BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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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 PROTEST OF A.12-04-019

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

Attorneys for Marina Coast Water District

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In accordance with Rule 2.6 of the Commission's Rules of Practice and Procedure, Marina Coast Water District ("MCWD") respectfully submits its Protest of A.12-04-019, *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* (the "Application").

I. Summary of Position and Grounds for Protest

MCWD protests the Application in its entirety, chiefly on the grounds that the Application is contrary to the Commission's policy as set forth in D.10-12-016, and the Application fails to establish a basis for a change in the Commission's policy. On April 30, 2012, MCWD filed its Motion to Dismiss the pending Application on those grounds, concurrently with a Motion to Intervene in A.12-04-09. MCWD addresses the May 11, 2012 Motion of the California-American Water Company ("Cal-Am") to Deny MCWD Party Status in a separately-filed response to that motion. The Application appears to assume that the Commission has already agreed to change its policy at Cal-Am's behest, but it does not provide any facts to demonstrate that the project proposed in the Application would actually serve its ratepayers or the public interest better than the Commission-approved Regional Desalination Project ("RDP") or that a change in Commission policy is otherwise warranted.

II. Procedural Issues: Category, Hearing, Issues and Schedule

MCWD does not object to categorizing the Application as a Ratemaking Proceeding. However, MCWD strongly urges that the Commission first decide the threshold question of the Commission's policy as raised in MCWD's Motion to Dismiss, before it commences routine consideration of the Application on what is likely to be a contentious and resource-draining eighteen-month or longer ratemaking proceeding schedule.

MCWD does not believe a hearing is needed in order to decide the threshold issue of whether the Application justifies a change in the Commission's recently-stated policy that the RDP is the project that can best, most economically and most expeditiously address the Monterey Peninsula's water supply crisis in the public interest. (D.10-12-016, pp. 6, 33-34, 203-05 at Conclusion of Law 65 and ordering ¶¶ 1, 7, 9-10.)

MCWD believes that once the Commission has determined whether or not it will change its existing policy, the schedule and need for hearing on other issues related to Cal-Am's Application to build a variation of the North Marina project alternative may then properly be

considered. MCWD believes it is highly unlikely that those issues, including potential factual disputes outlined more specifically below, can successfully be resolved within the estimated nine months remaining that Cal-Am suggests. In the interest of conserving party and Commission resources, as well as for the benefit of Cal-Am's ratepayers and the community, MCWD respectfully urges the Commission to first address the question of whether or not the Application justifies a change in the Commission's policy.

III. The Application Does Not Justify a Change in the Commission's Policy

An application that is contrary to the Commission's existing policy is "fruitless" and may be dismissed for that reason. (*Re Pacific Gas and Electric Company* (Cal. P.U.C. 2008) 2008 WL 4948590 ("D.08-11-004"), *Decision Granting Motion to Dismiss of Western Power Trading Forum* at *3.) Where the Commission finds that "resources will be wasted if this CPCN application" is heard, it may immediately dismiss the application. (*Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services Through the Use of Certain Existing Facilities and to Construct Additional Interconnection Facilities* (Cal. P.U.C. 1999) 199 WL 1957792 ("D.99-11-023"), *Opinion Dismissing Without Prejudice Western Gas Resources-California, Inc.'s Application for a CPCN* at *15, Finding of Fact 5.)

A. The Application is Contrary to Commission Policy

Here, Cal-Am requests a CPCN for a variation of the North Marina alternative analyzed in the Commission's Environmental Impact Report ("EIR"), a project that the Commission already reviewed and rejected. (*See* D.10-12-016, p. 174, Finding of Fact 104.) Consequently, the Application is directly contrary to the Commission's operative policy, as painstakingly developed over a period of twelve years, in response to A.B. 1182. (Stats. 1998, ch. 797 (Keeley).) The factual and legal background of the threshold issue of Commission policy is addressed in detail in MCWD's pending Motion to Dismiss. (Motion to Dismiss, pp. 4-9, 12-20.)

But Cal-Am does not explain why its North Marina alternative is now feasible and superior to the RDP. It merely complains, without any meaningful factual support, that the RDP is "no longer viable." (Application, p. 4.) Cal-Am's assertion appears to be based primarily on the Collins conflict of interest allegations, a matter that the Commission can readily resolve as MCWD outlined in its pending Motion to Dismiss (pp. 15-16), as well as in its March 1 and

March 15, 2012 submissions in A.04-09-019. (*See* MCWD's March 1, 2012 Separate Status Report, pp. 13-15 and MCWD's March 15, 2012 Consolidated Response, pp. 6-12, both filed in A.04-09-019.) This assertion is exactly the type of conclusion on an ultimate fact that the Commission does not take as true when deciding whether or not to dismiss an application. (D.99-11-023 at *3; D.08-11-004 at *2.) Moreover, Cal-Am's modified North Marina proposal presents multiple obstacles as to which the parties would have to present briefing and testimony and that the Commission would have to hear and resolve, if it decided to consider the Application.

B. The Application Raises Numerous Highly Contentious Issues

In addition to the threshold issue of policy, MCWD will address multiple issues should the Commission entertain the Application, including but not limited to those outlined below. MCWD will also respond to the matters raised by other participants.

The Application is mutually exclusive with the RDP (*Ashbacker Radio Corp. v. Federal Communications Comm.* (1946) 326 U.S. 327), and thus it is contrary to Commission policy as articulated in D.10-12-016. (D.10-12-016, pp. 160-168, Findings of Fact 23-70.) The Application relies on the Commission's certified EIR, but the Monterey County Superior Court recently purported to invalidate the EIR and the matter is currently before the Sixth Appellate District on MCWD's Petition for Writ of Mandate. If the matter is not resolved in MCWD's favor, and the Superior Court's annulment of the Commission's finding that its EIR was adequate is allowed to stand, the EIR cannot be relied upon. (*See* Pub. Resources Code §21167.3; *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373.)

The Application proposes to proceed in reliance on the existing EIR and preparation of a Supplemental EIR. (Application, pp. 22-23) However, the Application does not explain how that Supplemental EIR will evaluate significant changes from the RDP (*see* Application, Appendix H, pp. 2-3, indicating multiple modifications from the previous project description), which remains the only Commission-approved project, or explain why North Marina is now feasible and preferable to the RDP as the California Environmental Quality Act ("CEQA") requires. (Pub. Resources Code § 21166.)

The Application proposes a variation of the North Marina alternative, which the Commission already found infeasible, in part due to potential legal challenges. The related legal

challenges to the new Application would likely involve water rights, Agency Act compliance, and prior contractual commitments and rights, as well compliance with the Monterey County ordinance that prohibits private ownership of a desalination plant.

The Application discloses, in agreement with the existing EIR, that a small percentage of the source water for the proposed project would be Salinas Valley Groundwater Basin ("SVGB") water. (Application, Appendix H, pp. 5-10.) The Application speculates that the project will need to return approximately 780 acre-feet per year ("AFY") of product water to the SVGB in order to comply with the Agency Act. (Application, Appendix H, p. 10.) But the Application does not address the problem of how Cal-Am will obtain sufficient groundwater rights to extract the SVGB groundwater component of the source water in the first place. Pursuant to a 1996 Annexation Agreement among the Monterey County Water Resources Agency ("MCWRA"), MCWD and others, the property that Cal-Am may utilize for its source wells is entitled to a maximum of 500 AFY (s*ee* 1996 Annexation Agreement, p. 17 at §7.2, received in evidence in A.04-09-019, available at http://www.friedumspring.com/cpucdocs.htm, Exhibits LWL-22A, LWL-22B and LWL-22C), all of which may be used only within the SVGB (*id.* at §7.1). The Application does not explain how Cal-Am will make up the difference and overcome the export prohibition. In addition, if Cal-Am is proposing to acquire the property, the Application could easily be subject to increased costs and time for contested eminent domain proceedings. Similar challenges could arise in Cal-Am's acquisition of property for a desalination plant site.

Another challenge related to source wells is the proposed re-routing of pipelines from the routing analyzed in the RDP proposal. The Application appears to re-route the source water pipelines through sensitive beach habitat, which may require modification, extended and more complex environmental review or costly mitigation of impacts. (Application, Appendix H, Figs. 1-9.) Each substantial change in the North Marina "variation" from the RDP as reviewed in the existing EIR and approved by the Commission in D.10-12-016 further complicates consideration of the Application.

The Application proposes to use the Monterey Regional Water Pollution Control Agency's ("MRWPCA's") excess outfall capacity for brine discharge from Cal-Am's desalination plant. However, MCWD has a senior right to access MRWPCA outfall capacity for the next thirty-four (34) years, pursuant to its February 12, 2010 Outfall Agreement with MRWPCA. The Supplemental EIR for the Application would need to evaluate whether Cal-

Am's outfall access would be sufficient if MCWD were to require its full capacity for its own non-RDP and non-MPWSP uses.

If MRWPCA meets Cal-Am's benchmarks, the Application contemplates incorporation of a recycled or so-called "Groundwater Replenishment" ("GWR") element. However, the Application does not mention that the project's access to MRWPCA wastewater would be junior to the wastewater allocation already dedicated to the Castroville Seawater Intrusion Project ("CSIP") and to MCWD under the 1996 Annexation Agreement (*see* p. 8 at §5.7) as well as MCWD's 1989 Annexation Agreement with MRWPCA (also received in evidence in A.04-09-019, available at http://www.friedumspring.com/documents/LWL25.PDF; *see* p. 5 at §12) and a 2009 Memorandum of Understanding among MCWD, MCWRA and MRWPCA (draft received in A.04-09-019, available at http://www.friedumspring.com/documents/LWL13.PDF). More importantly, if the GWR element is indeed proposed to be included in the project, concurrent comprehensive environmental review would likely be required in order to avoid impermissibly "piecemealing" the review process for the project as a whole. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370. *See also Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 394-396 (environmental review must include reasonably foreseeable significant future action that is likely to "change the scope or nature of the initial project or its environmental effects").)

The Application asserts that Cal-Am will have access to low-cost Clean Water Act State Revolving Fund ("SRF") financing for non-point source mitigation projects. However, SRF financing for non-point source mitigation is not available to a private entity in California. (*See* SWRCB SRF page, http://www.waterboards.ca.gov/water_issues/programs/grants_loans/srf/. *See also* MCWD's Motion to Dismiss, pp. 13-14, fn. 85.) The Application does not explain how, or if, a public agency will serve as a financing conduit in relation to an exclusively Cal-Am-owned desalination plant in order to qualify for low-interest public agency SRF financing.

Finally, as MCWD set forth in its recent Separate Status Report in A.04-09-019, the specific facts drawn from Cal-Am's own data demonstrate that the RDP and only the RDP is still capable of meeting the CDO deadline and the project objectives that are identified in the Commission's EIR and articulated in D.10-12-016. (MCWD's Separate Status Report, pp. 15-16, Appendices A (timelines), B (cost analysis) thereto, filed March 1, 2012 in A.04-09-019.) The Application relies on the same overly optimistic timeline and minimized controversy that

Cal-Am presented to the Commission in A.04-09-019. It does nothing to change the fact that Cal-Am's proposed North Marina variation cannot be built on time or at a cost that is not substantially greater than the cost of the RDP. (*See ibid.,* Appendix A (timelines) and Appendix B (cost analysis) to MCWD's March 1, 2012 Separate Status Report, *copies of which are also attached hereto as* Appendices A and B.)

IV. Effect of the Application on MCWD

As a partner with Cal-Am and MCWRA in the RDP approved by the Commission in D.10-12-016, MCWD's interests will be severely impacted by the Commission's decision as to whether or not it wishes to affirm its policy and dismiss the Application, or alter its policy by entertaining the Application, because the Application proposes a project that does not involve MCWD and is mutually exclusive to the RDP. In addition, MCWD's interest in obtaining the 1,700 AFY of desalination product water it would receive under the RDP is jeopardized.

MCWD is a municipal water purveyor in Monterey County. MCWD's ability to serve its own ratepayers rests on its existing groundwater rights in the SVGB. The Application proposes an alternate desalination project that would involve the extraction of some amount of SVGB water by a party that possesses no water rights in the SVGB. The proposed project's ability to satisfy the requirement of the Monterey County Water Resources Agency Act (the "Agency Act"), and of section 7.1 of the 1996 Annexation Agreement, that all extracted SVGB water remain in the basin is unclear. Thus, MCWD's own rights in the basin may be adversely affected by the Application.

MCWD has an interest in the provisions of the 1996 Annexation Agreement, and in providing water service to the Lonestar/CEMEX property that Cal-Am apparently proposes to use for source wells in its North Marina variation. MCWD also has a senior interest in MRWPCA's outfall capacity through its pre-existing agreement with MRWPCA and a senior interest in wastewater under its Memorandum of Understanding with MCWRA and MRWPCA.

As a public agency and a purveyor of water in Monterey County, MCWD has an interest in the continued force and effect of the ordinance that prohibits private ownership of a desalination plant in Monterey County.

Finally, without excluding other interests that MCWD may raise in its Prehearing Conference Statement and otherwise, MCWD's own constituents have substantial economic and employment interests in a secure Peninsula water supply, due to the high proportion of Marina

residents that are employed in Monterey Peninsula businesses, including in the hospitality industry. Failure to achieve timely CDO compliance would disproportionately affect Marina and MCWD's own ratepayers' continued employment prospects, and the economic wellbeing of the community as a whole, as the Commission found in D.10-12-016. (D.10-12-016, CEQA Findings, p. 46.)

Notwithstanding MCWD's pending Motion to Dismiss the Application, if the Commission should decide to change its policy and consider the Application, the Application presents the potential for multiple significant effects on MCWD and its ongoing ability to serve its own constituents, as outlined above.

V. The Threshold Question of the Commission's Policy Must Be Resolved Promptly

This is not an ordinary Application.

If the Commission does not expeditiously resolve the question of whether or not the Application justifies a change in the Commission's policy, the Commission will implicitly endorse the Application by deciding to entertain it. It would also implicitly endorse Cal-Am's actions of the past year to frustrate implementation of the RDP, which MCWD continues to believe have been in direct violation of Commission orders, the Public Utilities Code and the project agreements approved by the Commission. That approach would send a chilling message to public agencies across California that may be considering future participation in project partnerships with regulated utilities.

MCWD would be directly hampered by commencement of a drawn-out ratemaking application process without a prompt resolution of its Motion to Dismiss, because it is a small public agency without access to ratepayer funding like Cal-Am. MCWD was drawn into Commission proceedings and the RDP proposal with the impression that it would be treated fairly. It cannot afford to participate in another years-long application process while it is waiting to find out whether or not the Commission still supports the RDP as the best policy in the public interest to solve the Monterey Peninsula's water supply crisis.

Proceeding to consider the merits of the Application without first considering the Motion to Dismiss will constitute a *de facto* denial of the Motion to Dismiss and an implicit endorsement of Cal-Am's position. Therefore, if the Commission decides to consider the Application rather than immediately addressing the Motion to Dismiss, in spite of all the potentially time-consuming and expensive obstacles presented, MCWD respectfully requests that the

Commission forthwith declare a Project Cessation for the RDP within the meaning of Article 7.4 of the Water Purchase Agreement. That approach would permit MCWD, MCWRA and Cal-Am to resolve their remaining RDP issues in proceeding A.04-09-019, in the most cost-effective and expeditious manner possible, without simultaneously impeding the Commission's progress in this proceeding.

V. Conclusion

For all of the reasons stated, and chiefly on the grounds of conflict with existing Commission policy and an absence of any clearly-articulated justification for a change in Commission policy, MCWD urges the Commission to (1) grant MCWD party status, (2) promptly consider and decide MCWD's Motion to Dismiss and (3) either grant the Motion to Dismiss or declare a Project Cessation of the RDP.

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Respectfully submitted,

FRIEDMAN DUMAS & SPRINGWATER LLP

By: *_/s/ Mark Fogelman*
Mark Fogelman
Ruth Stoner Muzzin
Attorneys for
MARINA COAST WATER DISTRICT