to be publicly financed, emerged from a relatively transparent and participatory process, and notably, it was substantially less expensive than Cal Am's other options ((an open ocean intake at Moss Landing, and a higher cost version of the RPD in North Marina) (incidentally the latter is the current Cal Am proposal—A.12-04-019)).

The qualities that made the RDP attractive to a wide section of the Monterey Peninsula have now disappeared. Cal Am acting alone has abandoned the community and CPUC values that supported the RDP. We are heading backwards.

The County Ownership Ordinance played a huge part in providing the foundation for the planning and public participation process, and the community willingness to push Cal Am toward partnering. Overriding this ordinance will undermine this incentive and this community value that has stood for 23 years.

F. Public partners exist: Two local public agencies could partner with Cal Am; either Monterey Peninsula Water Management District or the newly formed Mayors JPA, called Monterey Peninsula Regional Water Authority. Both would bring the minimum public partner advantages that were touted in the failed RDP. Either of these two would also bring added advantages of specific Monterey Peninsula responsibilities and roots, and local oversight exercised through local governance and elected representation.

By the way, the public partners in the RDP did not bring local representation nor the affected ratepayer commitment to succeed.

However, it has been Cal Am's preference to avoid a partner. Cal Am gains enormous financial benefits by operating independently without a public partner. It can be aided of course by CPUC responsibilities under its charge in Section 701.10(a), noted above.

It is clear that Cal Am prefers to go alone. It is clear that Cal Am investors benefit greatly if Cal Am goes alone. It is clear that ratepayers suffer higher costs if Cal Am goes alone.

## **CONCLUSIONS**

**Water rights:** Casual, if not cavalier, treatment of water rights proved to be fatal to the RDP partnership. If this is litigated or delayed significantly, the focus on the Salinas River Basin should be abandoned. Cal Am has no Plan B contingency plan other than a different well pattern in the same area without appropriate water rights. To proceed without water rights is a high risk to Cal Am's entire proposal. It could be exposed to litigation as much as five years after 2017! It is an undesirable risk to the ratepayers for fronting the financing, for possible stranded costs, and to the schedule. An alternative at Moss Landing should be taken under consideration by CPUC, since a Moss Landing site avoids all water rights issues. .

**County Ownership Ordinance:** If County Ordinance 10.72 is pre-empted, Cal Am might separate and insulate itself from its first real competition. Cal Am will love this preferential standing. CPUC cooperation with pre-emption will work against the ratepayer. It will remove the expectation for practical financing benefits, remove public governance and citizen protections, remove this incentive for Cal Am to work with its neighboring public agencies and its user base, and will suggest that the CPUC agrees to such disregard to Monterey Peninsula water customers.

## **RECOMMENDATIONS**

Water Rights: **Order Cal Am to seek an alternative water source outside the Salinas River Basin as a contingency plan.**

County Ownership Ordinance: **Whether it is pre-empted or not, order Cal Am to seek a public partner for all the obvious reasons: 1. lower cost benefits to ratepayers, 2. preserve community values, 3. foster an “all hands on deck”, full community support and engagement (a partnership) for resolving local water supply needs, and 4. stabilize long range water delivery and planning.**

Respectfully submitted

\_\_\_\_\_/s/ George T. Riley\_\_\_\_\_

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