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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the 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.

Application 04-09-019
(Filed September 20, 2004;
amended July 14, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING IN PART JOINT MOTION TO STRIKE PORTIONS OF
TESTIMONY OF MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

As set forth in the Amended Scoping Memo Ruling for Phase 2 of this proceeding,¹ on April 7, 2010, California-American Water Company (Cal-Am), Marina Coast Water District, (MCWD), Monterey County Water Resources Agency (MCWRA), Monterey Regional Water Pollution Control Agency, Surfrider Foundation, and Public Trust Advocates (Settling Parties) jointly filed a Motion to Approve Settlement Agreement. The proposed Settlement Agreement includes two implementing agreements, a proposed Water Purchase Agreement and an Outfall Agreement. On April 30, the Division of Ratepayer Advocates (DRA) and Monterey Peninsula Water Management District (MPWMD) filed and served comments opposing the Settlement. Both DRA and MPWMD also served

¹ Phase 2 Joint Amended Scoping Memo Ruling of Assigned Commissioner and Administrative Law Judge issued April 13, 2010.

testimony addressing various provisions of the proposed settlement and implementing agreements.

On May 21, 2010, Cal-Am, MCWD, and MCWRA (Joint Parties) filed and served a joint motion to strike portions of the testimony submitted by MPWMD. MPWMD timely filed and served its response on May 27, 2010, and, with my permission, the Joint Parties timely filed and served their reply on June 2, 2010.

The Joint Parties contend that MPWMD's testimony is flawed in three respects. First, Joint Parties maintain that certain aspects of the testimony violate the confidentiality requirements for discussions and negotiations in settlements and Alternative Dispute Resolution (ADR) forums. Rule 12.6 explicitly states, in part:

No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.

Joint Parties therefore move to strike the response to Question 22 (addressing whether or not to include MPWMD on the proposed advisory committee), because it reveals such negotiations. MPWMD counters that the issue was made public when the boards of directors of Cal-Am and MCWD and the Monterey County Board of Supervisors voted on the proposed Settlement Agreement and Implementing Agreements, and that the Water Purchase Agreement considered by those entities included language that named MPWMD as a member of the advisory committee, albeit one with limited rights.

Second, Joint Parties state that the testimony addresses legal issues, which should not be considered in testimony and that the sponsoring witnesses do not have legal training to opine on these issues. They move to strike Question and Answer 13, 14, and 15, which address the Brown Act, the Public Record Act, and the California Political Reform Act. MPWMD states that such testimony is merely bolstering the comments offered on the proposed Settlement Agreement and that the witnesses are fully conversant with these statutes in the scope of their duties.

Finally, Joint Parties contend that the testimony includes issues that are outside the scope of this proceeding, because MPWMD improperly introduces evidence of a complaint filed by the Ag Land Trust in Monterey Superior Court (Exhibit AB-4). As the Joint Parties see it, this exhibit muddies the record because the complaint considers water rights and the proposed Regional Project and this issue has been excluded from the proceeding in the Scoping Memo Ruling issued on March 26, 2009. MPWMD explains that the attached exhibit is submitted to identify the existence of the complaint and does not address its substance.

I agree that the confidential nature of settlement discussions and negotiations must be maintained. The Commission encourages Alternative Dispute Resolution and expects that one of the hallmarks of this process is good-faith confidential discussions. As the Commission stated in Resolution ALJ-185:

Confidentiality--For many ADR processes to be successful, the participating parties and the neutral must enter into confidentiality agreements. These agreements usually prevent the parties from publicly disclosing confidential information exchanged during the discussions. The agreements also prevent the neutral from communicating confidential information, the substance of the discussions, or the positions of any of the participating parties to

anyone including the decisionmakers. Confidentiality is always critical in mediation and [early neutral evaluation] ENE; but even in public workshops, confidentiality agreements may be required to enable participants to participate openly and creatively. Our Rule 51.9 of the Commission's Rules of Practice and Procedure (Rules) already establishes the confidentiality of discussions in all of these contexts, and, in accordance with law, we will honor and enforce these agreements. When confidential ADR processes are used, we believe the neutral's communications with the decisionmaker should be limited to timing and scheduling, a generalized assessment of whether settlement is likely, and other administrative and ministerial matters.²

However, since public documents do refer to MPWMD being a member of the advisory committee, I will not strike the entirety of Question and Answer 22. Instead, I strike the testimony as follows:

Page 15, A.22, beginning with the word "Inclusion" through the words "In fact;"

Page 16, beginning with the words "In the discussions" through the end of A.22 on page 17.

I also agree that the testimony offered in Questions and Answers 13, 14, and 15 address legal issues, which are suitable for briefing, but not for testimony. This testimony does not address disputed material issues of fact. These Questions and Answers are stricken.

Finally, I agree that there is no reason to include the Ag Land Trust complaint in the record of this proceeding. Issues related to water rights are outside the scope of this proceeding, other than "[t]o the extent that information on water rights and jurisdiction can inform our understanding of the proposed

² Resolution ALJ-185, issued August 25, 2005, at 6. Rule 51.9 is now codified as

Footnote continued on next page

Project and alternative, and how ownership and financing might be implemented, . . . ” as stated in the Scoping Memo Ruling issued on March 26, 2009.³ Parties can –and have – referred to the existence of this Superior Court complaint, but the initiating papers need not be a part of this record. Question and Answer 30 and Exhibit AB-4 are stricken.

IT IS SO RULED.

Dated June 3, 2010, at San Francisco, California.

/s/ ANGELA K. MINKIN
Angela K. Minkin
Administrative Law Judge

Rule 12.6.

³ Phase 2 Joint Scoping Memo Ruling at 8.

