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

**FILED**  
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In the Matter of the Application of  
California-American Water  
Company (U 210 W) for an Order  
Authorizing and Imposing a  
Moratorium on Certain New or  
Expanded Water Service  
Connections in its Monterey District.

Application No. A.10-05-020  
(filed May 24, 2010)

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**REPLY BRIEF OF STANLEY PLETZ**

John S. Bridges  
David C. Sweigert  
FENTON & KELLER  
A Professional Corporation  
2801 Monterey Salinas Highway  
P.O. Box 791  
Monterey, CA 93942  
Telephone: (831) 373-1241  
Facsimile: (831) 373-7219

Date: October 22, 2010

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9 Stan Pletz has made a substantial investment in planning and the regulatory process to  
10 develop a home on his residential lot located in Pacific Grove pursuant to entitlements issued by  
11 the City of Pacific Grove ("City") in 2001 and a water permit issued by the Monterey Peninsula  
12 Water Management District ("MPWMD") in 2008. The water permit was based on a small  
13 allocation (0.264 acre feet annually) from the City's jurisdictional allocation pursuant to  
14 MPWMD's rules and regulations. In pursuing development of his home, Mr. Pletz reasonably  
15 relied on the stringent rules and regulations of the MPWMD allowing use of water for his home.  
16 Unfortunately, his ability to develop his new home has been hampered and delayed by regulatory  
17 requirements applicable to Mr. Pletz's property based on the presence of 52 protected plants on  
18 his property. Mr. Pletz has diligently attempted to navigate the legal gauntlet to develop his  
19 property for over 8 years. Now a new and potentially formidable obstacle in the form of a  
20 proposed moratorium has been laid in his path.

21 By his participation in this proceeding, Mr. Pletz asks the Commission to protect his right  
22 to water service pursuant to his water permit on the same terms and conditions as other property  
23 owners in the service area of California American Water Company ("Cal-Am") who have been  
24 and continue to be served with water pursuant to water permits. Unless carefully tailored, any  
25 moratorium imposed to comply with the requirements of Order WRO-2009-0060 ("CDO")  
26 issued by the State Water Resources Control Board ("SWRCB") has the potential to prevent uses  
27 pursuant to water permits, to prevent use of a small water allocation properly issued by the City  
28 and MPWMD, to undermine the land use jurisdiction of the City, and to result in unfair treatment

1 of and significant economic harm to Mr. Pletz and other similarly situated Cal-Am customers.

2 I. ISSUES

3 A. **The Commission does not exercise concurrent jurisdiction with the SWRCB,**  
4 **nor is the Commission being asked to “overrule” the CDO.**

5 Cal-Am cites *Orange County APUCD v. Public Utilities Commission* Orange County Air  
6 (1971) 4 Cal.3d 945 (“*Orange County APUCD*”) for its argument that “the Commission cannot  
7 overrule the SWRCB’s concurrent jurisdiction over the appropriation of water.” However,  
8 *Orange County APUCD* is neither on point nor persuasive. There the Commission exercised its  
9 jurisdiction to “overrule” the agency with concurrent jurisdiction. (*Id.* at 954.) Here, no  
10 concurrent jurisdiction exists. The SWRCB regulates appropriation of unappropriated waters of  
11 the state (Water Code §§ 1052, 1831, subd. (d)(1), §§ 1200, 1201, 1225-1259.4), while the  
12 Commission regulates the basis on which service to customers is provided. (Pub. Util. Code §§  
13 451, 701.) Thus jurisdiction of the Commission and SWRCB do not overlap.

14 Moreover, the Commission is not being asked here to overrule the SWRCB’s CDO.  
15 Rather, the Commission is being asked to exercise its powers to harmonize its action with the  
16 CDO. The California constitution confers broad authority on the Commission and its authority is  
17 liberally construed. (*San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th  
18 893, 914-915.) The Commission’s authority to regulate the terms under which Cal-Am provides  
19 service to its customers is undisputed. In so doing, it is well within the Commission’s broad  
20 constitutional and statutory authority to ensure that the basis on which any moratorium is applied  
21 is fair and reasonable to all Cal-Am customers in light of the SWRCB’s mandate. This authority  
22 and jurisdiction extends to resolving any ambiguities in the CDO in a manner consistent with the  
23 Commission’s exclusive jurisdiction over service to Cal-Am’s customers.

24 B. **The Commission should not undermine the public’s interest and due process**  
25 **considerations by seeking “requests for clarification” from the SWRCB.**

26 Cal-Am asks the Commission to “seek clarification” from the SWRCB regarding the  
27 interpretation of the CDO for purposes of exercising its authority with respect to this application.  
28 As discussed in more detail in Mr. Pletz’s Opening Brief, the important issues the Commission is

1 being asked to address in this proceeding cannot and must not be resolved by resorting to  
2 informal consultations between Commission and SWRCB staff members. Given the importance  
3 of these issues, a full public airing through formal evidentiary hearings is necessary to give the  
4 SWRCB the necessary factual and legal background to address these issues in more detail.<sup>1</sup>

5 The issues of the impact and effect of the CDO or any proposed moratorium on  
6 residential water credits, water permits, and other similar or related entitlements under the rules  
7 of the MPWMD was not fully aired in the context of the SWRCB's evidentiary hearings on the  
8 CDO. The SWRCB acknowledged this in its Order Denying Reconsideration of the CDO,  
9 SWRCB Order WR 2010-0001 ("ODR").<sup>2</sup> (See ODR, p. 3, fn. 3.) Instead, the SWRCB  
10 appropriately adopted the most general language in Condition 2 and left it to other agencies with  
11 actual jurisdiction over water service, such as the Commission and MPWMD, to fill in the  
12 details. Thus consistent with its "broad authority," the Commission can and should reasonably  
13 determine the scope of the moratorium and the particular types of connections which it would  
14 prohibit.

15 **C. Any moratorium should not be applied in a way that would interfere with**  
16 **water use pursuant to Mr. Pletz's 2008 water permit and any extension,**  
17 **renewal, or replacement thereof.**

18 It is clear that the exception in Condition 2 of the CDO is intended to "grandfather" in  
19 projects that had their major approvals on or before approval of the CDO on October 20, 2009.  
20 As discussed in footnote 2 of Mr. Pletz's Opening Brief, the parties to this proceeding agree that  
21 the language of the exception in Condition 2 should be interpreted to apply in every case where  
22 the property owner obtained a water permit from MPWMD on or before October 20, 2009, the  
23 date the SWRCB approved the CDO.<sup>3</sup> Consequently, the Commission should adopt this  
24 interpretation.

25 <sup>1</sup> The SWRCB recognizes that "the factual basis for any order in this proceeding must be based  
26 exclusively on evidence presented or officially noticed as part of the proceeding." (Order  
27 Denying Reconsideration of CDO at page 9, citing Gov. Code § 11425.50, subd. (c).) The  
28 record before the SWRCB lacks any factual basis by which the SWRCB or its staff could  
"clarify" the CDO's impact on water credits and other water entitlements.

<sup>2</sup> A copy of the ODR is attached to Mr. Pletz's brief as Exhibit "B."

<sup>3</sup> Footnote 2 to Mr. Pletz's Opening Brief inadvertently referenced "October 20, 2010." That  
reference should have been to "October 20, 2009."

1           Whether or not the Commission adopts this interpretation agreed to by the parties,  
2 fairness and justice dictate that any moratorium not be applied to interfere with Mr. Pletz's  
3 ability to implement water use on his property pursuant to the 2008 MPWMD water permit and  
4 any extension, renewal, or replacement thereof. Mr. Pletz obtained his approvals from the City  
5 in 2001 and relied on MPWMD's rules and regulations in obtaining his water permit. Through  
6 no fault of his own, completion of his project and implementation of water use pursuant to his  
7 2008 water permit has been delayed pending his compliance with the onerous legal requirements  
8 arising from the presence of protected plant species on his property. Moreover, his water permit  
9 could expire soon. Because MPWMD ordinances do not provide for renewal of an existing  
10 permit, Mr. Pletz may be required to apply for a new water permit, which would be issued after  
11 the October 20, 2009 cutoff date state in the CDO. It would be manifestly unfair to Mr. Pletz  
12 and similarly situated customers of Cal-Am to deny them water use based on the CDO. Thus  
13 any moratorium the Commission may approve should clarify that the moratorium does not apply  
14 to prohibit water uses pursuant to any water permit issued by MPWMD on or before October 20,  
15 2009, even where that permit has expired and a property owner is forced to apply for and receive  
16 a new MPWMD water permit.

17           **D. Any moratorium approved by the Commission should not prohibit any new**  
18           **connections or increases in water use unless such new connection or increases**  
19           **in water use results from a change in zoning or major change in land use.**

20           The SWRCB could have drafted the CDO in a way that would have prohibited all new  
21 connections and all increases in water use. The SWRCB did not do so. CDO Condition 2 only  
22 prohibits Cal-Am from using Carmel River water for new connections and increases in water use  
23 when the new connection or increases in water use "result[s] from a change in zoning or use."<sup>4</sup>  
24 In limiting its prohibition to only those new connections or increases in water use "resulting from  
25 a change in zoning or use," the SWRCB recognized the inequity and economic harm to  
26 individuals and the community that would have resulted from a blanket prohibition on all new  
27 connections and all increases in water use. It is appropriate for the Commission to incorporate

28           <sup>4</sup> Such use would not be prohibited under the CDO if the exception in Condition 2 applies.

1 similar considerations in any moratorium it may approve and any such moratorium approved by  
2 the Commission should be similarly narrow. Therefore any moratorium approved by the  
3 Commission should not prohibit any new connections or increases in water use unless such new  
4 connection or increases in water use results from a change in zoning or change in land use.

5 E. **“Change in Use” as used in the CDO should be narrowly interpreted to mean**  
6 **a substantial change from one land use category to another or in the basic**  
7 **nature of the use and not a less significant change in use within a general**  
8 **land use category.**

9 In applying and interpreting Condition 2 of the CDO, there is not much dispute as to what  
10 would constitute a “change in zoning.” This would clearly be limited to a project that depends  
11 on an action by the city or county with land use jurisdiction which changes the land use  
12 designation under the applicable zoning ordinance (e.g., from residential to commercial).

13 The meaning of the phrase “change in use” is not as clear. In its broadest interpretation,  
14 it could encompass any change in the way a property is used. For example, the change in use of  
15 a single family home from a vacation home or part-time residence to a permanent residence  
16 would constitute a prohibited change in use under such a broad interpretation. Similarly, the sale  
17 of a home occupied by a couple to a large family, or the change in use of a commercial property  
18 from an unpopular restaurant to a popular restaurant would constitute changes in use that would  
19 be prohibited under such a broad interpretation. Such a broad interpretation would have obvious  
20 issues related to practicality, fairness, and enforceability.

21 A narrower and more reasonable interpretation of the phrase “change in use” would be  
22 one that limits its application to cases where there is a significant change in the nature of the use  
23 of the site that does not involve a change in zoning. Under this narrower interpretation, “change  
24 in use” would include, for example, a change from a pure residential use to a mixed  
25 residential/commercial use or from an office use to a high water-consuming use such as a  
26 carwash or laundry where the existing zoning allows both. Given its proximity in the CDO to  
27 the phrase “change in zoning,” it is reasonable to interpret “change in use” to mean a more  
28 substantial change in the use of the site. Under this interpretation, minor changes in residential  
or commercial land uses, such as the addition of a caretaker’s house, conversion of a duplex to

1 two detached single family homes, or conversion of a bar to a restaurant, would not be deemed a  
2 “change in use.” This narrower interpretation would not unnecessarily constrain and interfere  
3 with commerce in these challenging economic times, as would the broader interpretation  
4 discussed above. Furthermore, this narrow interpretation has the added advantage of fairness  
5 and enforceability.

6 For the reasons discussed elsewhere in this brief, the Commission should independently  
7 interpret the phrase “change in use” for purposes of any moratorium it may authorize, rather than  
8 to seek clarification from the SWRCB or its staff. The Commission should exercise its broad  
9 constitutional and statutory authority to narrowly interpret the phrase “change in use” to exclude  
10 changes in the same general categories of land use. Given Mr. Pletz’s plans to use his water  
11 under his water permit for residential development on his residential property in a developed  
12 residential subdivision in the City of Pacific Grove, use of water pursuant to his water permit  
13 would not relate to a “change in use.” Therefore neither the CDO nor a moratorium should apply  
14 to prevent water use on Mr. Pletz’s property pursuant to his water permit.

15 F. **Any moratorium should not interfere with the Mr. Pletz’s use of his water**  
16 **permit based on the allocation from the City’s jurisdictional allocation under**  
17 **MPWMD’s allocation program.**

18 As discussed in MPWMD’s Opening Brief at page 8:

19 The District has regulated new water use under an allocation  
20 system that has not increased since June 1993. Cal-Am water is  
21 limited, subject to many restrictions, and has been carefully  
22 managed to facilitate planned needs such as medical care facilities,  
23 senior and assisted living, low income housing and other uses of  
24 value to each unique community. Water remaining in the allocation  
25 is minimal, too small to significantly affect the Carmel River.  
26 Cities judiciously preserve this allocation as an exercise of  
27 restrained and prudent planning. The Commission should rely on  
28 the District’s expertise in applying the moratorium to particular  
types of connections.

26 Mr. Pletz’s water permit is based on an allocation from the City’s jurisdictional  
27 allocation. As stated by MPWMD, these allocations are “too small to significantly affect the  
28 Carmel River.” Moreover, “the use of the remaining allocation would not meaningfully affect

1 Cal-Am's ability to meet its future water supply limitations nor significantly impact existing  
2 customers." (Opening Brief of the Cities of Carmel-By-The-Sea, Del Rey Oaks, Monterey,  
3 Pacific Grove, Sand City, and Seaside, hereinafter, the "Cities," p. 8; see discussion in Cities'  
4 Opening Brief, pp. 8-10.)

5 In contrast to the de minimis impact on the Carmel River of Mr. Pletz's use of his small  
6 allocation from the City and MPWMD, the economic impact on Mr. Pletz of prohibiting him  
7 from building his home after 8 years of efforts to satisfy regulatory requirements would be great.  
8 For these reasons and for the other reasons discussed in the Opening Briefs of MPWMD and the  
9 Cities, the Commission should not adopt or approve a moratorium that would prevent Mr. Pletz's  
10 use of this allocation.

11 **G. Any moratorium should not apply retroactively.**

12  
13 As Cal-Am stated in its Amended Application in this proceeding, Cal-Am continues to  
14 receive requests for service pursuant to water connection permits issued by MPWMD. Many  
15 ordinary Cal-Am customers such as Mr. Pletz, who were not present at and did not participate in  
16 the SWRCB proceedings leading to the CDO, have continued to spend time and money under  
17 currently applicable MPWMD ordinances with the understanding and expectation that they will  
18 be served pursuant to water permits, water credits, and other entitlements approved by local land  
19 use jurisdictions and/or MPWMD. To apply a moratorium retroactively to prohibit water use  
20 pursuant to such permits, credits and entitlements would be grossly unfair to these customers.  
21 Retroactive application would force many property owners like Mr. Pletz to abandon their  
22 substantial investment-backed expectations and plans mid-stream and to walk away from any  
23 expectation of obtaining service pursuant to the water permits, water credits, and other  
24 entitlements they are authorized by law to receive under MPWMD's rules and regulations. To  
25 avoid this inequity, any Commission action to approve a moratorium should expressly include a  
26 condition that the moratorium shall not be applied retroactively to prohibit water uses pursuant to  
27 water permits, water credits, and other entitlements issued by MPWMD before the effective date  
28 of the Commission's action.

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II. CONCLUSION

The Commission should not approve a moratorium that is broader than that necessary to comply with the CDO or one that applies retroactively. To do so would harm the very residential water consumers whose interests the Commission is entrusted to protect and would be detrimental to the economy of the community in which those customers live. Instead, the Commission should approve a moratorium that harmonizes with the CDO but protects the interests and justifiable expectations of water consumers like Mr. Pletz who received land use approvals and have relied on and followed MPWMD's rules and regulations. Whether characterized as an exception or clarification that the moratorium does not apply to his situation, Mr. Pletz respectfully requests the Commission narrowly tailor any moratorium so as not to prevent water use by Mr. Pletz pursuant to his water permit or any extension, renewal or replacement thereof as set forth herein and in Mr. Pletz's Opening Brief.

Dated: October 22, 2010

Respectfully submitted,

/s/ DAVID C. SWEIGERT

David C. Sweigert  
FENTON & KELLER  
A Professional Corporation  
2801 Monterey-Salinas Highway  
Post Office Box 791  
Monterey, California 93942-0791  
Telephone: (831) 373-1241  
Facsimile: (831) 373-7219  
Attorneys for STANLEY PLETZ

1 **PROOF OF SERVICE**

2 I, Tina O'Brien, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not a  
4 party to the within action; my business address is 2801 Monterey-Salinas Highway, Post Office  
Box 791, Monterey, CA 93942. On October 22, 2010, I served the within document(s):

5 **REPLY BRIEF OF STANLEY PLETZ**

6  by transmitting via electronic mail the document(s) listed above to the email  
7 addresses listed on the attached official Service List on this date from 2801  
Monterey-Salinas Highway, Monterey, California.

8  by placing the document(s) listed above in a sealed envelope with postage  
9 thereon fully prepaid, in the United States mail at Monterey, California addressed  
to:

10 Gary Weatherford  
11 CA Public Utilities Commission  
12 Division of Administrative Law Judges  
13 Room 5020  
505 Van Ness Avenue  
San Francisco, CA 94102-3214

14 John Bohn  
15 CA Public Utilities Commission  
16 505 Van Ness Avenue, 5<sup>th</sup> Floor  
San Francisco, CA 94102-3214

17 I am readily familiar with the firm's practice of collection and processing correspondence  
18 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
19 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
motion of the party served, service is presumed invalid if postal cancellation date or postage  
meter date is more than one day after date of deposit for mailing in affidavit.

20 I declare that I am employed in the office of a member of the bar of this court at whose  
direction the service was made.

21 I declare under penalty of perjury under the laws of the State of California that the above  
22 is true and correct.

23 Executed on October 22, 2010, at Monterey, California.

24 

25 Tina O'Brien

SERVICE LIST

1 **PARTIES**

2 JASON S. RETTERER  
3 ATTORNEY AT LAW  
4 LOMBARDO & GILLES, LLP  
5 318 CAYUGA STREET  
6 SALINAS, CA 93901  
7 FOR: BAYLAUREL, LLC / CVR HSGE, LLC /  
8 QUAIL LODGE, INC.  
9 **jason@lomgil.com**

DAVID C. LAREDO  
ATTORNEY AT LAW  
DE LAY & LAREDO  
606 FOREST AVENUE  
PACIFIC GROVE, CA 93950-4221  
FOR: MONTEREY PENINSULA WATER  
MANAGEMENT DISTRICT  
**dave@laredolaw.net**

11 ALLISON BROWN  
12 CALIF PUBLIC UTILITIES COMMISSION  
13 LEGAL DIVISION  
14 ROOM 4107  
15 505 VAN NESS AVENUE  
16 SAN FRANCISCO, CA 94102-3214  
17 FOR: DRA  
18 **aly@cpuc.ca.gov**

LORI ANNE DOLQUEIST  
MANATT PHELPS & PHILLIPS LLP  
ONE EMBARCADERO CENTER, 30TH FLOOR  
SAN FRANCISCO, CA 94111-3719  
FOR: CALIFORNIA-AMERICAN WATER  
COMPANY  
**ldolqueist@manatt.com**

11 SHERI L. DAMON  
12 DAMON LAW OFFICES  
13 618 SWANTON ROAD  
14 DAVENPORT, CA 95017  
15 FOR: NATIONAL SECURITY GUARANTY,  
16 INC./PASADERA HOMEOWNER'S ASSN.  
17 **sldamon@covad.net**

RUSSELL M. MCGLOTHLIN  
BROWNSTEIN HYATT FARBER SCHRECK,  
LLP  
21 EAST CARRILLO STREET  
SANTA BARBARA, CA 93101  
FOR: CARMEL-BY-THE-SEA/DEL REY  
OAKS/MONTEREY/PACIFIC GROVE/SAND  
CITY/SEASIDE  
**rmcglotthlin@bhfs.com**

17 **INFORMATION ONLY**

18 ROBERT G. MACLEAN  
19 PRESIDENT  
20 CALIFORNIA AMERICAN WATER COMPANY  
21 1033 B AVENUE, SUITE 200  
22 CORONADO, CA 92118  
23 **robert.maclean@amwater.com**

TIMOTHY J. MILLER, ESQ.  
CORPORATE COUNSEL  
CALIFORNIA AMERICAN WATER COMPANY  
1033 B. AVENUE, SUITE 200  
CORONADO, CA 92118  
FOR: CALIFORNIA-AMERICAN WATER  
COMPANY  
**tim.miller@amwater.com**

22 FRANCES M. FARINA  
23 ATTORNEY AT LAW  
24 DE LAY & LAREDO  
25 389 PRINCETON AVENUE  
26 SANTA BARBARA, CA 93111  
27 **ffarina@cox.net**

ANTHONY L. LOMBARDO  
LOMBARDO & GILLES  
318 CAYUGA STREET  
SALINAS, CA 93902  
**tonv@lomgil.com**

SERVICE LIST

1 HEIDI A. QUINN  
2 ASSOCIATE GENERAL COUNSEL TO  
3 MONTEREY PENINSULA WATER  
4 MANAGEMENT DISTRICT  
5 heidi@laredolaw.net

RYAN C. DRAKE  
BROWNSTEIN HYATT FARBER SCHRECK,  
LLP  
21 EAST CARRILLO STREET  
SANTA BARBARA, CA 93101  
rdrake@bhfs.com

6 GLEN STRANSKY  
7 HIDDEN HILLS SUBUNIT RATEPAYERS  
8 ASSC.  
9 92 SADDLE ROAD  
10 CARMEL VALLEY, CA 93924  
11 FOR: HIDDEN HILLS SUBUNIT RATEPAYERS  
12 ASSN.  
13 glen.stransky@loslaureleshoa.com

JOHN S. BRIDGES  
FENTON & KELLER  
P.O. BOX 791  
MONTEREY CA 93942  
FOR: MAHROOM FAMILY PARTNERSHIP /  
STANLEY PLETZ / SHAN SAYLES  
jbridges@fentonkeller.com

14 DAVID P. STEPHENSON  
15 DIR – RATES & REGULATION  
16 CALIFORNIA-AMERICAN WATER CO  
17 4701 BELOIT DR  
18 SACRAMENTO, CA 95838  
19 dave.stephenson@amwater.com

DAVID SWEIGERT  
FENTON & KELLER  
P.O. BOX 791  
MONTEREY CA 93942  
FOR: MAHROOM FAMILY PARTNERSHIP /  
STANLEY PLETZ / SHAN SAYLES  
dsweigert@fentonkeller.com

20 STATE SERVICE

21 GARY WEATHERFORD  
22 CALIF PUBLIC UTILITIES COMMISSION  
23 DIVISION OF ADMINISTRATIVE LAW  
24 JUDGES  
25 ROOM 5020  
26 505 VAN NESS AVENUE  
27 SAN FRANCISCO, CA 94102-3214  
28 gw2@cpuc.ca.gov

JAMES A. BOOTHE  
CALIF PUBLIC UTILITIES COMMISSION  
WATER AND SEWER ADVISORY BRANCH  
ROOM 3-C  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214  
jb5@cpuc.ca.gov

MAX GOMBERG  
CALIF PUBLIC UTILITIES COMMISSION  
WATER BRANCH  
ROOM 4208  
505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3214  
FOR: DRA  
mzx@cpuc.ca.gov

JOHN BOHN  
CA PUBLIC UTILITIES COMMISSION  
505 VAN NESS AVENUE, 5<sup>TH</sup> FLOOR  
SAN FRANCISCO, CA 94102-3214  
jb2@cpuc.ca.gov