

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



FILED

07-06-12
04:59 PM

In the Matter of the Application of California-American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.

A.12-04-019
(Filed April 23, 2012)

**MARINA COAST WATER DISTRICT'S
MOTION TO MODIFY AND CLARIFY ASSIGNED
COMMISSIONER'S SCOPING MEMO AND RULING**

MARK FOGELMAN
RUTH STONER MUZZIN
FRIEDMAN & SPRINGWATER LLP
33 New Montgomery Street, Suite 290
San Francisco, CA 94105
Telephone: (415) 834-3800
Facsimile: (415) 834-1044
Email: mfogelman@friedmanspring.com
Email: rmuzzin@friedmanspring.com

Attorneys for Marina Coast Water District

Date: July 6, 2012

In accordance with Article 11 of the Commission’s Rules of Practice and Procedure and the provisions of the Assigned Commissioner’s Scoping Memo and Ruling (the “Scoping Memo”) issued June 28, 2012, authorizing the Assigned Administrative Law Judge to make revisions and provide direction concerning scoping and scheduling matters, Marina Coast Water District (“MCWD”) respectfully moves the Assigned Administrative Law Judge for a ruling modifying and clarifying the Scoping Memo as herein requested with respect to each of the issues identified below.

I. The Question Presented by the Application Must Be Clarified.

The Scoping Memo states the question to be addressed in this proceeding as follows: “Is the proposed Monterey Peninsula Water Supply Project *a reasonable and prudent means of securing replacement water for the Monterey District of Cal-Am*, and would the granting of the application be in the public interest?” (Scoping Memo, p. 2; emphasis added.) That is not a legally correct statement of the issue before the Commission. The Assigned Administrative Law Judge should modify and clarify the Scoping Memo to state the correct legal issue before the Commission.

In a certificate of public convenience and necessity (“CPCN”) proceeding under Public Utilities Code section 1001, the question before the Commission is not whether the proposed project is “*a reasonable and prudent means of securing replacement water for the Monterey District.*” (Scoping Memo, p. 2; emphasis added). In such a proceeding, the question presented is whether, considering all relevant factors, “the present or future public convenience and necessity require or will require” the construction of the proposed project. (*See Pub. Util. Code, §1001.*) In sum, the Commission may not grant the application unless it determines that the

proposed project is *the single project* that best serves the public interest, *whether or not it is a reasonable and prudent means of securing replacement water for the Monterey District.*

The Scoping Memo should correctly state the question presented.

II. All Feasible, Mutually-Exclusive Alternatives to the Monterey Peninsula Water Supply Project Must Be Addressed in Testimony, Cross-Examined, Considered at the Hearing, and Weighed in the Commission’s Public Convenience and Necessity Determination.

Under *Ashbacker Radio Corp. v. FCC* (1945) 326 U.S. 327, all feasible, mutually-exclusive alternatives to the Monterey Peninsula Water Supply Project must be addressed in testimony, cross-examined, considered at the comparative evidentiary hearing, and weighed in the Commission’s public convenience and necessity determination. That is because where only one project, whatever its components, can be approved to serve the Monterey District, the Commission must consider all competing projects to determine which one best serves the public interest.¹ The failure to conduct the comparative hearing required by *Ashbacker* is fundamentally unfair to competing applicants whose proposed projects do not receive Commission approval and it also violates the Commission’s responsibility to determine which of

¹ Since the Commission is being asked by Cal-Am to approve or re-approve the construction of its \$106 million delivery pipeline to the Monterey District, and to approve the utilization of that delivery pipeline by Cal-Am from particular water sources, it must consider each discrete water source that is proposed to feed into that pipeline (and with which Cal-Am would presumably contract for the provision of water), coupled with the pipeline itself, as a separate competing project. It is well-established that, for CEQA purposes, a project consists of “the whole of an action, which has a potential for resulting in a physical change in the environment.” (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 fn. 8. See also *Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 394-396.) In order to avoid impermissible “piecemealing,” environmental review must encompass every potential significant aspect of the project’s anticipated environmental impacts. (Pub. Resources Code § 21100.) The same would be true in determining whether the construction of a particular project “is or will be required by the present or future public convenience and necessity” under Public Utilities Code section 1001.

the competing projects is or will be required by the present or future public convenience and necessity as provided in Public Utilities Code section 1001.

For purposes of *Ashbacker* analysis, mutual exclusivity means “economic” mutual exclusivity, not legal mutual exclusivity. (See *Western Radio Services Co., Inc. v. Glickman* (9th Cir. 1997) 123 F.3d 1189, 1193, citing *Public Utilities Com. of California v. FERC* (D.C. Cir. 1990) 900 F.2d 269, 277 fn. 6 (“It is economic not legal mutual exclusivity that triggers *Ashbacker*.”); see also *Applications of Air California and Pac. Southwest Airlines* (1971 Cal. P.U.C.) 71 CPUC 798, 1971 WL 26284, *Order Continuing Hearing; Consolidating Applications; and Setting Prehearing Conference* at *2-3, citing *Ashbacker*.) Here, according to Cal-Am, the water supply required to serve the Monterey District demand without continuing Cal-Am’s illegal withdrawals from the Carmel River is 8800 AFY or approximately 9 million gallons per day. Each competing alternative for serving the Monterey District and meeting that demand is clearly mutually exclusive from the other alternatives in an economic sense since the approval of projects that provide more than 8800 AFY or approximately 9 million gallons per day to Cal-Am’s service area is not economically justified, is not economically needed, and cannot be in the public interest.

Out of fairness to the interests of proponents of competing projects to serve the Monterey District, and to satisfy its statutory responsibility for determining which competing alternative best serves the public interest, the Commission must conduct a comparative evidentiary hearing under *Ashbacker*. The Scoping Memo should be revised to so indicate.

III. The Environmental Impacts of the Monterey Peninsula Water Supply Project Must Be Addressed in Testimony, Cross-Examined, Considered at the Hearing, and Weighed in the Commission’s Public Convenience and Necessity Determination.

While MCWD understands that the Commission intends to conduct this proceeding on two separate tracks – a California Environmental Quality Act (“CEQA”) compliance track and a CPCN track – the Commission must consider the environmental impacts of the project in making its CPCN determination. That would be true even if CEQA did not exist (and thus no CEQA compliance track were required) because the environmental impacts of the project are important factors that must be considered in determining whether the project is in the public interest. This means that the parties are entitled to present evidence of environmental impacts and present testimony and cross-examine witnesses on environmental issues at the CPCN hearing.

It is well established that a CPCN determination must be made on the basis of all relevant factors (*see Northern California Power Agency v. Public Utilities Com.* (1971) 5 Cal.3d 370), and adverse environmental impacts are clearly relevant factors to be considered at the hearing in determining whether the public convenience and necessity requires the construction of the project. Indeed, in the *Northern California Power Agency* case, the Commission itself represented to the California Supreme Court that it was required to consider environmental factors at a CPCN hearing. As stated by the Supreme Court:

Indeed, the answer of the Commission in this case . . . states: “When a hearing is requested under Section 1005 [of the Public Utilities Code], as in this case, the Commission will notice and hold a hearing, and may do so on its own motion, so that it may be apprised of any relevant factors bearing on the issue of public convenience and necessity. [Par.] Such factors include the effect on the environment”

(*Northern California Power Agency, supra*, 5 Cal.3d at p. 378; *see also Atlantic Refining Co. v. Public Service Com.* (1959) 360 U.S. 378, 391 (in determining “public convenience and

necessity,” the decision-making agency is required to “evaluate all factors bearing on the public interest.”.)

In addition, because testimony and evidence concerning the environmental impacts of the project must be considered at the CPCN hearing, the schedule for the proceeding reflected in the Scoping Memo should be changed to assure that such testimony and evidence will not be required to be prepared and served, and no evidentiary hearing will be held, until after the Final Environmental Impact Report or any Supplemental Environmental Impact Report required to be prepared by the Commission under CEQA is finalized. Only after environmental review is completed, and the Commission’s Final Environmental Impact Report (or Supplemental Environmental Impact Report, as appropriate) is considered, will Cal-Am and the Parties be able to fully prepare their testimony, including testimony addressing the environmental impacts of the project and how those impacts will affect the public interest.

The Scoping Memo should be modified to so indicate.

IV. The Schedule Should Not Allow Interim Rate Relief or Test Well Requests Until After the Commission Determines that the Monterey Peninsula Water Supply Project is Legally Feasible and the Briefing on Legal Feasibility Should Be Broadened to Permit Briefing of all Legal Issues Going to the Legal Feasibility of the Project.

MCWD believes, for multiple reasons stated in its prior pleadings, that the Monterey Peninsula Water Supply Project is not legally feasible and in the final analysis has no chance of being constructed.² Indeed, Cal-Am’s President testified at the hearing in A.04-09-019 that the Regional Desalination Project approved in D.10-12-016 was the only feasible alternative for

² A.04-09-019, March 1, 2012 Separate Status Report of MCWD, pp. 15-19; MCWD’s March 15, 2012 Consolidated Response, pp. 3-6; *In the Matter of the Application of California-American Water Company for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates*, A.12-04-019, MCWD’s May 25, 2012 Protest, pp. 2-6; *In the Matter of the Application of California-American Water Company, etc.*, A.12-04-019, MCWD’s June 4, 2012 Prehearing Conference Statement, pp. 6-9, 13-25.

meeting the Cease-and-Desist Order deadline. (Rebuttal Testimony of Robert G. MacLean, May 27, 2010, p. 7.)

In the Assigned Administrative Law Judge's Ruling (June 1, 2012), ALJ Weatherford requested legal briefing on the following "selected" issues which are relevant to determining the legal feasibility of Cal-Am's proposed project: 1) "Is the County Ordinance Governing Desalination and Limiting Desal Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?" and 2) "Does or Will Cal-Am, or Another Entity Participating in the Separate Groundwater Replenishment and Aquifer Storage Projects of Cal-Am's Proposal for Replacement Water, Possess Adequate Rights to the Slant Well Intake Water, Groundwater Replenishment Water and to the Outfall for purposes of Project Feasibility?" (June 1, 2012 Ruling, pp. 3-4.) In the Scoping Memo, the schedule set forth does not provide for the resolution of the question of legal feasibility of the project prior to the consideration of interim rate relief or whether Cal-Am should be authorized to construct test wells. (Scoping Memo, p. 3.) The question of the legal feasibility of the project should be determined prior to any consideration of interim rate relief or test well authorization. The Commission should not authorize the expenditure of ratepayer funds on a project that is legally infeasible. The schedule for this proceeding contained in the Scoping Memo should be modified accordingly.

The briefing of "selected" issues should also be broadened to permit the Parties to raise and address other issues that go to the legal feasibility of the proposed project. The briefing should not be limited to a few "selected" issues when other issues that would render the project infeasible would provide independent grounds to dismiss the application. Accordingly, the Parties should be permitted in their opening briefs to address the topic of "Other Issues that

Could Render the Proposed Project Infeasible.” The Scoping Memo should be modified to broaden the briefing of “selected” issues accordingly.

V. Conclusion

For the reasons above stated, MCWD respectfully requests that the Assigned Administrative Law Judge issue a ruling modifying and clarifying the Scoping Memo as herein requested.

DATED: July 6, 2012

Respectfully submitted,

FRIEDMAN & SPRINGWATER LLP

By: /s/ Mark Fogelman

Mark Fogelman

Ruth Stoner Muzzin

Attorneys for

MARINA COAST WATER DISTRICT