

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

Application of California-American Water
Company (U210W) for an Order Authorizing
the Collection and Remittance of the Monterey
Peninsula Water Management District User Fee.

A.10-01-012
(Filed January 5, 2010)

**COMMENTS OF CALIFORNIA-AMERICAN WATER COMPANY (U210W) ON THE
PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE BUSHEY**

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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, California-American Water Company (“California American Water” or “Company”) hereby submits its comments on the proposed decision of Administrative Law Judge Bushey, mailed December 21, 2010 (“PD”).¹ The PD rejects the all-party settlement between California American Water, the Monterey Peninsula Water Management District (“MPWMD”) and the Division of Ratepayer Advocates (“DRA”) and dismisses the Application. The PD, however, contains a number of misconceptions regarding MPWMD’s “User Fee” and the relationship between California American Water and MPWMD’s Mitigation Program and Aquifer Storage and Recovery (“ASR”) Program. These misconceptions have resulted in a number of factual and legal errors in the PD. California American Water respectfully requests that the Commission modify the PD to correct these errors and adopt the all-party settlement. As required by Rule 14.3(b), California American Water has

¹ California American Water joins in the comments submitted by the MPWMD, and in particular, the list of factual and legal errors listed in sections III and IV of those comments.

attached as Appendix A the proposed findings of fact and conclusions of law that support the requested revisions.

Contrary to PD's description, the Mitigation Program and the ASR Program are not California American Water obligations or capital projects that California American Water has "contracted out" to MPWMD. MPWMD's Mitigation Program and ASR Program are local government programs funded by a utility user's tax imposed by the MPWMD in accordance with California law.

When the Mitigation and ASR Programs are correctly viewed as local government programs funded through a utility user's tax, the all-party settlement agreement offered to resolve this proceeding meets the Commission's criteria for adopting settlement agreements: (a) it is consistent with the law, particularly the Commission's *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities*;² (b) it is reasonable in light of the record; and, (c) it is in the public interest.

Accordingly, the Commission should approve the all-party settlement agreement, which would authorize California American Water to resume its prior practice of collecting and remitting to MPWMD its User Fee by way of a surcharge on customer bills. The settlement would also authorize California American Water to impose a surcharge on customer bills to collect the balance in the MPWMD User Fee Balancing Account, as this balance represents utility user's taxes the Company has paid for its customers since July 2009.

² D.89-05-063, *Investigation on the Commission's Own Motion to Establish Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities*, 1989 Cal. PUC LEXIS 890 ("D.89-05-063, 1989 Cal. PUC LEXIS 890", or "Commission's Guidelines").

II. BACKGROUND

A. Procedural History

In the Commission's decision regarding California American Water's 2008 general rate case for the Monterey District, D.09-07-021, the Commission raised concerns about the MPWMD User Fee.³ The Commission ordered the Company to meet with MPWMD regarding costs "properly the responsibility of California-American Water Company and its ratepayers."⁴ The Commission further ordered California American Water to develop and submit for Commission approval within 180 days "a program to fund the projects currently performed by the Monterey Peninsula Water Management District that are properly California-American Water Company's responsibility."⁵ Finally, the Commission authorized California American Water to track interim costs in an advice letter.⁶

The misconceptions regarding MPWMD's Mitigation and ASR Programs are apparent in the language of D.09-07-021, which refers to "Management District expenditures on [California-American Water's] behalf." After meeting and conferring with MPWMD, California American Water attempted to clarify this issue in its Application, explaining that the Mitigation Program was MPWMD's responsibility, and that California American Water would only be responsible if for some reason MPWMD discontinued the program.⁷ Similarly, the purpose of MPWMD's ASR program is to use MPWMD's water rights in order to augment the existing constrained

³ D.09-07-021, *Application of California-American Water Company (U210W) for Authorization to Increase its Revenues for Water Service in its Monterey District by \$ 24,718,200 or 80.30% in the year 2009; \$ 6,503,900 or 11.72% in the year 2010; and \$ 7,598,300 or 12.25% in the year 2011 Under the Current Rate Design and to Increase its Revenues for Water Service in the Toro Service Area of its Monterey District by \$ 354,324 or 114.97% in the year 2009; \$ 25,000 or 3.77% in the year 2010; and \$ 46,500 or 6.76% in the year 2011 Under the Current Rate Design, and Related Matters*, 2009 Cal. PUC LEXIS 346 ("D.09-07-021, 2009 Cal. PUC LEXIS 346"), **180-190.

⁴ D.09-07-021, 2009 Cal. PUC LEXIS 346, *236, Ordering ¶24.

⁵ D.09-07-021, 2009 Cal. PUC LEXIS 346, **236-237, Ordering ¶25.

⁶ *Id.*

⁷ A.10-01-012, *In the Matter of the Application of California-American Water Company (U 210 W) for an Order Authorizing the Collection and Remittance of The Monterey Peninsula Water Management District User Fee*, filed January 5, 2010 ("Application"), p. 7.

water supply in Monterey.⁸ The MPWMD program inures to the benefit of California American Water because the Company has an obligation under Order 95-10 to obtain legal water rights; however, California American Water does not have a legal obligation to do so via the ASR Program. The key is that the Mitigation and ASR Programs are local government programs funded by a utility user's tax, as the Commission's Guidelines describe a utility users' tax.⁹

To assure the Commission that California American Water was not incurring costs for tasks performed by MPWMD and paid by the User Fee, the Company provided testimony that further described the cooperative – but not duplicative – efforts of California American Water and MPWMD.¹⁰

DRA filed the only protest to the application, which raised the issue of the interest rate earned on the balancing account that would track the utility user's taxes the Company has paid for its customers since the Commission issued D.09-07-021.¹¹ Those payments were necessary so the Mitigation and ASR Programs could continue uninterrupted to the benefit of the Carmel River and California American Water's customers. California American Water reached agreement with DRA on the interest rate for the balancing account, facilitating the all-party settlement that is the subject of the PD. California American Water, MPWMD and DRA filed a joint motion for approval of the all-party settlement agreement on May 18, 2010.

In the seven months that elapsed between the filing of the settlement motion and the issuance of the PD, the parties received no indication that there were concerns regarding the sufficiency of the record or the terms of the settlement. Although not required, it is common

⁸ Direct Testimony of Joseph W. Oliver ("Oliver Testimony"), p. 4

⁹ D.89-05-063, 1989 Cal. PUC LEXIS 890, **5-9.

¹⁰ Direct Testimony of F. Mark Schubert ("Schubert Testimony"), *passim*.

¹¹ *Protest of the Division of Ratepayer Advocates*, filed February 18, 2010, p. 3.

Commission practice for an ALJ to bring such concerns to the parties so that the parties may modify the settlement to clarify the issues and address the ALJ's concerns.¹²

B. The History of MPWMD and the Water Allocation Program

The Monterey Peninsula has a long history of water supply deficits. That history is well-described in Commission decisions D.09-12-017 and D.10-12-016.

The MPWMD was born out of the water supply deficits that arose from the 1976-1977 drought, which resulted in water rationing on the Monterey Peninsula. MPWMD is a local special district created by the Monterey Peninsula Water Management District Law enacted by the California Legislature in 1977.¹³ Among the various powers of MPWMD is its authority to regulate "water distribution systems" within its jurisdiction and to adopt rules and regulations to implement that authority.¹⁴

1. The Water Allocation Program

In 1981, MPWMD adopted Ordinance 7, which created the Monterey Peninsula's first standby rationing plan. That rationing plan included Rule 30, which required MPWMD to adopt an annual resolution establishing a "municipal unit allotment," which in turn is "the maximum quantity of water that can be delivered by a particular water distribution system within a municipal unit in one water year."¹⁵ This is the genesis of the "Water Allocation Program." As

¹² See D.09-04-066, *In the Matter of the Application of The Nevada Hydro Company for a Certificate of Public Convenience and Necessity for the Talega-Escondido/Valley-Serrano 500-kV Interconnect*, 2009 Cal. PUC LEXIS 195 ("D.09-04-066, 2009 Cal. PUC LEXIS 195"), **9-11 (Providing the utility multiple opportunities to file adequate documents, including an amended application); see also D.08-10-018, *In the Matter of the Application of San Jose Water Company (U 168 W) for an Order Approving the Sale of the Main Office under Section 851 and Authorizing the Investment of the Sale Proceeds under Section 790* ("D.08-10-018") (Providing multiple opportunities for utility to make required filings).

¹³ The Monterey Peninsula Water Management District Law is codified in Chapter 118 of the Water Code Appendix. Wat. Code App. §§118-1 to 118-901.

¹⁴ Wat. Code App. §118-363.

¹⁵ A "municipal unit" was defined by Ordinance 7 as the Cities of Carmel, Del Rey Oaks, Monterey, Pacific Grove, Sand City, Seaside, and the portion of the County of Monterey and the City of Marina within the District's boundaries.

part of this program, MPWMD limited California American Water's appropriations from the Carmel River to 20,000 acre-feet per year ("afy") based on average rainfall.¹⁶

In 1990, MPWMD revised significantly its Water Allocation Program to reflect dry-year rather than average-year conditions and to account for environmental flow needs.¹⁷ In compliance with the California Environmental Quality Act ("CEQA"), MPWMD prepared an Environmental Impact Report ("EIR") to analyze the environmental effects of a modified Water Allocation Program.¹⁸ MPWMD described the purposes of the environmental impact report as:

This EIR analyzes the cumulative impacts of the extraction of water from the [Monterey Peninsula Water Resource System] and the delivery of this water to users in the Monterey Peninsula area. More specifically, however, this EIR focuses on the California-American Water Company (Cal-Am), which supplies approximately 92 percent of the water delivered by water distribution systems to users in the Monterey Peninsula area, and the role of the Monterey Peninsula Water Management District, in regulating the Cal-Am system. Cal-Am, an investor-owned private utility, currently supplies water to public and private customers within part or all of the following jurisdictions: Carmel-by-the-Sea, Del Rey Oaks, City of Monterey, Pacific Grove, Sand City, Seaside, and Monterey County. Cal-Am is the only supplier within the district that serves more than one jurisdiction.¹⁹

On November 5, 1990, the MPWMD Board certified the Final EIR for the Water Allocation Program and adopted findings that included a set of mitigation measures for the selected production limits. These mitigation measures are the MPWMD's Five-Year Mitigation Program.²⁰

Darby Fuerst, MPWMD's General Manager, explained the Mitigation Program in his testimony as follows:

The Mitigation Program was necessary because the production level that was analyzed and selected for CAW's main system, i.e., Water Supply Option V or 16,744 afy, resulted in significant, adverse environmental impacts that must be mitigated. The California Environmental Quality

¹⁶ Direct Testimony of Darby Fuerst ("Fuerst Testimony"), p. 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Exhibit MPWMD-DF-01.

²⁰ *Id.*

Act (CEQA) requires that, for each significant impact identified in an EIR, the EIR must discuss feasible measures to avoid or substantially reduce the program's significant environmental effect.

The Five-Year Mitigation Program formally began in July 1991 and ran through June 1996. Following public hearings in May 1996, the District Board authorized continuation of the Five-Year Mitigation Program through 2001. Since 2001, the District Board has voted to continue the Comprehensive Mitigation Program as part of the District's annual budget approval process. Continuation of the Mitigation Program is necessary for implementation of the District's Water Allocation Program. Implementation of the Water Allocation Program is necessary, in turn, to ensure that sufficient water is available to reliably serve CAW's customers.²¹

2. MPWMD Surcharges

Since 1983, MPWMD has adopted nine ordinances that either imposed or modified some form of a utility user's tax.²² Each ordinance ordered the water purveyor to place the tax on the customer's bill as a surcharge, and then collect and remit the surcharge to MPWMD.²³ In most cases, the ordinances increased the amount of the surcharge, but two ordinances reduced the total tax imposed on utility customers.²⁴ In all but three instances, the surcharge applied to all water distribution systems with more than 50 connections, whether a regulated utility, a mutual water company, or municipal water system.²⁵ In one instance, the ordinance applied to all water purveyors regardless of size.²⁶ Two ordinances imposed the surcharge only on California American Water customers.²⁷ Most of these surcharges funded MPWMD activities either to improve the Carmel River, or to implement its regulatory powers in light of water supply emergencies.²⁸ Two surcharges funded MPWMD capital projects.²⁹

²¹ Fuerst Testimony, pp. 6-7 (emphasis added).

²² MPWMD Ordinances 10, 36, 37, 51, 55, 58, 61, 67 and 123, available at <http://www.mpwmd.dst.ca.us/ordinances/ordinances.htm> (last checked January 10, 2011).

²³ *Id.*

²⁴ MPWMD Ordinances 55 and 61,

²⁵ MPWMD Ordinances 10, 36, 55, 58, 61, and 67.

²⁶ MPWMD Ordinance 37.

²⁷ MPWMD Ordinances 51 and 123.

²⁸ MPWMD Ordinances 10, 37, 51, 55, 58, 61, and 67.

²⁹ MPWMD Ordinances 36 and 123.

C. State Water Resources Control Board Order 95-10 and the Mitigation Program

During the late 1980's until 1995, the Carmel River was the subject of great scrutiny at the State Water Resources Control Board ("SWRCB"). On July 5, 1995, SWRCB issued two decisions, Decision 1632 and Order 95-10. Decision 1632 granted MPWMD the right to divert up to 29,000 acre-feet of water from the Carmel River.³⁰ In Order 95-10, the SWRCB found that California American Water did not have the rights to over 10,000 acre-feet of the water it was diverting from the Carmel River.³¹ The SWRCB allowed California American Water to continue diverting water above its established rights, but imposed additional requirements on California American Water.³² Specifically, the SWRCB included in Order 95-10 a condition that, if MPWMD ceased implementing the mitigation measures in the Five Year Mitigation Program, then California American Water was to assume those duties and ensure that the Mitigation Program continued.³³ As of the end of 2010, MPWMD has continued to implement the Mitigation Program, funded in part by the User Fee.³⁴

D. MPWMD Aquifer Storage and Recovery Program

Decision 1632 authorized MPWMD to divert 29,000 afy to the New Los Padres Dam and Reservoir; however, the MPWMD's electorate voted down the bond measure to fund the New Los Padres Dam and Reservoir.³⁵ In response, MPWMD looked for alternatives projects to

³⁰ Via the proposed New Los Padres Dam and Reservoir.

³¹ SWRCB Order 95-10, p. 25, *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/wro1995.shtml (last checked January 10, 2011).

³² SWRCB Order 95-10, pp. 40-44.

³³ SWRCB Order 95-10, p. 43, Ordering Paragraph 11.

³⁴ Fuerst Testimony, p. 7.

³⁵ Oliver Testimony, p. 4.

maintain or use the various permits that MPWMD obtained for the New Los Padres Dam project, including the SWRCB permits.³⁶

The MPWMD developed the ASR program as the means for maintaining the SWRCB permits.³⁷ The ASR program takes excess winter Carmel River flow and stores that water in the Seaside Groundwater Basin.³⁸ California American Water then pumps that water from the Seaside Groundwater Basin during the summer and fall when water levels are low on the Carmel River.³⁹

As described in testimonies of Joseph Oliver, MPWMD's Water Resources Manager, and F. Mark Schubert, California American Water's Director of Engineering, the Company and MPWMD have divided the responsibilities for this program. MPWMD constructs the ASR wells overlying the Seaside Basin.⁴⁰ California American Water constructs the necessary distribution system improvements to bring Carmel River water to the ASR wells, and uses its existing Carmel Valley well network to divert the excess Carmel River water and deliver the water to the ASR wells.⁴¹ MPWMD and the Company have been jointly working on modifying the SWRCB water rights as necessary to reflect ASR operations, not dam and reservoir storage.⁴²

As stated in F. Mark Schubert's testimony, there is no duplication of effort in the ASR program. MPWMD expenditures funded by the User Fee are for MPWMD's construction expenditures, and related engineering and permitting activities.⁴³

³⁶ Oliver Testimony, *passim*.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Schubert Testimony, p. 4.

⁴² *Id.*, p. 9

⁴³ Schubert Testimony, p. 4.

III. ERRORS IN THE PROPOSED DECISION

The Proposed Decision contains numerous factual and legal errors.

A. California American Water Complied With D.09-07-021

First, California American Water is concerned about the PD's assertion that the Company did not address all of the issues required by D.09-07-021.⁴⁴

D.09-07-021 contains the following orders relating to the MPWMD User Fee:

24. California-American Water Company shall meet and confer with the Monterey Peninsula Water Management District regarding costs properly the responsibility of California-American Water Company and its ratepayers.

25. No later than 180 days after the effective date of this order, California-American Water Company shall develop and submit for Commission approval a program to fund the projects currently performed by the Monterey Peninsula Water Management District that are properly California-American Water Company's responsibility, and is authorized to file an advice letter to create a memorandum account for interim costs.

The discussion in the decision regarding the User Fee provides additional insight into the required content of this subsequent application, which states:

The Management District has a variety of funding mechanisms at its disposal over which this Commission has no jurisdiction. *If the expenditures are properly Cal-Am's responsibility, we must ensure that the projects undertaken by the Management District on Cal-Am's behalf are necessary and are being provided in the most cost-effective manner.*

We are also concerned that the Management District's explanation of the user fee was incomplete. The Management District stated that of the current 8.325% fee, it uses 7.125% for mitigation measures, which it did discuss, and 1.2% for the Aquifer Storage and Recovery project costs. The Management District offered no discussion of its Aquifer Storage and Recovery costs. This is troubling because in Cal-Am's Partial Settlement Agreement with DRA, discussed below, the parties agree that Cal-Am will continue to record Aquifer Storage and Recovery costs in a memorandum

⁴⁴ PD, p. 12

account for reasonableness review by the Commission in Cal-Am's next general rate case and that costs are expected to be about \$14 million. We are concerned that having Cal-Am and the Management District expend funds for the same purpose may not be the most cost-effective means of undertaking the required measures.

Therefore, we direct Cal-Am to meet and confer with the Management District to discuss funding for, and implementation of, both the Mitigation Program and, the Aquifer Storage and Recovery Project, including particularly the possibility of implementing them as joint projects like that described above. The parties may also consider other cost effective and efficient methods for Cal-Am to fully meet any responsibility it may have for the Mitigation Program and the Aquifer Storage and Recovery project.

These excerpts show that the purpose of the meet and confer process, in part, was to determine which of the MPWMD programs are California American Water's responsibility, and, if the programs are California American Water's responsibility, then to ensure that any collaboration with the MPWMD is cost-effective.

The result of the "meet and confer" process was agreement between the Company and MPWMD (and ultimately DRA) that neither the Mitigation Program nor the MPWMD's ASR activities are California American Water's responsibility. Both are local government programs. Accordingly, California American Water's application sought to reinstate the prior practice because Commission precedent – specifically the Commission's *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities* – is clear that the prior practice was wholly proper as discussed below.

The discussion in D.09-07-021 appears to imply that the Mitigation Program and ASR Program are the Company's responsibilities, despite the conclusion that the record in that proceeding did "not provide sufficient legal or factual support to determine the appropriate level

of Cal-Am funding for the Mitigation and Aquifer Storage and Recovery projects.”⁴⁵ While the Application attempted to dispel any notion that these programs are the Company’s responsibility, the PD necessarily accepts as true what was unproven in D.09-07-021 – that the MPWMD Mitigation and ASR Programs are California American Water obligations – with no evidence to support that conclusion. This is a factual error. This factual error results in numerous legal errors in the PD’s treatment of the Settlement Agreement, the Memorandum Account, and the Application.

B. The Settlement Agreement Is Consistent with the Commission’s Guidelines on the Equitable Treatment of Local Government Revenue Producing Mechanisms.

The MPWMD Mitigation and ASR Programs are local government programs funded by a utility users’ tax, and the Commission has previously addressed the appropriate treatment of utility user’s taxes. The Commission’s *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities* describes a utility user’s tax as “pass-along taxes to the consumer, usually based on consumption, but collected by the utility for the taxing entity.”⁴⁶ The Commission’s *Guidelines* then set forth the following Findings of Fact, Conclusions of Law and Ordering Paragraphs:

- The Commission has no jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers, or utilities, or users’ taxes on commodities used by a utility to produce its product. (Finding of Fact #9)
- Public utilities should be authorized in their discretion to set forth as a separate line item in a utility bill the utility users’ tax imposed by the local government entity on utility customers within the jurisdiction of that local governmental entity. (Conclusion of Law #3)
- A public utility is authorized, in its discretion, to set forth as a separate line item in a utility bill the utility users’ tax imposed on the local government entity on utility

⁴⁵ D.09-07-021, 2009 Cal. PUC LEXIS 346, *189.

⁴⁶ D.89-05-063, 1989 Cal. PUC LEXIS 890, *15.

customers within the jurisdiction of that local governmental entity. (Ordering Paragraph #4)

The PD omits any reference to the Commission's Guidelines despite that decision being a basis for the application, and instead treats the User Fee as a rate charged by the utility.⁴⁷ Treating the MPWMD User Fee as a rate charged by a utility is a legal and factual error because the MPWMD User Fee is not a rate charged by the utility, but is a utility user's tax. As a result, the PD then applies the wrong legal standard in: (a) determining whether the settlement is consistent with the law; and, (b) in its disposition of the Application. This fundamental flaw also undermines each one of the critiques levied by the PD against the Settlement Agreement and the Application.

As discussed above, the detailed history regarding the Water Allocation Program and the MPWMD User Fee shows a number of points that the PD misses or obfuscates. First is that the Mitigation Program is a MPWMD activity that MPWMD first implemented on its own accord to protect the Carmel River, but since 1990 has been and continues to be a program required by CEQA mitigate the significant environmental effects that result from the MPWMD's allocation of the limited water on the Monterey Peninsula. The Mitigation Program *as a whole* is not something that is required of California American Water. Some of the specific mitigation measure that comprise the Mitigation Program require California American Water to take some action or affects the Company's operations in some way; however, *those actions or operational effects are not funded by MPWMD's User Fee.*

Second, because CEQA requires the mitigation program, which addresses the adverse environmental effects on the Carmel River caused by the Monterey Peninsula's demand for

⁴⁷ Compare Application, p. 10 to PD, p. 12.

potable water, the Mitigation Program is in the public interest, and any decision that interrupts these mitigation measures is not in the public interest.

Third, the testimonies of Joseph Oliver and F. Mark Schubert make clear that the MPWMD and California American Water are not engaging in duplicative efforts in implementing the ASR Program. In fact, the uncontradicted testimony of F. Mark Schubert shows that it would cost California American Water millions of dollars to pursue its own water rights for the ASR program such as the one currently being implemented with the MPWMD.⁴⁸

To the extent that the Commission is concerned about ratepayer protection from unreasonable costs, California American Water and MPWMD have explained the protections that exist in California law regarding government agency finance.⁴⁹ The Commission favorably cited to such protections as a means to ensure government agencies implement projects reasonably and prudently.⁵⁰ The record shows that the MPWMD is implementing such legal protections with regard to the MPWMD User Fee: each change in the User Fee has been done by an ordinance that requires two readings at open, public meetings.⁵¹

It is also important to note the similarity of the ASR Program to California American Water's southern California purchase water programs – where a government agency owns and operates infrastructure from which the utility acquires water – but for one material difference. That difference is that the Company does not pay the MPWMD for the ASR water because the customers have already paid for it through the User Fee. The Commission has routinely allowed

⁴⁸ Schubert Testimony, p. 13

⁴⁹ Application, p. 13.

⁵⁰ D.10-12-016, *In the Matter of the Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates*, pp. 83-84.

⁵¹ See MPWMD Ordinances 10, 36, 37, 51, 55, 58, 61, 67 and 123.

California American Water to recover the costs associated with its southern California purchase water programs. The record here does not support a different result.

C. The PD Improperly Denies California American Water the Opportunity to Recover the Balance in the MPWMD User Fee Memorandum Account

The PD's factual errors regarding compliance with D.09-07-021 and the fundamental legal flaw of omitting the Commission's Guidelines as relevant Commission precedent has resulted in legal errors in the treatment of the MPWMD User Fee memorandum account. Specifically, the PD states that California American Water should dissolve the MPWMD User Fee memorandum account and prohibits any recovery of the costs tracked in that account in rates.⁵² It appears that this is because the PD concludes that the Application does not address the issues raised in D.09-07-021.⁵³ As California American Water has previously pointed out, this is factually incorrect. In addition, the PD cites no authority for the proposition that the appropriate disposition of a memorandum account is to dissolve its existence, without prudence review, as a "punitive measure" for deficiencies in the Application. To the contrary, Commission practice is to provide a utility an opportunity to correct perceived deficiencies in filings.⁵⁴ The Commission has not provided California American Water that opportunity here. Thus, the PD is legally flawed, as the treatment of the memorandum account is tantamount to a taking.

The PD's treatment of the memorandum account and future mitigation program costs is also flawed because it is internally inconsistent. The PD makes factual findings that certain documents in the record constitute the mitigation measures that SWRCB would require

⁵² PD, pp. 15-16.

⁵³ PD, p. 15.

⁵⁴ See D.09-04-066, 2009 Cal. PUC LEXIS 195 (Providing the utility multiple opportunities to file adequate documents, including an amended application); and D.08-10-018 (Providing multiple opportunities for utility to make required filings).

California American Water to implement if MPWMD does not.⁵⁵ The PD then offers suggestions on what the Commission may accept as a “beginning point to prepare a budget for the mitigation program that is Cal-Am’s responsibility.”⁵⁶ If some of the costs are reasonable, as the PD suggests based on its “starting point for a budget,” then some of the costs recorded in the memorandum account are indisputably reasonable and prudent, yet the PD does not provide California American Water the opportunity to recover the costs incurred to date. The PD also does not provide the Company a memorandum account to record future costs that would be the subject of these future budgets. These are legal errors.

IV. CONCLUSION

The PD is legally and factually flawed. The most egregious error is that the PD ignores the core legal basis cited in the Application for granting the requested relief, and therefore applies the incorrect legal standard to both the Settlement Agreement and the Application.

Accordingly, California American Water respectfully requests that the Commission revise the Proposed Decision to:

- Authorize California American Water to reinstate its prior practice because California American Water is proposing to collect a utility user’s tax.
- Correct any treatment of the MPWMD User Fee as a rate charged by a utility subject to Public Utilities Code sections 451 and 454 and properly characterize it as a utility user’s tax;
- Revise the analysis of the settlement agreement in light of D.89-05-063, D.10-12-016, and MPWMD’s comments on the Proposed Decision to conclude that the settlement meets the Commission’s standard for approval;

⁵⁵ As noted by MPWMD, this conclusion reached by the PD is a factual error.

⁵⁶ This is applying ratemaking standards to a local government program, which is inconsistent with the Guidelines.

- Authorize California American Water to collect the balance in the MPWMD User Fee memorandum account because California American Water has been paying its customer's utility user's taxes, and California American Water should be authorized to collect those advances from its customers, with the appropriate interest.

Dated: January 10, 2011

Respectfully submitted,

By: /s/ Timothy J. Miller
Timothy J. Miller
Attorney for California-American Water
Company

PROOF OF SERVICE

I, Cinthia A. Velez, declare as follows:

I am employed in San Francisco County, San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, One Embarcadero Center, 30th Floor, San Francisco, California 94111. On January 10, 2011, I served the within:


Comments of California-American Water Company (U210W) on the Proposed Decision of Administrative Law Judge Bushey

on the interested parties in this action addressed as follows:

See Attached Service List

- (BY CPUC E-MAIL SERVICE)** By transmitting such document electronically from Manatt, Phelps & Phillips, LLP, San Francisco, California, to the electronic mail addresses listed above. I am readily familiar with the practice of Manatt, Phelps & Phillips, LLP for transmitting documents by electronic mail, said practice being that in the ordinary course of business, such electronic mail is transmitted immediately after such document has been tendered for filing. Said practice also complies with Rule 1.10 of the Public Utilities Commission of the State of California and all protocols described therein.
- (BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, San Francisco, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 10, 2011, at San Francisco, California.



Cinthia A. Velez

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A.10-01-012
[Updated December 20, 2010]

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Commissioner John Bohn
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APPENDIX A

Findings of Fact

1. No party has identified a disputed issue of material fact. The Monterey Peninsula Water Management District is a local special district created by California law with jurisdiction over potable water resources within a portion of Monterey County.

2. The MPWMD adopted a Water Allocation Program under its statutory authority to regulate water distribution systems.

3. The MPWMD prepared an Environmental Impact Report for the Water Allocation Program that identified significant, adverse environmental impacts that must be mitigated.

4. The MPWMD adopted a Five Year Mitigation Program to mitigate the significant adverse environmental impacts of the Water Allocation Program.

25. Cal-Am must implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District. The Mitigation Program for the District's Water Allocation Program Environmental Impact Report is comprised of mitigation measures for fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife.

6. The MPWMD has implemented the Mitigation Program every year since 1991.

37. Cal-Am must implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District. The Mitigation Program for the District's Water Allocation Program Environmental Impact Report is comprised of mitigation measures for fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife.

48. The Management District's 2007-2008 Annual Report for the Mitigation Program shows that the Management District allocated nearly \$1 million of costs of its new office building to the Mitigation Program is funded by a combination of the User Fee and other property taxes.

59. The Management District's 2007-2008 Annual Report for the Mitigation Program shows the Aquifer Storage and Recovery Project Program as a component of the user fee Mitigation Program costs and also as a stand-alone additional user fee is a cooperative, non-duplicative project implemented by Cal-Am and MPWMD to augment water supplies within Cal-Am's Monterey District.

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~~610. Cal-Am is actively pursuing water supply augmentation through its Coastal Water Project and the Management District need not act on Cal-Am's behalf MPWMD's ASR activities are funded in part by the MPWMD User Fee.~~

~~711. The rebate program, salaries for the Conservation Office Staff and project expenditures for ordinance enforcement are booked as part of the Mitigation Program, even though such costs are not included in the Management District's 2007-2008 Annual Report for the Mitigation Program. The Management District did not explain whether these booked costs are included in the user fee even though the Commission has approved and separately funded a joint conservation program with the Management District which may include some of the same costs. The MPWMD User Fee is a utility user's tax.~~

~~812. The testimony supporting the application shows accounting treatment inconsistent with Commission ratemaking standards does not have jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers, or utilities.~~

~~13. Cal-Am has been paying MPWMD's User Fee for its customers since the adoption of D.09-07-021.~~

Conclusions of Law

1. No evidentiary hearings are necessary. The testimony supporting the application should be received into evidence and the record on this application closed so that the matter can be determined at this time.
2. The settlement agreement is ~~not~~ reasonable in light of the record, consistent with the law, or in the public interest.
3. The settlement agreement should ~~not~~ be approved.
4. As a utility user's tax, Cal-Am has not met its burden of ~~does not have to~~ justifying the proposed user fee for the Management District.
5. ~~Application 10-01-012 does not meet the Commission's standards set out in D.09-07-021 and Cal-Am's application should be dismissed~~ The Commission has previously granted utilities the discretion to set forth as a separate line item in a utility bill the utility user's tax imposed by the local governmental entity on utility customers within the jurisdiction of that local government entity.
6. The California American Water is authorized to transfer the balance in the Monterey Peninsula Water Management District User Fee Memorandum Account to a balancing account ~~should be dissolved and the balance recorded in the account should not be included in revenue requirement or recovered from ratepayers in any~~

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way and to recover that balance as a surcharge on customer bills in accordance with settlement agreement.