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**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

January 20, 2009

Agenda ID #8262  
Ratesetting

TO PARTIES OF RECORD IN A.07-12-010

This is the proposed decision of Administrative Law Judge (ALJ) Walwyn, previously designated as the presiding officer in this proceeding. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Upon the request of any Commissioner, a Ratesetting Deliberative Meeting (RDM) may be held. If that occurs, the Commission will prepare and publish an agenda for the RDM 10 days beforehand. When the RDM is held, there is a related ex parte communications prohibition period. (See Rule 8.2(c)(4).)

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov). Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed either electronically pursuant to Resolution ALJ-188 or with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Walwyn at [cmw@cpuc.ca.gov](mailto:cmw@cpuc.ca.gov) and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

/s/ JANET A. ECONOMO for  
Karen V. Clopton, Chief  
Administrative Law Judge

KVC:jt2

Attachment

Decision **PROPOSED DECISION OF ALJ WALWYN** (Mailed 1/20/2009)

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

Application of California-American Water Company (U210W) for an Order Authorizing a Special Conservation Program and Modifications to its Rate Design in its Monterey District, and Authorization to Increase its Rates for Water Service in its Monterey District.

Application 07-12-010  
(Filed December 14, 2007)

**DECISION ON PHASE ONE CONSERVATION ISSUES**

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## DECISION ON PHASE ONE CONSERVATION ISSUES

### 1. Summary

This decision adopts two proposed settlements between California-American Water Company (Cal-Am), the Commission's Division of Ratepayer Advocates (DRA), and the Monterey Peninsula Water Management District (MPWMD). These settlements revise the conservation stages, Stages 1-3, of Cal-Am's existing Rule 14.1 to (1) include Cal-Am's Bishop, Hidden Hills, and Ryan Ranch sub-systems along Highway 68 in conservation requirements, (2) adopt interim emergency rates for these sub-systems, and (3) provide for the sharing of confidential customer usage data with MPWMD.<sup>1</sup> The two settlements are uncontested. However, after the settlements were submitted, Cal-Am sought to substantially narrow the type of customer data it would provide to MPWMD, and to change the terms under which data would be provided. We review further the issue of data-sharing in light of this.

We do not address water rationing procedures under Rule 14.1. This is the remaining issue in Phase 1. Cal-Am and MPWMD reached a preliminary agreement on Stages 4-7 of Rule 14.1 and further settlement negotiations with all parties began after MPWMD finalized its revised rationing plan, Ordinance 137, on December 8, 2008.<sup>2</sup>

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<sup>1</sup> MPWMD is a regional water authority and has independent regulatory authority for conservation and rationing in the Monterey Peninsula Water Resource System. See Statutes of 1977, Chapter 527, as amended (found at West's California Water Code Appendix, Chapters 118-1 to 118-901).

<sup>2</sup> Ordinance 137 became effective on December 31, 2008.

In Phase 2, the Commission is considering comprehensive conservation programs for Cal-Am's Monterey District in 2009-2011. As part of this phase we consider Cal-Am's request to renew funding for a portion of MPWMD's conservation programs through a special surcharge, and also Cal-Am's request to collect funds for its own conservation programs through the same surcharge. Evidentiary hearings have been held on Phase 2 and parties have requested additional time for settlement discussions.

## **2. Procedural Background**

The Commission regulates water service provided by Cal-Am in its seven California districts pursuant to Article XII of the California Constitution, the Public Utilities Code, and the rules of the Commission. For Cal-Am and other Class A water utilities, Public Utilities Code Section 455.2<sup>3</sup>, as implemented in Decision (D.) 04-06-018, provides for a general rate case (GRC) proceeding every three years.<sup>4</sup>

Cal-Am serves approximately 39,000 water connections in the Monterey District using water from the Carmel River and Seaside Basin systems. The Monterey District is a decade ahead of other water districts regulated by the Commission in implementing aggressive conservation and rationing measures due to the significant physical and regulatory constraints on its water supply.

Cal-Am filed this application separately from its Monterey GRC Application (A.) 08-01-027 in order to have the Commission address its

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<sup>3</sup> Unless otherwise stated, all statutory references are to the California Public Utilities Code.

<sup>4</sup> A Class A utility is defined as an investor-owned water utility with over 10,000 service connections.

conservation proposals on a more expedited schedule than the June 2009 GRC procedural schedule. Protests were timely filed by DRA and MPWMD. Public participation hearings (PPHs) were held in the Monterey District on May 28 and May 29, 2008. Following the PPHs, the Hidden Hills Subunit Ratepayers Association (HHSRA) received intervenor status in this proceeding.<sup>5</sup>

In its application, Cal-Am requests authority to nearly quadruple the annual budget for its conservation programs, and to also spend an additional \$2.9 million per year for rationing implementation costs. The total request for test year 2009 is \$5.3 million. Recognizing that the conservation and water rationing programs are complex and expensive, and that Cal-Am is additionally asking for very substantial rate increases in its pending GRC proceeding, the assigned Commissioner issued a May 9, 2008 ruling adopting an early evaluation process to coordinate the review of this application and A.08-01-027.<sup>6</sup>

The assigned Commissioner and ALJ confirmed that good cause exists to consider Cal-Am's conservation and rationing programs in this proceeding, separate from the pending GRC application, in the June 27, 2008 Scoping Memo. The Scoping Memo also found that some issues that Cal-Am included in this application, specifically rate design, revenue recovery mechanisms, and low-income program proposals, were better handled in A.08-01-027 and, consequently, those issues were transferred.

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<sup>5</sup> See Administrative Law Judge (ALJ) ruling on June 13, 2008.

<sup>6</sup> In its Monterey District GRC filing, Cal-Am requests an 80.30% or \$24,718,200 increase in 2009, an 11.72% increase in 2010, and a 12.25% increase in 2011. (See June 27, 2008 Scoping Memo in A.08-01-027, p. 6.)

The Scoping Memo adopted a two-phase procedural schedule. It determined that Phase 1 would address Cal-Am's proposed modifications to its conservation and rationing procedures set forth in a revised Rule 14.1, interim emergency conservation rates for the sub-systems of Bishop, Ryan Ranch, and Hidden Hills, and procedures for sharing customer consumption data with MPWMD. Cal-Am and MPWMD's proposed conservation programs were scheduled for Phase 2, which provided DRA and other parties additional time to comprehensively review the proposals.

Evidentiary hearings on Phase 1 issues were held on July 28-30 and August 12-13, 2008. In its application, Cal-Am initially submitted a revised Rule 14.1 in collaboration with MPWMD, but prior to hearing it revised its testimony to sponsor a stand-alone proposal with different features than those MPWMD supported. By the end of hearings, Cal-Am and MPWMD stated they had reached a preliminary agreement to again collaborate and would meet and confer with DRA and other parties prior to finalizing a settlement.

On October 10, 2008, three Phase 1 settlements were submitted. The first settlement addresses Stages 1-3 and data sharing with MPWMD, the second settlement recommends interim emergency rates for the sub-systems pending adoption of final rates in the GRC proceeding. The third settlement is a preliminary agreement between Cal-Am and MPWMD that sets forth principles for development of a rationing program. The agreement is conditioned on the final provisions of MPWMD's pending Ordinance 137; Cal-Am retains its right to return to an earlier stand-alone rationing proposal. Additional hearings were

scheduled to allow Cal-Am to exercise this right.<sup>7</sup> Therefore, we agree with comments filed by DRA and HHSRA that the rationing agreement is not ripe for consideration here. This decision will address only the first two Phase 1 settlements.

Evidentiary hearings for Phase 2 issues were held on November 12-14, 2008. Cal-Am, DRA, and MPWMD reached a general agreement prior to hearings and reached a final settlement, which was submitted on January 16, 2009.

### **3. The Critical Water Supply Needs in Cal-Am's Monterey District**

Customers in the Monterey District face severe water supply limitations and growing financial burdens. Cal-Am has been operating under at least Stage 1 conservation requirements of its existing Rule 14.1 since 1999.<sup>8</sup>

The water supply limitations for the Monterey District are due to (1) the region's vulnerability to drought, and (2) the legal and regulatory restrictions on Cal-Am's use of water from the Carmel River and the Seaside Basin. To fund Cal-Am's efforts to find new sources of water supply, customers are paying special surcharges for recovery of the abandoned costs of the Carmel River Dam project and the preconstruction costs of the Coastal Water Project.

The financial burdens on Cal-Am's customers include the existing special surcharges discussed above as well as pending substantial rate increase requests

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<sup>7</sup> In a December 23, 2008 e-mail, MPWMD stated that settlement discussions among Cal-Am, DRA, and MPWMD had resumed and requested that evidentiary hearings scheduled for January 6-9, 2009 be cancelled. As a result, the hearings were taken off calendar.

<sup>8</sup> See the January 15, 2008 Draft Cease and Desist Order (CDO) of the State Water Resources Control Board (SWRCB), p. 4.

in this proceeding, the Monterey GRC proceeding, the General Office proceeding, and the Coastal Water Project proceeding.<sup>9</sup>

The regulatory limitations on Cal-Am's water supply come primarily from a July 6, 1995 decision, Order 95-10, by the SWRCB. This order found Cal-Am did not have a legal right to the approximately 10,730 acre-feet annually of water it was diverting from the Carmel River; the illegal diversion constituted approximately 69% of the water being supplied by Cal-Am to its customers. To remedy the illegal diversions, the SWRCB directed Cal-Am alternatively to reduce its average historical diversions from the Carmel River by 15% in Water Year 1996 and to minimize its future diversions while it diligently proceeded to obtain the right to additional water supplies or to face enforcement action.

On January 15, 2008, the SWRCB issued a draft CDO that, if finalized, would require Cal-Am to decrease its use of Carmel River water by 50% over a seven-year period beginning in 2009. The draft CDO states that in the 12 years since Order 95-10 was issued, Cal-Am has failed to reduce its illegal diversions from the Carmel River beyond an initial 20% reduction and that Cal-Am will continue this practice unless the SWRCB takes further action. A critical finding that the draft CDO relies upon is:

The current water management strategy used by Cal-Am/MPWMD, however, has not resulted in any significant reduction of unlawful diversions from the Carmel River since 1998. Instead, it appears that water savings resulting from conservation efforts have been redirected to support marginal increases in development. (Draft CDO at p. 5.)

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<sup>9</sup> The Coastal Water Project is A.04-90-019, and the General Office proceeding is A.08-01-024.

The SWRCB held evidentiary hearings on the draft CDO this summer and a proposed decision is expected in the early part of 2009. If the final decision affirms the draft CDO, it will have an immediate and profound impact on the Monterey District. As discussed in the draft CDO, due to extensive sedimentation in San Clemente and Los Padres reservoirs, the primary source of water supply for Cal-Am's customers is the 21 wells situated downstream of San Clemente Dam on the lower Carmel River. These wells, which pump subterranean water from the Carmel River for customer use, supply about 89% of water needs for Cal-Am customers today and would be subject to the proposed 50% reduction.

Under Order 95-10, the SWRCB regulates Cal-Am's withdrawals from the Seaside Coastal Subareas of the Seaside Groundwater Basin but not the Laguna Seca Subarea.

The other regulatory restriction on water supply arises from a lawsuit brought by Cal-Am on August 14, 2003 to adjudicate its water rights in the Seaside Groundwater Basin. The Monterey Superior Court's March 27, 2006 ruling in *California American Water v. City of Seaside, et al.*, Case No. M66343 (Seaside Basin Adjudication) found that the basin is in overdraft and that Cal-Am must reduce its take from its wells in both the Coastal Subareas and the Laguna Seca Subarea.

Cal-Am serves three satellite systems along the Highway 68 corridor that are in the Laguna Seca Subarea and are not included in SWRCB's Order 95-10. These systems currently operate separately from the main system and are Bishop, Hidden Hills, and Ryan Ranch (the sub-systems). The Seaside Basin Adjudication requires Cal-Am's production from the Laguna Seca Subarea to be

reduced from 345 acre feet annually to zero on a timetable to be administered by the Seaside Basin Watermaster.

The Commission is addressing the water supply needs of the Monterey District through both the pursuit of additional supply sources and the adoption of aggressive conservation and rationing measures.

Our objective in Phase 1 is to adopt a regulatory framework that can be rapidly activated to require increasingly stringent reductions in customers' water consumption, and our objective in Phase 2 is to adopt conservation programs that produce substantial and verifiable water savings at a reasonable cost.

#### **4. Proposed Settlements**

This decision considers two Phase 1 settlements filed by Cal-Am, DRA, and MPWMD on October 10, 2008. HHSRA was a party to the settlement discussions but not a signatory; on October 27, 2008, it stated in response to another matter that it did not oppose and would not comment on these settlements.<sup>10</sup> Cal-Am has properly noticed its settlement negotiations and engaged in extensive discussions with all interested parties prior to finalizing the agreements.

We review these uncontested settlements pursuant to Article 12 of the Commission's Rules of Practice and Procedure (Rules). Rule 12.1(d) provides that, prior to approval of a settlement, the Commission must find a settlement is "reasonable in light of the whole record, consistent with the law, and in the public interest." The sponsoring parties state that the agreements represent a

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<sup>10</sup> HHSRA's response was part of comments opposing a third proposed settlement by Cal-Am and MPWMD. As discussed earlier, that agreement is not ripe for consideration here in this decision.

compromise by them and that pursuant to Rule 12.5 the parties do not intend that the adoption of the settlements by the Commission be construed as a precedent or statement of policy of any kind for or against any party in any current or future proceeding.

We first address the proposed settlement on Stages 1-3 of Cal-Am's revised Tariff Rule 14.1 and then address the proposed settlement on interim emergency rates for the sub-system customers.

#### **4.1. Proposed Settlement on Conservation Stages 1-3 of Rule 14.1**

The sponsoring parties to this settlement are Cal-Am, DRA, and MPWMD. In this proceeding, Cal-Am proposes to change its existing Rule 14.1 Water Conservation Plan which has three stages of conservation, to a revised Rule 14.1 which has three stages of conservation and an additional four stages of rationing. This settlement addresses Stages 1-3, and includes a new tariff, MO-14.1.<sup>11</sup> The proposed settlement also includes an agreement for the sharing of customer data with MPWMD, which we will address here after discussion of the proposed changes to Rule 14.1.

##### **4.1.1. Conservation Stages 1-3 of Revised Rule 14.1**

The settlement agreement and proposed revised Rule 14.1 and Tariff MO-14.1 are included with this decision as Attachment 1. The key settlement changes to Rule 14.1 are:

- Sub-system customers in Bishop, Hidden Hills, and Ryan Ranch are included in the conservation plan;

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<sup>11</sup> Tariff MO-14.1 would replace existing charges for the removal of flow restrictors and in lieu of water waste fees for multi-family dwelling customers; it replaces Tariff MO-8.

- The existing Production Table 1 for Stages 2 and 3, which lists production triggers for the Carmel River System, is updated to include new monthly production limits for the Seaside Basin. This table is for main system customers. A new table, Production Table 2, provides the Laguna Seca Subarea monthly production triggers for Stages 2 and 3. Sub-system customers will only move to Stages 2 and 3 when the production triggers in both Table 1 and 2 have been reached;
- Cal-Am, in coordination with MPWMD, will conduct Landscape Water Audits and establish landscape water budgets for all customers (1) with a dedicated irrigation meter, (2) with an irrigated area of greater than three acres, or (3) who are classified as Large Residential Customers;
- There is a phase-in of production triggers at Stage 3. This occurs for both main system and sub-system customers as the water year (October 1 of each year to September 30 of the succeeding year) proceeds to the higher use months by providing a slightly more stringent trigger for each successive quarter in the water year and monthly triggers in the second quarter;
- Flow restrictors can be installed on customer meters. This will occur after three or more notices of water waste violations from Cal-Am or MPWMD and a fee will be charged for removal of the flow restrictor. Water waste fees will no longer apply to customers with individual meters; revised Rule 14.1 will only impose water waste fees on multifamily residential water waste in lieu of a flow restrictor;
- Cal-Am will be authorized to provide individual customer variances from flow restrictor requirements for medical needs that are certified by a doctor. Customers may also seek variances from flow restrictor requirements through MPWMD's appeal process;

- Stage 3 will require implementation of emergency rate schedules for both main system customers and sub-system customers;<sup>12</sup> and
- Customer notification is required at Stage 2 and a 30-day customer notice prior to Stage 3 emergency rates.

The most controversial issue in this settlement is the inclusion of the sub-system customers in Cal-Am's conservation plan. At the PPHs in Monterey, many customers from these sub-systems stated they had not received adequate notice of this change and they felt Cal-Am's proposal violated the contracts their systems had with Cal-Am. Further, customers stated that Cal-Am had not informed them of the Superior Court case and therefore they had not had an opportunity to participate in the Seaside Basin Adjudication and defend the water rights they had previously given to Cal-Am. After the PPHs, HHSRA petitioned to be a party in this proceeding and has actively participated here and also before the MPWMD board.

The language in revised Rule 14.1 specifically references Cal-Am's legal production limits from the Seaside Basin Adjudication and includes the sub-system customers in the conservation plan. Customers in the Toro, Ambler Park, Ralph Lane and Chualar sub-systems remain excluded from the conservation plan because they are not served by water subject to SWRCB Order 95-10 or the Seaside Basin Adjudication.

The evidence in our record is that the sub-system customers are served by water from the Laguna Seca Subarea and are therefore part of the water usage limitations imposed under the Seaside Basin Adjudication. This is based on the

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<sup>12</sup> The Commission previously approved emergency rates for main system customers by decision.

testimony of Cal-Am and MPWMD and also the recent actions of the MPWMD Board in revising its Regulation XV to include Ordinances 134 and 135. DRA states in its report it did not independently evaluate the technical data but rather relies on MPWMD's staff to evaluate the specific production triggers and the MPWMD board to adopt the appropriate changes to its Regulation XV.<sup>13</sup> Finally, no party provided evidence to establish the sub-systems were not included in the Laguna Seca Subarea or exempt from the Seaside Basin Adjudication.

The MPWMD board recently finalized changes to its Regulation XV addressing the Seaside Basin Adjudication. All active parties in this proceeding had notice and an opportunity to participate before the MPWMD board. Specifically, Ordinance No. 134, adopted on August 18, 2008, and Ordinance No. 135, adopted on September 23, 2008, amended Regulation XV's definition of the Monterey Peninsula Water Resource System to include the sub-systems and to include the water production limitations of the Seaside Basin Adjudication.

The settlement references the latest version of Regulation XV, to include Ordinances 134 and 135, and adopts a consistent definition of the MPWRS and corresponding production triggers. We find that consistency between a current Regulation XV and Cal-Am's Rule 14.1 is an important step in having Cal-Am and MPWMD work together to effectively address the critical water needs on the Monterey Peninsula; DRA also cites the importance of this in its testimony.

The Commission's regulatory oversight of Cal-Am is maintained in the settlement's provision that any future changes by MPWMD in Regulation XV

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<sup>13</sup> See Exhibit 21, DRA Report, p. 15.

will not automatically be reflected in Cal-Am's Rule 14.1 but rather will continue to be reviewed and approved by the Commission.

Our record here and the recent actions of MPWMD's board support a finding that the revised Rule 14.1 should include the sub-system customers and should do so in a manner that is consistent with MPWMD's current Regulation XV. While the settlement includes the sub-system customers in Cal-Am's conservation plan for the first time, it does so in a manner that recognizes that these customers are not subject to Stages 2 and 3 production limits unless the Seaside Basin Adjudication limits for the Laguna Seca Subarea have also been triggered. We find this different treatment of main system and sub-system customers is fair and reasonable.

Next, we turn our attention to the other settlement changes. We agree with the parties on the change from charging water waste fees to instead installing flow restrictors where it is possible. We find the use of flow restrictors is a more effective method to achieve water reduction compliance; in addition, these customers already have strong price signals from the increasing block rate design structure.

We find the more stringent production triggers, landscape audit and water budget requirements, and expanded use of emergency rates to be measures that are necessary for the Monterey District.

We also find beneficial the addition of language specifying 30-day customer notice of rate increases, and the inclusion of a formal process for customers to receive individual variances from flow restrictor requirements based on documented medical needs. However, there is one customer notice provision in the settlement that causes us concern. This is the Section V.H. language stating "the Company shall maintain communication with Customers

regarding the ongoing water supply situation and related conservation requirements via direct mail and/or advertising in local print and/or broadcast media.” As discussed at hearing, customers at the PPHs objected to receiving excessive mailers from Cal-Am and the price of advertising, both print and broadcast is quite high.

Developing and maintaining a comprehensive conservation website and displaying the weblink and a local conservation phone number, answered directly by local Cal-Am employees, at the bottom of each customer’s bill, may be a cost-effective and efficient alternative. While this decision approves the settlements as discussed in this decision, we note that we expect to address the issue of a comprehensive website for conservation in the next phase of this proceeding.

We agree with the settlement’s provision that Revised Rule 14.1 become effective immediately upon a Commission decision adopting the settlement and that Tariff MO-14.1 be implemented immediately via advice letter.

Finally, the MPWMD Board in its Ordinance No. 135 specifically states that while it includes the Cal-Am sub-systems of Bishop, Hidden Hills, and Ryan Ranch in the conservation/rationing programs set forth in the ordinance and Regulation XV, the ordinance does not negate provisions of any purchase agreement between Cal-Am and another Water Distribution System. We agree with MPWMD in our review of this settlement and make a specific finding that in approving this settlement we do not negate provisions of any purchase agreement between Cal-Am and any of the sub-systems.

#### 4.1.2. MPWMD's Access to Customer Data

Included in the Rule 14.1 settlement is an agreement for Cal-Am to provide customer data to MPWMD to the extent it is necessary for MPWMD to prepare for, test, implement and enforce Stages 1-3.

Specifically, Section IV of the settlement states:

The Parties agree that California American Water shall provide MPWMD customer data that is necessary for MPWMD to prepare for, test, implement and enforce Stages 1-3. The Parties recommend that California American Water provide the information listed in the table attached hereto as Appendix C. The Parties acknowledge MPWMD's regulatory authority to secure compliance with its Rules and Regulations. The Parties further acknowledge that on October 3, 2008, MPWMD filed a motion in support of its need to access California American Water customer data. These data shall be deemed a trade secret, and shall not be available for public review.

The type of customer data the parties agree to share is quite extensive and includes a customer's meter and service address, as well as an individual customer's water use survey and landscape audit information. This data can also be used by MPWMD in rationing Stages 4-7 and to assess and quantify water savings from conservation programs Cal-Am administers, which are under consideration in Phase 2. We address all data sharing between Cal-Am and MPWMD here.

In this proceeding, the Commission has a comprehensive evidentiary record addressing the confidentiality and customer privacy issues surrounding the sharing of customer data with MPWMD.<sup>14</sup> We summarize the procedural

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<sup>14</sup> The issue of customer data sharing was originally raised in A.08-02-018 for implementation of Cal-Am's pre-rationing program costs. That proceeding was uncontested and handled on an *ex-parte* basis. D.08-07-010, issued July 11, 2008,

*Footnote continued on next page*

history of how the record developed. First, we recognize that MPWMD is charged by legislative statute with the responsibility to manage and conserve the water resources within the Monterey Peninsula Water Resource System.

MPWMD states it has been provided customer identifiable consumption data by Cal-Am in past years under a written nondisclosure agreement and it is willing to enter into any additional terms of agreement specified by the Commission.

On June 11, 2008, MPWMD filed a motion to compel Cal-Am to provide five years' of consumption data on all its metered customer connections in order for it to analyze Cal-Am's conservation proposals. Cal-Am filed a response on June 13, 2008 stating it would provide the information requested by MPWMD provided (1) MPWMD agreed to maintain the confidentiality of any customer identifiable information and (2) the Commission directed Cal-Am to do so.

A Law and Motion hearing was held on June 16, 2008 in San Francisco. At the hearing, parties discussed whether MPWMD had made a sufficient showing of its need for customer identifiable data. At the conclusion of the hearing, MPWMD withdrew its request for a ruling on its motion in light of Cal-Am's agreement to provide aggregated data and the Commission's intention to further address the matter in Phase 1 hearings.

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required Cal-Am to coordinate its pre-rationing activities, including the sharing of customer data, in A.07-12-010. Our scoping memo identified this as a Phase 1 issue and, therefore, parties addressed it in their testimony and this settlement. Notwithstanding the settlement, Cal-Am later raised the issue in Phase 2 hearings, and parties were given an opportunity to submit opening briefs on November 26 and closing briefs on December 4, 2008.

In its Phase 1 report, DRA supported MPWMD having customer identifiable information under the existing nondisclosure agreement for purposes of evaluating conservation proposals.<sup>15</sup>

After the conclusion of Phase 1 hearings, MPWMD submitted a motion and declaration on October 3, 2008 in further support of its request for specific data, and provided specific examples of customer data needs and the manner in which this data has been used during the past 20 years. The settlement cites that filing in support of the data sharing agreement.

Following submission of the settlement which addresses the confidentiality issue between Cal-Am and MPWMD, Cal-Am expressed new concerns during the Phase 2 hearings in November 2008. Although not repudiating the settlement, Cal-Am states that it has customer privacy concerns that (1) customers who are violating MPWMD's conservation rules and regulations might choose to not participate in voluntary residential conservation audits because the customer could be subject to enforcement action if they are violating MPWMD building permits or ordinances, (2) MPWMD may be required to publicly disclose customer records under the Public Records Act, and (3) MPWMD's request for individual customer monthly consumption data is not necessary for it to perform its statutory duties.<sup>16</sup> Cal-Am and MPWMD briefed these issues following the hearings.

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<sup>15</sup> See Exhibit 21, p. 50. While supporting the request here, DRA expressed some concern about providing information for the purpose of issuing fines and stated it would address that in the rate design phase of A.08-01-027.

<sup>16</sup> See Cal-Am and MPWMD's November 26, 2008 opening briefs and December 4, 2008 closing briefs.

**Discussion**

Before addressing the settlement agreement governing confidentiality issues between Cal-Am and MPWMD, we discuss overriding legal and policy issues concerning confidentiality raised by Cal-Am in Phase 2. Nothing raised by Cal-Am causes us to recommend modification of the settlement.

Cal-Am's Phase 2 concerns are that customer privacy rights outweigh MPWMD's need for access to the customer data agreed to in the settlement. While utility customers, like other individual California citizens, have constitutionally-based privacy interests which include an interest in controlling the disclosure of detailed personal information, the extent of a privacy right is dependent on the circumstances. (*Hill v. National Collegiate Athletic Ass'n.* (1994) 7 Cal.4th 1; *Pioneer Electronics v. Superior Court* (2007) 40 Cal.4th 360; D.05-04-030.) The record here provides us the necessary information to balance the need of a public agency charged with promoting and enforcing conservation measures to obtain from Cal-Am individual customer water consumption data with that individual customer's privacy rights. In doing so, we find that Cal-Am exaggerates the sensitivity of customer water usage information when it argues that inalienable privacy rights will be trampled by the disclosure at issue here.

First, Cal-Am has shared, in 2000, and again in 2002, detailed confidential customer information with the MPWMD, pursuant to an appropriate nondisclosure agreement, evidently with no customer complaints regarding this practice. Past experience with customer information disclosure to MPWMD reveals little apparent reason for Cal-Am to fear adverse consequences from anticipated similar future disclosures.

Second, to the extent that Cal-Am customers seeking building permits for water using facilities such as second bathrooms signed permit applications

authorizing disclosure of specified water usage information, such customers can have no reasonable expectation of privacy in that information.

Third, as MPWMD points out, the California Supreme Court has already addressed the relationship between the California Constitutional right to privacy and the public's right to government information regarding water utility customers who exceed their water allotments, and found that the public's right to information in government records regarding excessive users outweighs customer privacy interests. (*New York Times Company v. Superior Court* (1990) 218 Cal.App.3d 1579 (Goleta Water District.) Thus, customers who disobey water use restrictions do not have an objectively reasonable expectation of privacy regarding such unlawful conduct.<sup>17</sup>

Fourth, Pub. Util. Code § 588 addresses district attorney requests for information regarding customers of telephone, electric and gas utilities, but does not apply to disclosures of information by water utilities. While the Commission's Water Standard Practice U-15-W appears to suggest that § 588 limitations also apply to requests to water utilities for customer information, the Commission's regulations cannot expand the scope of the actual statute itself; further, Standard Practice U-15-W addresses disclosure of customer information to the public, rather than to governmental agencies with policies and procedures designed to restrict subsequent disclosures of such information to the public.

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<sup>17</sup> This reasoning could also apply to the Public Records Act exemption cited by MPWMD. Government Code Section 6254.16(d) allows a Public Records Act disclosure if the local water agency determines that the utility customer who is the subject of the request has used utility services in a manner inconsistent with applicable local utility usage policies.

Finally, nothing argued by Cal-Am in its Phase 2 briefs causes us to change the settlement before us here. In the settlement, Cal-Am expressly agrees to provide MPWMD with detailed customer information, including address, account numbers, usage information, and so on, when certain during certain stages of water restrictions. The record shows that Cal-Am and MPWMD are currently experiencing Stage 1 water restrictions.

We do not agree with Cal-Am that any future nondisclosure agreement between Cal-Am and MPWMD should include a requirement that customers be given notice of the proposed usage information disclosure, with the right to refuse to consent to such disclosure. Giving Cal-Am's customers what amounts to the power to veto the disclosure of usage information to MPWMD would provide those concerned about their excess water usage, or noncompliance with water restrictions, with a clear opportunity to avoid the very government scrutiny that could result in effective enforcement of water use laws and regulations. This would not be consistent with the public interest.

This is not to say that we believe that Cal-Am should be required to disclose all detailed customer information to MPWMD beyond what is discussed in this record. Instead, we simply direct Cal-Am to cooperate with MPWMD's water use and enforcement efforts by providing access to the customer information it has already agreed to provide, pursuant to the settlement, subject to a reasonable nondisclosure agreement. We will not, based on Cal-Am's arguments, presume that MPWMD is likely to abuse its request for customer information or refuse to exercise its own options for restricting subsequent public disclosure of extensive customer records in response to Public Records Act requests. However, to address the concern specifically cited by Cal-Am at

hearing, we direct that Cal-Am disclose to any residential customer requesting a free conservation audit that this information will be shared with MPWMD.

We approve the settlement agreement's treatment of the sharing of customer data between Cal-Am and MPWMD with a clarification. Section IV of the settlement states in part: "The data shall be deemed a trade secret, and shall not be available for public review."

This language is consistent with MPWMD's existing ordinances. We clarify that the settlement is confirming the agreement among Cal-Am, MPWMD, and DRA regarding confidentiality but its characterization of the data as "trade secrets" is not binding on third parties or the Commission. Thus, the data shall be protected as required by law.

#### **4.1.3. Action on Proposed Settlement**

Based on our discussion of Attachment 1, we find the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest. Therefore, we should adopt it.

#### **4.2. Proposed Settlement on Stage 3 Interim Emergency Rates for Sub-system Customers**

This settlement between Cal-Am, DRA, and MPWMD will provide interim emergency conservation rates for the sub-systems during Stage 3 of revised Rule 14.1; permanent emergency rates for the sub-systems are being addressed in the GRC proceeding, A.08-01-027. In response to concerns raised by DRA, the settlement also contains a plan for Cal-Am to try to reduce the water usage of customers that receive "free water" service by deed or contract. The settlement is appended to this decision as Attachment 2.

The main system customers have existing emergency rates for Stage 3. The interim emergency conservation rates for the sub-systems use a similar rate

design. Specifically, the settlement provides the following interim emergency rates:

- for non-residential sub-system customers, Cal-Am will charge the current quantity rate (per respective tariff sheets) for each unit of water delivered up to the customer's monthly allotment and \$19.10 for each unit of water delivered over the customer's monthly allotment; and<sup>18</sup>
- For residential customers in Bishop and Hidden Hills, usage from 0 to 24 hundred cubic feet (ccf) per month will be charged at the current rates, usage from 25 to 40 ccf per month will be charged at the fourth block emergency rate for main system customers, and usage of 41 ccf and above per month will be charged at the fifth block emergency rate for main system customers.<sup>19</sup>

The settlement also provides for separate Emergency Water Revenue Adjustment Mechanisms (WRAMs) for sub-system customers that work in the same manner as the current emergency WRAM for main system customers. Specifically, each sub-system Emergency WRAM would be a balancing account that would track the difference between the revenues collected in each

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<sup>18</sup> As part of this agreement, Cal-Am will establish monthly allotments for all non-residential customers, except private fire service and private fire hydrant customers, using surveys or water audits and will then notify the customers of their annual allotment and provide a description of how the monthly allotments are calculated. Allotments will be established using the same non-residential criteria established for main system customers. All Ryan Ranch customers are served under non-residential rates as they are mostly commercial customers, with a few public authority and private fire service customers.

<sup>19</sup> For Bishop, the current rate for usage from 0 to 24 ccf per month is \$2.3477. For Hidden Hills, the current rate for usage from 0 to 8 ccf per month is \$2.8639, and usage from 9 to 24 ccf per month is \$3.8185. The current fourth block emergency rate for Monterey main system residential customers is \$13.7524 per ccf, and the fifth block emergency rate is \$27.5048 per ccf.

sub-system from charging emergency rates less the revenues that would have been collected from charging current rates. The funds collected will earn interest and be refunded when Cal-Am returns to Stage 1 or 2 or January 1, 2010, whichever comes first. The funds will be refunded within each sub-system with one-half of the money being distributed to those customers who paid the emergency rates, in proportion to the amount of collections each customer paid, and the remaining one-half of the money distributed to all customers in the sub-system, excluding fire service customers, based on a customer's meter size.

The settlement proposes the same rates as initially requested by Cal-Am in its application. DRA analyzed this proposal in its report, stating while it had unanswered questions regarding the proposed rate levels, it did agree that interim emergency rates should be adopted. DRA states it supports interim emergency rates because these three sub-systems are currently exceeding their allocation of water under the Seaside Basin Adjudication, and in Ryan Ranch a significant portion of the water supply has been coming from the Carmel River; therefore, there is a need for these systems to cut back on their water usage similarly to the rest of the customers on the Monterey main system.

We find our record contains strong support for adopting interim emergency rates and limited support for the specific rate levels proposed. We find the record support acceptable because (1) these rates can only be effective after 30 days' notice to customers and will only be applicable until permanent rates take effect in the summer of 2009, and (2) each sub-system has a separate Emergency WRAM that will distribute any funds collected back to the customers in each sub-system. In addition, the settlement provides that sub-system customers will be eligible for all conservation programs offered by Cal-Am to its main system customers.

The last issue covered in the settlement is “free service” customers. Cal-Am has about 15 customers in the Monterey District who receive free service based on historical contracts, some with underlying deeds granting water rights and easements to Cal-Am in return for water service. In its report, DRA recommends that Cal-Am pursue any possible action it can to charge these customers for water usage.<sup>20</sup>

Section 8 of the settlement provides that Cal-Am will review the deeds and/or contracts of the “free water” customers and will take reasonable and necessary action to limit the customers’ usage to the amount of water that is legally available under the deeds/contracts, and will also determine whether it can negotiate termination of free service and if so, at what cost. Cal-Am will first focus its efforts on the five customers with the highest usage, but will offer all customers water audits, surveys, and assistance with conservation measures. Finally, the settlement provides that Cal-Am will report the actions it takes under Section 8 and the results of those actions in its next GRC application, scheduled to be filed on July 1, 2010.

Given the severe water supply limitations faced by the Monterey District, we find the provisions of Section 8 very important. Cal-Am should place a high priority on addressing its “free water” customers in the manner provided by the settlement, and should also ensure it is metering and monitoring its own company usage and the usage of MPWMD. Pursuant to the directives in D.06-11-050, Cal-Am, in collaboration with MPWMD, provides the Commission an annual conservation report. In addition to the settlement’s July 1, 2010

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<sup>20</sup> See Exhibit 21, pp. 21-23.

reporting requirement for free water usage, we find that Cal-Am should also include in its annual conservation report a section discussing the actions it has taken to address free water usage and the results of those actions.

Based on the discussion above, we find the settlement to be reasonable based on the whole record, consistent with existing law, and in the public interest. Therefore, we should adopt it.

## **5. Comments on Proposed Decision**

The proposed decision was mailed to the parties in accordance with Section 311(d) of the Public Utilities Code and Rule 14.3 of the Rules of Practice and Procedure.

## **6. Assignment of Proceeding**

John A. Bohn is the assigned Commissioner and Christine M. Walwyn is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. Pursuant to the June 27, 2008 scoping memo, this proceeding is being handled in two phases. Phase 1 addresses revisions to Cal-Am's conservation and rationing procedures and in Phase 2 we will authorize conservation programs for the Monterey District in the 2009-2011 general rate case period.

2. The scope of this proceeding does not include the portion of Cal-Am's application that addresses low income programs, permanent conservation rate design, and related revenue recovery mechanisms. The scoping memo transferred these issues to Cal-Am's general rate case for the Monterey District, A.08-01-027.

3. Evidentiary hearings on Phase 1 issues were held on July 28-30 and August 12-13, 2008.

4. On October 10, 2008, two motions for adoption of proposed Phase 1 settlements were filed by Cal-Am, DRA, and MPWMD. One settlement is titled "Settlement Agreement Among The Division of Ratepayer Advocates, Monterey Peninsula Water Management District and California-American Water Company on Conservation Issues for the Monterey District," contains Appendices A, B, and C, and is attached to this decision as Attachment 1. The other settlement is titled "Partial Interim Settlement Agreement Between the Division of Ratepayer Advocates, California-American Water Company, and The Monterey Peninsula Water Management District," and is attached to this decision as Attachment 2.

5. These two settlements are uncontested.

6. On October 10, 2008, Cal-Am and MPWMD filed a motion for adoption of a proposed Phase 1 settlement titled "CAW/MPWMD Settlement Agreement Addressing Conservation/Rationing Plan." Comments stating that this settlement is not ripe for Commission consideration were timely filed by DRA and HHSRA.

7. We do not address the October 10, 2008, Cal-Am/MPWMD settlement in this decision.

8. The water supply limitations for the Monterey District are due to (1) the region's vulnerability to drought, and (2) the legal and regulatory restrictions on Cal-Am's use of water from the Carmel River and Seaside Basin imposed by the SWRCB's July 6, 1995 decision in Order 95-10 and the Monterey Superior Court's March 27, 2006 ruling in *California American Water v. City of Seaside, et al.*, Case No. M66343 (Seaside Basin Adjudication).

9. Cal-Am has been operating under at least Stage 1 conservation requirements since 1999.

10. On January 15, 2008, the SWRCB issued a draft CDO to enforce compliance with Order 95-10. If finalized, the CDO would require Cal-Am to decrease its use of Carmel River water by 50% over a 7-year period beginning in 2009.

11. There is an immediate need to adopt a regulatory framework that can be rapidly activated to require increasingly stringent reductions in customers' water consumption.

12. Cal-Am proposes to change its existing Rule 14.1 Water Conservation Plan, which has three stages of conservation, to a revised Rule 14.1 which has three stages of conservation and an additional four stages of rationing.

13. The two proposed settlements under review in this decision address only the conservation stages, Stages 1-3.

14. Under MPWMD's Ordinances 134 and 135, Cal-Am's sub-system customers in Bishop, Hidden Hills, and Ryan Ranch (sub-system customers) are included within the Monterey Peninsula Water Resource System for the first time. Therefore, these customers are now subject to the conservation and rationing provisions of MPWMD's Regulation XV.

15. The sub-system customers are served by water from the Laguna Seca Subarea and subject to the water supply limitations imposed by the Seaside Basin Adjudication.

16. The revised Rule 14.1 should include the Seaside Basin Adjudication production limits, to include the Laguna Seca Subarea, in Stages 1-3.

17. Sub-system customers are not be subject to Stages 2 and 3 production limits unless both the production limits for main system customers and the production limits for the Laguna Seca Subarea have been triggered.

18. A different treatment of main system and sub-system customers under Rule 14.1 is fair and reasonable.

19. It is reasonable for Cal-Am to install flow restrictors wherever it is possible rather than to impose water waste fees.

20. The more stringent production triggers, landscape audit and water budget requirements, and expanded use of emergency rates proposed in the revised Rule 14.1 settlement are reasonable.

21. The settlement language requiring a 30-day customer notice for rate increases and including a formal process for customers to receive individual variances from flow restrictor requirements based on documented medical needs is beneficial and reasonable.

22. The Commission has a comprehensive evidentiary record addressing the confidentiality and customer privacy issues surrounding the sharing of customer data with MPWMD.

23. The type of customer data sharing listed in the proposed settlement, at Attachment 1, Appendix C, is quite extensive and includes a customer's meter and service address, as well as an individual customer's water use survey and landscape audit information. This data can also be used by MPWMD in rationing Stages 4-7 and to assess and quantify water savings from conservation programs that Cal-Am administers.

24. We address all data sharing issues between Cal-Am and MPWMD here.

25. Cal-Am has provided MPWMD customer identifiable consumption data in previous years under a written nondisclosure agreement and the record does not contain evidence of violations of the nondisclosure agreement or customer complaints regarding this practice.

26. It is reasonable for the rate design for interim emergency rates for sub-system customers to be similar to the rate design for emergency rates for main system customers.

27. It is beneficial for sub-system customers to have separate Emergency WRAMs that work in the same manner as the current Emergency WRAM for main system customers.

28. Sub-system customers should be eligible for all conservation programs offered by Cal-Am to its main system customers.

29. Cal-Am has about 15 customers who receive free service based on historical contracts.

30. The provisions of Section 8 of the settlement at Attachment 2 deal with Cal-Am's efforts to address the free service customers and should be given a high priority by Cal-Am.

31. Cal-Am should include reporting on free water usage in its annual conservation report as well as in its July 1, 2010 GRC application.

32. Cal-Am should meter and monitor its own water usage and the water usage of MPWMD.

### **Conclusions of Law**

1. The October 10, 2008 proposed settlement titled "CAW/MPWMD Settlement Agreement Addressing Conservation/Rationing Plan" is not ripe for consideration in this decision.

2. In considering adoption of the Cal-Am/DRA/MPWMD proposed settlements, we do not negate the provisions of any purchase agreement between Cal-Am and customers of the sub-systems in the Laguna Seca Subarea.

3. MPWMD is charged by legislative statute with the responsibility to manage and conserve the water resources within the Monterey Peninsula Water Resource System.

4. While utility customers, like other individual California citizens, have constitutionally-based privacy interests which include an interest in controlling

the disclosure of detailed personal information, the extent of a privacy interest is dependent on the circumstances.

5. The record here provides us the necessary information to balance the need of a public agency charged with promoting and enforcing conservation measures to obtain from Cal-Am individual customer water consumption data with that individual customer's privacy rights.

6. Public Utilities Code Section 588 addresses district attorney requests for information regarding customers of telephone, electric and gas utilities, but does not apply to disclosures of information by water utilities.

7. In the proposed settlement at Attachment 1, Cal-Am expressly agrees to provide MPWMD with detailed customer information, including address, account numbers, and usage information. We clarify that this information should be provided according to Section IV of the settlement subject to a reasonable nondisclosure agreement.

8. Cal-Am should disclose to all customers requesting a free conservation audit that the information will be shared with MPWMD.

9. The proposed settlement at Attachment 1 is reasonable in light of the whole record, consistent with the law, and in the public interest.

10. The revisions to Rule 14.1 should become effective immediately upon the Commission decision adopting the settlement.

11. Tariff MO-14.1 should be implemented immediately via advice letter.

12. The proposed settlement at Attachment 2 is reasonable in light of the whole record, consistent with the law, and in the public interest.

**O R D E R**

**IT IS ORDERED** that:

1. The proposed settlement at Attachment 1 is adopted as discussed in this decision.
2. The revised Rule 14.1 is effective immediately.
3. California-American Water Company (Cal-Am) may implement Tariff MO-14.1 immediately via advice letter.
4. Cal-Am shall provide the customer usage data agreed to in the settlement to the Monterey Peninsula Water Management District (MPWMD) subject to a reasonable nondisclosure agreement.
5. The proposed settlement at Attachment 2 is adopted as discussed in this decision.
6. Cal-Am shall report on free water usage in its annual conservation report as well as in its July 1, 2010 general rate case application.
7. Application 07-12-010 remains open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

