

Decision 11-03-043 March 24, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California Water Service Company (U60W), a California Corporation, for an Order authorizing the allocation of Net Proceeds from MTBE (methyl tertiary-butyl ether) Groundwater Contamination Litigation.

Application 09-07-011
(Filed July 8, 2009)

**DECISION DEFERRING REMAINING ISSUES TO A GENERAL RATE CASE
AND CLOSING PROCEEDING**

1. Summary

This decision closes the proceeding in which California Water Service Company (Cal Water) has sought authority for the allocation of net proceeds from litigation pertaining to the contamination of groundwater by methyl tertiary-butyl ether (MTBE).

Earlier, in Phase I of the proceeding, the Commission issued Decision (D.) 10-04-037 that adopted a settlement reached between the parties and allowed the existing MTBE Litigation Memorandum Account to be amended to track the use of funds to construct treatment and replacement facilities. The available funds from the MTBE litigation settlement, determined to be \$34,254,417.07 subject to adjustment based on specified contingencies, were ordered to be used for the construction or purchase of MTBE treatment and replacement facilities.

The proceeding remained open for Phase II, until a separate rulemaking proceeding (Rulemaking 09-03-014), produced both an applicable definition of "net proceeds" and rules for the accounting treatment of contamination proceeds

by Commission-regulated water companies, which occurred in D.10-10-018 and D.10-12-058. Upon the conclusion of the rulemaking Cal Water and the sole protestant, Division of Ratepayer Advocates, jointly moved to close this proceeding on the basis of an agreement (see Memorandum of Understanding, attached to this decision as Appendix A) deferring to future General Rate Cases (GRC) the resolution of unresolved Phase II issues.

This decision concludes that the issues previously set for resolution in Phase II of this proceeding either have been recently resolved by actions of Cal Water and D.10-10-018, the generic contamination proceeds rulemaking, are not ripe for resolution or can be more efficiently addressed within a future GRC. As a result, the decision defers the remaining issues to a future GRC and closes the proceeding.

2. Background and Procedural History

The assigned Commissioner's September 29, 2009 Ruling and Scoping Memo bifurcated this proceeding and Phase I later culminated in Decision (D.) 10-04-037. (For a procedural history of Phase I, see that decision at 1-4.) Phase II subsequently was taken off calendar to await the outcome of the related Rulemaking (R.) 09-03-014, which occurred on December 16, 2010. The assigned Administrative Law Judge (ALJ) activated Phase II on December 21, 2010, by setting a Prehearing Conference (PHC) for January 18, 2011, and requesting counsel to meet, confer and file and serve a joint case management statement. The PHC then was rescheduled for January 31, 2011. In lieu of a joint case management statement California Water Service Company (Cal Water) and Division of Ratepayer Advocates (DRA) on January 27, 2011, filed a joint motion to close the proceeding, accompanied by a Memorandum of Understanding, which became the main subject of the PHC. After reviewing the pending

Phase II issues with parties during the PHC, the assigned ALJ took that motion under advisement, indicating that a ruling on the motion would be forthcoming. This decision grants the motion and closes the proceeding.

3. Discussion

3.1. Status of Phase II Issues in the Wake of the Contamination Proceeds Rulemaking

The September 28, 2009, Assigned Commissioner's Ruling and Scoping Memo identified eight issues for Phase II.¹

The first issue, whether any of the subject contamination proceeds have been included in rate base and recovered in present rates, has been resolved by the parties' joint assurance that remediation-related plant items have been removed from rate base.²

The parties have reasonably concluded in their Memorandum of Understanding³ that resolution of the second issue, addressing the relevant and comparative risks assumed by ratepayers and shareholders, should await a future General Rate Case (GRC) occurring after a "determination that litigation has concluded and that all replacement capital improvements have been completed."⁴ This is appropriate given the fact that the factors set out in D.10-10-018⁵ to inform the allocation of net proceeds presume a full temporal record of the risks involved.

¹ Ruling and Scoping Memo at 4-5.

² PHC R.T. 49:11-50:1.

³ At 1, para. 1, and 2, para. 6.

⁴ Id. at 2, para. 6.

⁵ At 48-49 (Table 2).

The third and fourth issues, determining the proper accounting treatment for plant investments made with contamination award proceeds, were resolved in D.10-10-018 (they are to be treated as contributions in aid of construction (CIAC)).⁶

The fifth issue, expenditure or investment of prospective settlement proceeds arising from post-April 2008 detections of contamination, is resolved by the terms of the memorandum account⁷ and the parties' agreement that available funds from such detections will be used for the construction or purchase of methyl tertiary-butyl ether (MTBE) treatment and replacement facilities as needed.⁸

There is no record that the sixth issue, allocation of the contamination settlement proceeds among Cal Water's 24 districts, has been addressed formally to date. Instead Cal Water is making district-by-district⁹ investments in remediation on the basis of need, with offsetting adjustments to CIAC pursuant to D.10-10-018. This approach, apparently supported by DRA,¹⁰ is consistent with the Phase I D.10-04-037 requiring that the available net proceeds "must all be expended for the construction or purchase" of treatment and replacement facilities.¹¹ Further, as noted above, the CIAC accounting treatment accords with

⁶ D.10-10-018 at 63, O.P. 1 and 2.d.

⁷ "The Commission will determine the disposition of the [MTBE Memorandum Account] in connection with Cal Water's general rate cases or a separate proceeding." D.10-04-037, Appendix A (Preliminary Statement) at F.1.

⁸ PHC R.T. 51:23-55:22.

⁹ Estimated to be four or five districts thus far. PHC R.T. 52:13-28 through 55:22.

¹⁰ PHC R.T. 54:26 through 55:27.

¹¹ D.10-04-037 at 12-13, O.P.4.

the rulemaking D.10-10-018. We conclude that the issue of investments in remediation within and across Cal Water's districts¹² is most efficiently addressed in Cal Water's periodic company-wide GRCs.

Issue number seven, whether Cal Water's calculations and estimates of amounts invested, and to be invested, in treatment and replacement plant, are accurate, is not ripe without one or more data requests by DRA,¹³ which we conclude can occur more efficiently in conjunction with Cal Water's GRCs rather than in this proceeding.

The eighth and final Phase II issue identified in the Scoping Memo asks how the term "net proceeds" should be defined and applied, a query expressly answered in D.10-10-018,¹⁴ resolving that issue for purposes of this proceeding.

3.2. Conclusion

As the foregoing discussion reveals, issues previously set for resolution in Phase II of this proceeding either have been recently resolved by actions of Cal Water¹⁵ and the generic contamination proceeds rulemaking D.10-10-018,¹⁶

¹² In the Preliminary Statement authorizing the contamination proceeds memorandum account for Cal Water, seventeen of the twenty-four districts are named as candidates for remediation investments.

¹³ PHC RT 56:5-26.

¹⁴ At 64-65, OP 6:

Gross proceeds received minus all (1) reasonable legal expenses related to litigation, (2) costs of remedying plants, facilities, and resources to bring the water supply to a safe and reliable condition in accordance with General Order 103-A standards, and (3) all other reasonable costs and expenses that are the direct result and would not have to be incurred in the absence of such contamination, including all relevant costs already recovered from ratepayers (for which they have been, or will be, repaid or credited).

¹⁵ Scoped issues 1 and 6.

are not ripe for resolution¹⁷ or can be more efficiently addressed within a future GRC.¹⁸ As a result, there is a just and reasonable basis for closing the proceeding as jointly requested by the parties.

4. Categorization and Need for Hearings

In Resolution ALJ 176-3238, dated July 30, 2009, the Commission preliminarily categorized this application as Ratesetting and preliminarily determined that hearings were necessary. No party contested the joint motion and a public hearing is not necessary.

5. Reduction of Comment Period

Pursuant to Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, because this is an uncontested matter where the decision grants the relief requested, the 30-day public review and comment period otherwise required by Section 311 of the Public Utilities Code is reduced to seven days. No comments were received.

6. Assignment of Proceeding

Commissioner John A. Bohn was assigned this proceeding initially; upon the completion of his term, the proceeding was assigned on January 12, 2011 to President Michael R. Peevey. Gary Weatherford is the assigned ALJ.

¹⁶ Scoped issues 3, 4, 5 and 8.

¹⁷ Scoped issues 2 and 6.

¹⁸ Scoped issues 2, 6 and 7.

Findings of Fact

1. Damage incurred from the MTBE contamination has left Cal Water with a need to make expenditures for the construction or purchase of MTBE treatment and replacement facilities.

2. Cal Water initiated this proceeding with Application 09-07-011 for an order authorizing the allocation of net proceeds from MTBE groundwater contamination litigation.

3. Phase I of this proceeding culminated in D.10-04-037, issued on April 26, 2009, under which Cal Water was ordered to use all of a specified amount of contamination proceeds for the construction or purchase of MTBE treatment and replacement facilities.

4. Pursuant to D.10-04-037, Cal Water is applying contamination proceeds to treatment and remediation through a memorandum account, treating the resulting replacement plant as contribution in aid of construction.

5. Phase II of this proceeding awaited the outcome of the contamination proceeds rulemaking R.09-03-014, which produced D.10-10-018 (October 14, 2010) and culminated in D.10-12-058 (December 16, 2010).

6. The issues previously set for resolution in Phase II of this proceeding either have been recently resolved by actions of Cal Water and the generic contamination proceeds rulemaking (D.10-10-018 and D.10-12-058), are not ripe for resolution or can be more efficiently addressed within a future GRC. The status of each of the eight issues identified in the September 28, 2009 Assigned Commissioner's Ruling and Scoping Memo in this proceeding is as follows:

- a. Have any of the MTBE Contamination Settlement proceeds already invested in utility plant been included in rate base and recovered in present rates? This issue has been resolved by the joint assurance of the parties Cal Water and DRA that

- remediation-related plant items have been removed from rate base.
- b. What have been the relevant and comparative risks assumed by ratepayers and shareholders, respectively, concerning the MTBE contamination of Cal Water's water supply and related litigation? Resolution of this issue can await a future GRC occurring after a determination that litigation has concluded and that all replacement capital improvements have been completed.
 - c. How should Cal Water account for treatment and replacement plant investments related to MTBE contamination? This issue was resolved by D.10-10-018, which ordered that the accounting treatment shall be as contributions in aid of construction.
 - d. How should Cal Water account for future plant investments made from MTBE settlement proceeds received to date and to be received, respectively? This issue likewise was resolved by D.10-10-018, which ordered that the accounting treatment shall be as contributions in aid of construction.
 - e. How should any MTBE settlement proceeds arising from detections after April 12, 2008, be expended and/or invested? Available funds from such detections can be ordered to be used for the construction or purchase of MTBE treatment and replacement facilities as needed in accordance with the MTBE Memorandum Account and the agreement of the parties.
 - f. How should Cal Water's investment of MTBE contamination proceeds in utility plant be allocated among its 24 districts? Cal Water has been making district-by-district investments in remediation from available MTBE contamination proceeds on the basis of need, consistent with the order in the Phase I, D.10-04-037 at Ordering Paragraph 4, requiring that the available net proceeds "must all be expended for the construction or purchase" of treatment and replacement facilities. Issues that arise concerning investments in remediation within and across Cal Water's districts can be addressed in Cal Water's periodic company-wide GRC.
 - g. Does Table 1 of John Tootle's prepared testimony relative to MTBE contamination proceeds accurately present the amount

- invested in treatment and replacement plant, and reasonably estimate the additional investments that should be made in treatment and replacement plant? The accuracy of Cal Water's calculations and estimates of amounts invested, and to be invested, in remediation can be addressed in Cal Water's periodic company-wide GRC rather than in this proceeding.
- h. How should the term "net proceeds" be defined and applied in resolving the foregoing Phase 2 issues? The term "net proceeds" was defined in D.10-10-018 and is applicable here.

Conclusions of Law

1. Evidentiary hearings are not needed for Phase II of the proceeding.
2. The Phase II Memorandum of Understanding between Cal Water and DRA (attached as Appendix A), combined with the outcome in the contamination proceeds rulemaking (D.10-10-018 and D.10-12-058), provides a reasonable and just basis for a decision closing this proceeding.
3. The proceeding should be closed as that outcome is reasonable in light of the whole record, consistent with law, and in the public interest.

O R D E R

IT IS ORDERED that:

1. Available methyl tertiary-butyl ether (MTBE) settlement proceeds arising from detections after April 12, 2008, shall be used by California Water Service Company (Cal Water) for the construction or purchase of MTBE treatment and replacement facilities as needed in accordance with the MTBE Memorandum Account and the Memorandum of Understanding between Cal Water and the Division of Ratepayer Advocates.
2. The following Phase II issues, identified in the September 28, 2009 Assigned Commissioner's Ruling and Scoping Memo and that remain

unresolved, shall be deferred to a future General Rate Case of the California Water Service Company (Cal Water):

- What have been the relevant and comparative risks assumed by ratepayers and shareholders, respectively, concerning the methyl tertiary-butyl ether (MTBE) contamination of Cal Water's water supply and related litigation?
- How should Cal Water's investment of MTBE contamination proceeds in utility plant be allocated among its 24 districts?
- Does Table 1 of John Tootle's prepared testimony relative to MTBE contamination proceeds accurately present the amount invested in treatment and replacement plant, and reasonably estimate the additional investments that should be made in treatment and replacement plant?

California Water Service Company shall present those issues at its next General Rate Case (GRC), and subsequent GRCs as relevant, for a determination of whether any or all of those issues are ripe for resolution.

3. Hearings are no longer necessary.
4. Application 09-07-011 is closed.

This order is effective today.

Dated March 24, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners