

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



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Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates.

A.04-09-019
(Filed September 20, 2004;
Amended July 14, 2005)

**REPLY COMMENTS OF CALIFORNIA-AMERICAN WATER COMPANY ON
THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE
WEATHERFORD**

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July 9, 2012

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I. INTRODUCTION

Pursuant to Article 14 of the Rules and Practice of Procedure of the California Public Utilities Commission (“Commission”), California-American Water Company (“California American Water”) hereby submits its reply comments on the *Proposed Decision Granting Motion to Withdraw Petition to Modify Decision 10-12-016 and Closing Proceedings*, mailed June 12, 2012 (“Proposed Decision”). In these reply comments, California American Water will discuss the comments filed by the Marina Coast Water District (“MCWD”) and Monterey County Water Resources Agency (“MCWRA”).

II. APPLICABILITY OF THE JANUARY 2012 CUT-OFF DATE

As California American Water noted in its opening comments, the Commission should clarify the language in the Proposed Decision referring to a January 2012 cut-off date for recovery of certain costs.¹ Although California American Water believes that the January 2012 cut-off applies solely to costs related to the California American Water-only facilities, it is concerned that the ambiguous language in the Proposed Decision, if adopted, could possibly be used in the future to bar recovery of other Regional Desalination Project-related costs incurred

¹ Although the Proposed Decision uses January 17, 2012 as the cut-off date, California American Water explained in its opening comments that it announced to the Commission of its withdrawal of support from the Regional Desalination Project on January 18, 2012.

after the January 2012 date. Indeed, all three commenting parties – California American Water, MCWD, and MCWRA – agreed that the Commission should modify the Proposed Decision to make it clear that the prohibition on recovery of costs incurred after the January 2012 cut-off applies *only* to the California American Water-only facilities.² Such unanimity between these parties is rare these days, which only underscores the critical need for this correction. California American Water therefore requests that the Commission adopt the language set forth in its opening comments, as well as in Appendix A to these comments.

III. TRACKING OTHER REGIONAL DESALINATION PROJECT COSTS

After reading the opening comments on the Proposed Decision, California American Water realized that further clarification of the Proposed Decision is necessary to ensure that California American Water is able to recover reasonable and necessary costs incurred after the January 2012 cut-off in connection with its withdrawal from the Regional Desalination Project-related costs. As California American Water discussed in its opening comments, the Proposed Decision recognizes that California American Water will likely continue to incur Regional Desalination Project-related costs, despite its withdrawal from the Project.³ The Proposed Decision encourages the parties to continue mediation, mentions the possibility of litigation, and directs California American Water to file a future application for recovery.⁴ All of these actions would be related to the Regional Desalination Project and all would result in California American Water incurring costs. Indeed, tracking the costs in the existing memorandum account is consistent with a recent directive from the Commission’s Division of Water and Audits to *separately* track legal and related expense that California American Water incurs in connection with the Regional Desalination Project.⁵ While it is appropriate to track

² *Comments of California-American Water Company on The Proposed Decision of Administrative Law Judge Weatherford*, filed July 2, 2012 ("CAW Comments"), pp. 2-4; *Marina Coast Water District's Comments on Proposed Decision Closing Proceeding*, filed July 2, 2012 ("MCWD Comments"), pp. 4-5; *Comments of Monterey County Water Resources Agency on Proposed Decision of Administrative Law Judge Weatherford Dated June 12, 2012*, filed July 2, 2012 ("MCWRA Comments"), pp. 1-3.

³ CAW Comments, pp. 2-3.

⁴ See Proposed Decision, p. 20.

⁵ Letter from Bruce DeBerry, Program Manager, Division of Water and Audits, to David Stephenson, Director – Rates and Regulation, California American Water, dated July 6, 2012 (stating that “Legal and related expenses that

such costs in the current memorandum account, as California American Water has been doing, it would be helpful for the Commission to confirm that this practice is correct in order to avoid future confusion and litigation. California American Water has included proposed language providing this confirmation in Appendix A to these comments.

IV. MCWD'S COMMENTS

While MCWD correctly notes that the Commission should clarify the language regarding the January 2012 cut-off to make it clear that it applies solely to California American Water-only facilities costs, MCWD raises several other issues, which are based on misrepresentations and are unreasonable requests of the Commission.⁶ For example, MCWD asks the Commission to determine whether it should proceed with the appeal of the Ag Land Trust decision regarding the EIR for the Regional Desalination Project and implies that costs related to that litigation should be recovered from California American Water's customers.⁷ First, MCWD was to have recovered these costs only through the sale of product water and they were explicitly excluded as a reimbursable cost and were not eligible for recovery from California American Water customers in advance of the facility commissioning.⁸ Even if the project had gone forward, the Ag Land Trust litigation costs were to be indebted by the public agencies and recovered as product water cost. Second, now that the Regional Desalination Project is not going forward, MCWD must make its *own* determination as to whether it should continue the Ag Land Trust litigation. California American Water advised MCWD on several occasions that the expenditure of any additional money to advance the Regional Desalination Project is a waste of MCWD ratepayer funds. Specifically, California American Water

Cal-Am may claim for the Regional Desalination Project (RDP) will be subject to a prudence review by the Commission. The Division of Water and Audits therefore directs Cal-Am to track separately all legal and leg-related expenses for the RDP.”)

⁶ These reply comments do not address the numerous factual and legal misrepresentations in MCWD's opening comments to the Proposed Decision. Indeed, many of the actions MCWD proposes are improper and unsupported. The fact that California American Water does not address these comments in no way waives California American Water's right to challenge MCWD's allegations in the future.

⁷ MCWD Comments, pp. 2-3, 5.

⁸ *Marina Coast Water District's Notice of Filing of Conformed Copy of Water Purchase Agreement Containing Previously-Announced Revisions Acceptable to the Signatories*, filed August 30, 2010, Appendix A, *Water Purchase Agreement*, § 14.2.

cautioned MCWD that it will not support MCWD in any effort to recover from California American Water's customers or shareholders MCWD's costs to prosecute the Ag Land Trust.⁹ The Commission does not regulate MCWD and this is not a decision for the Commission to make. If MCWD chooses to pursue the appeal, it will do so at its own risk.

Similarly, MCWD asks the Commission to declare that MCWRA's anticipatory breach of the Regional Desalination Project agreements is the "sole reason" the Regional Desalination Project is not going forward.¹⁰ MCWD's claim is misleading and fails to recognize the reality of the situation. With or without the anticipatory breach,¹¹ the lack of financing from the public agencies, potential delays from the litigation regarding the Environmental Impact Report ("EIR"), fallout from the Collins conflict-of-interest matter, the inability of the parties to reach agreement after nearly half a year of discussion and mediation, and, perhaps most importantly, the looming State Water Resources Control Board deadline, all increased the uncertainty surrounding the project. As such, the Proposed Decision correctly finds that there is "too much uncertainty associated with the Regional Desalination Project to force Cal-Am to pursue that project further."¹²

Finally, MCWD once again appears to be attempting to use the Commission process to further its litigation position. Indeed, despite its civil claim against MCWRA and the County,¹³ in its opening comments MCWD still tries to pursue its claims for relief and recovery

⁹ In letters dated May 8, 2012 and May 22, 2012 to Dan Burns, MCWD's president, and Mark Fogelman, counsel for MCWD, respectively, the Company cautioned MCWD that it has a legal obligation to mitigate any damages it may incur and that MCWD's continuing efforts to litigate the issues surrounding the Regional Desalination Project, including its writ petition in the Sixth District Court of Appeal and related activities are inconsistent with its obligation to mitigate any damages that may incur.

¹⁰ MCWD Comments, p. 2.

¹¹ As explained in its compliance filing with the Commission, California American Water terminated the Water Purchase Agreement and related agreements on September 28, 2011. (*California-American Water Company Compliance Filing*, filed March 1, 2012 ("March 1, 2012 CAW Compliance Filing"), pp. 2-5.).

¹² Proposed Decision, p. 19. California American Water explained in multiple pleadings the developments which made the project no longer viable. *See e.g.*, *California-American Water Company Compliance Filing - Mediation Update*, filed January 18, 2012, pp. 1-2; March 1, 2012 CAW Compliance Filing, pp. 2-5; *Status Report of California-American Water Company*, filed March 1, 2012, pp. 2-4; *California-American Water Company Response to the Separate Status Report of Marina Coast Water District*, filed March 15, 2012, pp. 2-10.

¹³ On June 28, 2012, MCWD served a claim on MCWRA and the County of Monterey alleging that both entities failed to honor commitments made pursuant to the agreements related to the Regional Desalination Project.

of Regional Desalination Project-related costs at the Commission.¹⁴ The Commission should disregard MCWD’s inappropriate attempts to pursue relief at the Commission and reject MCWD’s proposed changes to Proposed Decision’s Findings of Fact and Conclusions of Law.

V. CONCLUSION

California American Water greatly appreciates the thoughtful effort undertaken to craft the Proposed Decision, which accurately concludes that the Regional Desalination Project, which the Commission approved in D.10-12-016, “has no reasonable prospect of achieving its goals” and that “there is simply too much uncertainty associated with the Regional Desalination Project to force Cal-Am to pursue that project further.”¹⁵ With the minor modifications discussed above and in its opening comments, California American Water supports the Proposed Decision as an effective and efficient step in transitioning from the now-defunct Regional Desalination Project to California American Water’s proposed Monterey Peninsula Water Supply Project.

July 9, 2012

Respectfully submitted,

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¹⁴ MCWD Comments, pp 4-5.

¹⁵ Proposed Decision, p. 19

Appendix A

Proposed New Conclusion of Law

8. California American Water may continue to track separately Regional Desalination Project-related costs, other than California American Water-only facility costs, in the existing memorandum account for future recovery.

Proposed Changes to Ordering Paragraph

2. California-American Water Company shall file a new application to the extent that there are disputed costs related to the Reimbursement Agreement or the Line of Credit under the Water Purchase Agreement. However, the Division of Water and Audits should continue processing all currently unprocessed Advice Letters dealing with rate base offsets for California-American Water Company only facilities discussed in Decision 10-12-016. California-American Water Company should not claim any costs incurred **for the California American Water-only facilities** after January 17 **18**, 2012, the date California-American Water Company **publicly** announced its withdrawal from the Regional Desalination Project, **in connection with the authorization in Decision 10-12-016. California American Water may continue to track separately other Regional Desalination Project-related costs in the existing memorandum account for future recovery.**